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## When Chemical Releases Occur at a Federal Facility: Navigating the Recovery Labyrinth

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This Article was inspired by exercises that took place in Umatilla County, Oregon, as part of the Chemical Stockpile Emergency Preparedness Program (CSEPP), a federal government program designed to protect local populations from the danger posed by hazardous releases on federal lands.<sup>1</sup> The Oregon CSEPP site is one of six locations where the nation's chemical weapons are stockpiled.<sup>2</sup> The Homeland Security Exercise and Evaluation Program (HSEEP) designs and delivers HSEEP-compliant, emergency preparedness exercises, which are conducted annually at all CSEPP sites.<sup>3</sup> The exercises simulate both a chemical release from a CSEPP site and the measures that would have to be taken to safeguard the public. The simulations focus primarily on emergency evacuation and steps to be taken directly following the release. However, these simulations do not address long-term recovery from a release or the scenario where a natural disaster or a negligent act by the government or a third party causes the chemical release. Hazardous releases may take a number of forms.<sup>4</sup> Far from unique to CSEPP, there are well over 4000 different federal government properties containing hazardous waste, which, at a minimum, threaten to release hazardous substances and must be cleaned up.<sup>5</sup>

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<sup>1</sup> See FEMA, Chemical Stockpile Emergency Preparedness Program (CSEPP), <http://fema.gov/government/grant/csepp.shtm> (last visited Jan. 9, 2010). See generally 50 U.S.C.A. § 1521 (West 2009).

<sup>2</sup> FEMA, *supra* note 1.

<sup>3</sup> See FEMA, About HSEEP, [https://hseep.dhs.gov/pages/1001\\_About.aspx](https://hseep.dhs.gov/pages/1001_About.aspx) (last visited Jan. 9, 2010); FEMA, 2009 ANNUAL OPERATING PLAN NATIONAL PREPAREDNESS DIRECTORATE (2009), available at [http://www.fema.gov/pdf/about/divisions/npd/npd\\_operating.pdf](http://www.fema.gov/pdf/about/divisions/npd/npd_operating.pdf).

<sup>4</sup> See, e.g., *Coeur D'Alene Tribe v. Asarco Inc.*, 280 F. Supp. 2d 1094 (D. Idaho 2003), modified in part *sub nom.* *United States v. Asarco Inc.*, 471 F. Supp. 2d 1063 (D. Idaho 2005); *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066 (9th Cir. 2006), cert. denied, 128 S. Ct. 858 (2008).

<sup>5</sup> Charles de Saillan, *The Use of Imminent Hazard Provisions of Environmental Laws to Compel Cleanup at Federal Facilities*, 27 STAN. ENVTL. L.J. 43, 46 (2008).

In some facilities, plans are in place to address the contingency of a release. For example, the CSEPP Incident Response Action Plan for the Greater Umatilla Community (Response Plan), promulgated in 2004 and revised in 2009,<sup>6</sup> directs what should happen if there is a chemical incident at the Umatilla Army Depot (UMAD), and testing of the Response Plan takes place regularly. The Response Plan includes policies and procedures for recovery and restoration, which provide guidance for recovery under the following provisions:

23. Local jurisdictions will pursue options to insure that area citizens, businesses, and governmental agencies are made whole by the [f]ederal [g]overnment to include: reimbursement for lost or reduced property values, lost or reduced tax revenues, lost or reduced markets, and lost or reduced business opportunities, and lost or reduced income.
24. The federal government will be responsible for all off post actions and costs associated with restoration and recovery of federal property within the impacted event footprint. The federal government will not allow their properties to become a threat to surrounding properties and work expeditiously to ensure restoration and recovery are completed in coordination with local activities.
25. The treaty rights of the Confederated Tribes of the Umatilla Indian Reservation and the provisions of the Native American Graves Protection and Repatriation Act and the Archeological Protect Act [sic] will be observed as they apply Recovery and Restoration activities.<sup>7</sup>

The Response Plan assumes that the Governor has requested and the President has declared an emergency or a disaster, and that the federal government will be responsible for all costs incurred by local governments, businesses, and others if the release of chemical agent results in a community level event.<sup>8</sup> In fact, steps must be taken in

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<sup>6</sup> CHEMICAL STOCKPILE EMERGENCY PREPAREDNESS PROGRAM, CSEPP INCIDENT RESPONSE ACTION PLAN FOR THE GREATER UMATILLA COMMUNITY (2009), available at [http://www.csepp.org/sites/csepp.org/files/CSEPP\\_Plan\\_6-19-2009.pdf](http://www.csepp.org/sites/csepp.org/files/CSEPP_Plan_6-19-2009.pdf).

<sup>7</sup> *Id.* at 207.

<sup>8</sup> *Id.* at 205–07. CSEPP maintains a website describing the risk of severe earthquakes and other “acts of God” for the area surrounding the UMAD. CSEPP, Local Hazards, <http://www.csepp.net/frdismain.html> (last visited Jan. 9, 2010). See *Department of Defense’s Chemical Stockpile Emergency Preparedness Program [CSEPP]: Hearing Before the Environment, Energy, and Natural Resources Subcomm. of the H. Comm. on Government Operations*, 103d Cong. 206 (1993) (responses by the Centers for Disease Control and Prevention (CDC) to questions from Mike Synar, Chairman, Environment, Energy, and Natural Resources Subcomm. of the H. Comm. on Government Operations), for more information concerning such risks.

order to declare an emergency or disaster.<sup>9</sup> Also, whether the federal government will be responsible for the costs of cleanup and recovery depends on the actions the affected entities take in the wake of a chemical release. Possible claims may include negligence or other acts or omissions by a federal government employee, a government contractor, and third parties.<sup>10</sup> This Article will focus on the tort of negligence and other torts common to toxic harm recovery claims.<sup>11</sup>

The purpose of this Article is to describe the legal options a local government, private individual, or business might pursue to recover from a chemical release at a federal facility caused by an emergency or disaster, as defined by law, or by the negligence of federal personnel, government contractors, or third parties. The first avenue of recovery is most likely the Stafford Act.<sup>12</sup> However, eligibility under the Act is not automatic, and quick action is required.<sup>13</sup> Additionally, remedies under the Stafford Act are limited.<sup>14</sup> Military administrative remedies, the Federal Tort Claims Act (FTCA), and the Military Claims Act (MCA) may also be sources of remedies for personal injury or property damage.<sup>15</sup> Injunctive relief is provided under the Comprehensive Environmental Recovery, Compensation, and Liability Act (CERCLA).<sup>16</sup> CERCLA allows for the clean up of any contamination from the release and is necessary to pay for the long-term and expensive process of restoring natural resources and protecting human health.<sup>17</sup> Cultural resources may also be impacted,

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<sup>9</sup> See *infra* notes 28–55 and accompanying text outlining the FEMA process to obtain disaster or emergency relief.

<sup>10</sup> One early example is that of a military plane crashing into the Empire State Building. *Empire State Building Sustained Crash*, ABC NEWS, <http://abcnews.go.com/us/story?id=92525&page=1> (last visited Jan. 9, 2010). See *Molony v. Boy Comic Publishers*, 98 N.Y.S.2d 119, 120 (1950). Previous examples of acts that might have triggered legal claims at UMAD include a 2004 event when a fire was started in the rocket shear machine during decentralization of M55 rockets. Press Release, U.S. Army Chem. Materials Agency, Rocket Fire at the Umatilla Chemical Agent Disposal Facility (Dec. 7, 2005), available at [http://www.ucem.us/pressreleases/05Releases/05Dec7\\_RocketFire.pdf](http://www.ucem.us/pressreleases/05Releases/05Dec7_RocketFire.pdf).

<sup>11</sup> A “tort” is a civil wrong or injury for which the court will provide a remedy in the form of damages. BLACK’S LAW DICTIONARY 1626 (9th ed. 2009).

<sup>12</sup> Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C.A. §§ 5121–5208 (West 2009).

<sup>13</sup> See 44 C.F.R. § 206.36 (2009).

<sup>14</sup> See 42 U.S.C. § 5193 (2006).

<sup>15</sup> See Federal Tort Claims Act, 28 U.S.C. §§ 1346(b)(1), 2671–80 (2006); Military Claims Act, 10 U.S.C. § 2733 (2006).

<sup>16</sup> 42 U.S.C. § 9659(c) (2006).

<sup>17</sup> See *id.* § 9606(a).

and implementation of the National Historic Preservation Act (NHPA) may be needed to protect our national heritage.<sup>18</sup> The constraints of these statutes require careful planning to ensure the possibility of sufficient recovery. Also, the interaction of the different statutes presents a legal challenge because enforcing rights under one statute may bar recovery under another.<sup>19</sup>

Ambiguous guidance regarding the response to a chemical release can cause the kinds of difficulties and provoke criticisms of the kind experienced in the response to Hurricane Katrina.<sup>20</sup> Further, the hazardous substances involved in these incidents trigger legal constraints among the applicable statutes. Recently, the CSEPP produced a resource on how to seek federal assistance for those who might experience injury or loss in the event of a release of chemical weapons agent from one of the storage installations in the continental United States.<sup>21</sup> As a topical outline of available assistance, the guide is helpful because it provides a wider scope of recovery options than this Article covers, such as crop insurance and recovery for noninsured crops and livestock forage, and also some parameters of the options available. However, it does not give the user an in-depth look at limitations of these different means of recovery. This Article was written in an effort to assist local governments, businesses, and private individuals as they navigate the legal remedies for losses suffered after a chemical release.<sup>22</sup>

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<sup>18</sup> See 16 U.S.C. §§ 470 to 470x-6 (2006).

<sup>19</sup> See *infra* notes 107-10 and accompanying text.

<sup>20</sup> See Jillian L. Morrison, *Post-Disaster Contracting: An Examination of the Costs Associated with the Stafford Act's Local Contracting Preference and Implementation Proposals to Maximize Community Revitalization*, 37 PUB. CONT. L.J. 687, 693 (2008); ARGONNE NAT'L LAB. DECISION & INFO. SCIS. DIV., CSEPP RECOVERY PLAN WORKBOOK (2003), available at [http://emc.ornl.gov/CSEPPweb/PDF/CSEPP\\_Recovery\\_Plan\\_Workbook\\_April\\_2003.doc](http://emc.ornl.gov/CSEPPweb/PDF/CSEPP_Recovery_Plan_Workbook_April_2003.doc) (giving vague guidance regarding the CSEPP while failing to identify significant legal issues and questions that must be addressed when processing claims).

<sup>21</sup> CHEM. STOCKPILE EMERGENCY PREPAREDNESS PROGRAM, GUIDE FOR ASSISTANCE AND COMPENSATION FOLLOWING A CHEMICAL EVENT 6 (2009).

<sup>22</sup> This Article does not cover criminal or terrorist acts; however, footnote material in this Article does refer to such events. Especially since September 11th, there are statutes, case law, and treatises distinguishing terrorism from crimes or comparing the two. In 2003, Rinaldo Campana noted CSEPP sites as potential targets available for terrorists to exploit. Rinaldo Campana, President, C5 Group, Inc., Former Chief, Weapons of Mass Destruction Countermeasures Unit, Fed. Bureau of Investigation (HQ), Responding to an Incident Involving Weapons of Mass Destruction-An Overview, Speech Presented at the 30th National Spring Conference of the Environment Sponsored by the ABA Standing Committee on Environmental Law (Apr. 12, 2002), in 9 WIDENER L. SYMP. J. 249, 249

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(2003). According to Campana, the U.S. government “had always considered an airplane attack into an igloo containing these chemical stockpiles as a major vulnerability even before the September 11th incident.” *Id.* The Ninth Circuit has also recognized the importance of including terrorism as a risk when assessing risk of harm to resources. *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm’n*, 449 F.3d 1016, 1028 (9th Cir. 2006). The court found that the Nuclear Regulatory Commission’s categorical refusal under the National Environmental Protection Act (NEPA) to consider environmental effects of a possible terrorist attack on a proposed interim spent fuel storage installation on Diablo Canyon nuclear facility was generally not reasonable. *Id.* The court reasoned that the agency in other contexts did not view the risk of terrorist attacks to be insignificant, precise quantification of risk was not necessary to trigger NEPA’s requirements, the agency did not adequately show that risk of terrorist attack was unquantifiable, and it was possible to conduct low-probability, high-consequence analysis. *Id.* Army intelligence components engaged in civil disturbance activities, such as terrorist attacks, would do so in accordance with civil disturbance plan Garden Plot. DEP’T OF THE ARMY, ARMY REG. NO. 381-10, MILITARY INTELLIGENCE: U.S. ARMY INTELLIGENCE ACTIVITIES 4 (2007), available at [http://www.army.mil/USAPA/epubs/pdf/r381\\_10.pdf](http://www.army.mil/USAPA/epubs/pdf/r381_10.pdf).

Also, criminal penalties of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901–6992k (2006), provide remedies for intentional acts related to hazardous waste. 42 U.S.C. § 6928(d); DEP’T OF DEF., DIRECTIVE NO. 3025.15, MILITARY ASSISTANCE TO CIVIL AUTHORITIES (1997), available at <http://www.dtic.mil/whs/directives/corres/pdf/302515p.pdf>; DEP’T OF DEF., DIRECTIVE NO. 3025.12, MILITARY ASSISTANCE FOR CIVIL DISTURBANCES (MACDIS) (1994), available at <http://www.dtic.mil/whs/directives/corres/pdf/302512p.pdf>. In *United States v. Hoflin*, 880 F.2d 1033, 1035–36 (9th Cir. 1989), the Ocean Shores, Washington, Public Works Director ordered employees to bury on the grounds of the City’s sewage treatment plant barrels containing paint left over from road maintenance and sludge removed from the kitchen of the City’s golf course. The Ninth Circuit upheld criminal conviction of the Public Works Director for violating RCRA by disposing of the paint without having obtained a permit. *Id.* at 1040. Lack of knowledge of a permit is not an essential element of the crime the conviction was based on; rather, proper conviction results from knowingly treating, storing, or disposing of any hazardous waste without having obtained a permit or in knowing violation of the permit. *Id.* at 1036.

These RCRA provisions have been applied to federal facilities’ operations. As *United States v. Dee*, 912 F.2d 741, 745 (4th Cir. 1990), illustrates, Army civilian employees were subject to criminal conviction for RCRA violations. In *Dee*, the indictment charged the defendants with violating RCRA by illegally storing, treating, and disposing of hazardous wastes at the Pilot Plant. *Id.* at 743. They were convicted of multiple violations of RCRA’s criminal provisions for illegally storing, treating, and disposing of hazardous wastes. *Id.* The defendants first asserted that they were immune from criminal prosecution under RCRA because of their status as federal employees working at a federal facility. *Id.* at 744. However, “sovereign immunity does not attach to individual government employees so as to immunize them from prosecution for their criminal acts.” *Id.* (citing *O’Shea v. Littleton*, 414 U.S. 488, 503 (1974)). RCRA provisions require the U.S. Department of Justice to deputize Environmental Protection Agency (EPA) employees to serve as special deputy U.S. Marshals with respect to violations of RCRA’s criminal provisions. 42 U.S.C. § 6979b (2006).

I

**EMERGENCY AND DISASTER RECOVERY FOR EARLY RELIEF**

The Robert T. Stafford Disaster Relief and Emergency and Assistance Act (Stafford Act)<sup>23</sup> governs how the federal government can assist communities recovering from emergencies and disasters. In doing so, the Stafford Act provides immediate assistance in the form of both activity and financial relief.<sup>24</sup> The statute defines “major disaster” as a natural catastrophe including hurricanes, tsunamis, earthquakes, and, regardless of cause, any fire, flood, or explosion in any part of the United States or U.S. territories that the President determines warrants major disaster assistance.<sup>25</sup> Federal assistance supplements the available resources of the state and local governments and disaster relief organizations.<sup>26</sup> An “emergency” means any “occasion or instance for which, in the determination of the President, [f]ederal assistance is needed to supplement [s]tate and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.”<sup>27</sup> The statute also applies where the federal government has primary authority for response pursuant to federal law, that is, areas where the federal government has exclusive, concurrent, or proprietary jurisdiction.<sup>28</sup>

In order to apply for assistance under the Stafford Act, there must be a declaration of a major disaster or an emergency.<sup>29</sup> When a chemical release occurs that the state determines may be beyond the state and local government’s capacity to respond, the state will request the Federal Emergency Management Agency (FEMA)

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<sup>23</sup> 42 U.S.C.A. §§ 5121–5208 (West 2009).

<sup>24</sup> *Id.* §§ 5121–63.

<sup>25</sup> *Id.* § 5122(2)–(3).

<sup>26</sup> *Id.* § 5122(2).

<sup>27</sup> *Id.* § 5122(1).

<sup>28</sup> Such jurisdiction existed over the Murrah Federal Building in the 1995 Oklahoma City bombing. EUGENE BAIME ET AL., OPERATIONAL LAW HANDBOOK 451–53 (John Rawcliffe & Jeannine Smith eds., 2006), available at <http://www.fas.org/irp/doddir/army/law0806.pdf>, cited in Christopher B. Walters, *Responding to National Disasters and Emergencies: A Contract and Fiscal Law Primer*, ARMY LAW., Oct. 2007, at 35, 36. Walters’ article identifies key sources to federal contracting law for response to national disasters and emergencies, including the Federal Acquisition Regulation (FAR), 48 C.F.R. pt. 18 (2009), and the Economy Act, 31 U.S.C. § 1535 (2006). Walters, *supra*, *passim*.

<sup>29</sup> See 42 U.S.C. §§ 5170, 5191 (2006).

regional director to do a joint state-FEMA preliminary assessment.<sup>30</sup> A preliminary damage assessment must be done “to determine the impact and magnitude of damage and the resulting unmet needs of individuals, businesses, the public sector, and the community as a whole.”<sup>31</sup> This information is used by the state as a basis for the Governor’s request and by FEMA to document its recommendation to the President. The Governor also submits requests for the local government, which includes counties, municipalities, and Indian tribes.<sup>32</sup>

A request for major disaster declaration must be made within thirty days of the occurrence of the release.<sup>33</sup> When a release occurs or threatens to occur in a state, which would not qualify as a major disaster, the Governor may request an emergency declaration.<sup>34</sup> The request must be submitted within five days after the need for assistance becomes apparent, but no more than thirty days after the release.<sup>35</sup> The FEMA Associate Director determines and designates the types of assistance to be made available and the disaster-affected areas eligible for supplementary federal assistance under the Stafford Act.<sup>36</sup>

Upon declaration of a major disaster or emergency, the President, Director, or Associate Director will appoint a federal coordinating officer and the Governor will appoint a state coordinating officer to coordinate the state and local efforts with the federal government.<sup>37</sup> The state and FEMA directors will enter into a FEMA-state agreement stating “the understandings, commitments, and conditions for assistance under which FEMA disaster assistance shall be provided.”<sup>38</sup> There is no dollar amount or time limit on federal

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<sup>30</sup> 44 C.F.R. § 206.33 (2009).

<sup>31</sup> *Id.*

<sup>32</sup> 42 U.S.C. § 5122(7). There have been calls for a statutory amendment to set tribes apart for Stafford Act funding so that they do not have to go through the state to receive such assistance from the federal government. See Courtney A. Stouff, Comment, *Native Americans and Homeland Security: Failure of the Homeland Security Act to Recognize Tribal Sovereignty*, 108 PENN ST. L. REV. 375, 389–93 (2003).

<sup>33</sup> 44 C.F.R. § 206.36. A denial of emergency or disaster declaration may be appealed to the President. *Id.* § 206.46.

<sup>34</sup> *Id.* § 206.35.

<sup>35</sup> *Id.*

<sup>36</sup> See *id.* § 206.39.

<sup>37</sup> 42 U.S.C. § 5143 (2006).

<sup>38</sup> 44 C.F.R. § 206.44(a) (2009).

assistance available for a major disaster.<sup>39</sup> Assistance is limited to \$5,000,000 for a single emergency, and the President must report to Congress when the limit is exceeded, but more is needed.<sup>40</sup> In that case, the President must determine if emergency assistance is immediately needed because there is a continuing and immediate risk to lives, property, public health or safety, and necessary assistance will not otherwise be provided on a timely basis.<sup>41</sup> The various types of assistance available under the Stafford Act include: (1) temporary housing assistance for individuals and households;<sup>42</sup> (2) financial assistance for medical care, transportation, or other services needed by individuals and households;<sup>43</sup> (3) grants of up to \$10,000 for individuals or families;<sup>44</sup> (4) crisis counseling<sup>45</sup> and disaster legal services for low income individuals;<sup>46</sup> and (5) various other forms of assistance to public facilities.<sup>47</sup> The President may also loan up to \$5,000,000 to local governments that suffer a substantial loss of tax and other revenue as a result of a major disaster.<sup>48</sup>

Especially following Hurricane Katrina, FEMA funds are also supposed to provide an economic stimulus to the affected local economy. When allocating FEMA funds to private firms under contract for “debris clearance, distribution of supplies, reconstruction, and other major disaster or emergency assistance activities . . . preference shall be given, to the extent feasible and practicable, to those organizations, firms, and individuals residing or doing business primarily in the area affected” by the disaster or emergency.<sup>49</sup> Apparently, this type of allocation did not occur in the wake of

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<sup>39</sup> *See id.*

<sup>40</sup> 42 U.S.C. § 5193 (2006).

<sup>41</sup> *Id.* § 5193(2)(b)–(c).

<sup>42</sup> 44 C.F.R. § 206.101.

<sup>43</sup> *Id.* § 206.119(b)(1)–(2).

<sup>44</sup> *Id.* § 206.131(a).

<sup>45</sup> *Id.* § 206.171.

<sup>46</sup> *Id.* § 206.164.

<sup>47</sup> *Id.* § 206.220–.228. More information and directions on how to obtain financial assistance to recover from disasters under the Stafford Act and other sources may be found in the introduction to Oregon’s Disaster Recovery Assistance Guidebook. OR. EMERGENCY MGMT., OR. MILITARY DEP’T, DISASTER RECOVERY ASSISTANCE GUIDEBOOK (2007), available at [http://www.oregon.gov/OMD/OEM/fin\\_rec/disaster\\_recover\\_guide.shtml](http://www.oregon.gov/OMD/OEM/fin_rec/disaster_recover_guide.shtml).

<sup>48</sup> 42 U.S.C. § 5184 (2006).

<sup>49</sup> *Id.* § 5150(a)(1); see 48 C.F.R. §§ 26.200–.205 (2009); see also Walters, *supra* note 28, at 39.

Hurricane Katrina.<sup>50</sup> The underutilization of local contractor preference after Hurricane Katrina caused a reevaluation of this preference, which demonstrated a tension in the Stafford Act's policy goals.<sup>51</sup> On the one hand, the federal government is to provide quick, efficient, cost-effective emergency response; on the other, implementing the socioeconomic goal of revitalizing the community using federal procurement preferences restrains the market from responding quickly with the needed goods and services.<sup>52</sup> Hence, effective preplanning is necessary for successful community revitalization.<sup>53</sup>

There are significant limitations to the Stafford Act. While an important first step, the immediate assistance of the Stafford Act is limited by a relatively short application period and a capped allowance of government funds.<sup>54</sup> Also, under the Stafford Act, a chemical release that is not caused by a natural disaster is not guaranteed to be declared a major disaster or an emergency.<sup>55</sup> Since FEMA's determination of Stafford Act assistance eligibility is discretionary and not reviewable,<sup>56</sup> remedies for a chemical release are not assured.<sup>57</sup> For this reason, in cases where federal facilities

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<sup>50</sup> Walters, *supra* note 28, at 42.

<sup>51</sup> See Morrison, *supra* note 20, at 687.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> See, e.g., 42 U.S.C. § 5170b (2006) (focusing federal efforts on assistance essential to meeting immediate threats to life and property); *id.* § 5174(h) (limiting financial assistance to individuals and households); *id.* § 5178 (limiting grants to individuals). A useful component of a CSEPP exercise might be to identify case studies detailing the cost of recovery where FEMA was used to recover from a chemical incident.

<sup>55</sup> See *Kansas ex rel. Hayden v. United States*, 748 F. Supp. 797, 798–99 (D. Kan. 1990), *reconsideration dismissed*, 751 F. Supp. 1495 (D. Kan. 1990), and *aff'd*, 953 F.2d 1392 (10th Cir. 1992).

<sup>56</sup> 42 U.S.C. § 5148 (2006). Even though assistance under the Stafford Act is not guaranteed by the statute, at least one statute does appear to rely on the Stafford Act to provide a source of assistance. 50 U.S.C.A. § 1521 (West 2009). In the example given above regarding the CSEPP, aid ends on the completion date of grants and cooperative agreements, with respect to the facility entered into pursuant to the statute, and 180 days after completion of the destruction of the stockpile even if there are latent effects. *Id.* § 1521(c)(5)(B). The CSEPP statute requires the FEMA Director to carry out a program to provide assistance responding to emergencies involving risks to public health or safety that the Secretary identifies as being risks resulting from the storage of chemical agents or the destruction of such agents and munitions. *Id.* § 1521(c)(5)(A).

<sup>57</sup> See 50 U.S.C.A. § 1521(c)(4). Pursuant to § 1521(c)(4), the Department of the Army (Army) and FEMA entered into a Memorandum of Agreement whereby the Army provides funds to FEMA to support the CSEPP mission of assisting state and local

carry the risk of a chemical incident, legislation, in the form of an amendment to the Stafford Act, would likely provide the best means to assure major disaster or emergency assistance under this statute. This solution would be particularly appropriate for federal facilities in the United States that carry out statutory functions, such as a chemical weapons incineration program that already provides for warning assistance and other formal community protection measures.<sup>58</sup> Also, in addition to offering only limited funds at the outset of an emergency, the Stafford Act is not designed to address the long-term remediation of natural resources that is necessary for the protection of human health and the revitalization of commercial production.<sup>59</sup> Nor does this statute provide a cause of action for an individual or a local government to bring an administrative claim;<sup>60</sup> assert criminal penalties where appropriate;<sup>61</sup> or obtain a remedy against the federal government,<sup>62</sup> a private contractor, or any other entity that could be held responsible for its role in the release.

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governments in carrying out the functions relating to off-post emergency preparedness and response in the communities surrounding military installations that store and dispose of lethal chemical agents and munitions. FEMA, FISCAL YEAR 2008 REPORT TO CONGRESS: CHEMICAL STOCKPILE EMERGENCY PREPAREDNESS PROGRAM (2008), available at [https://www.cseppportal.net/SiteCollectionDocuments/2008\\_CSEPP\\_Report\\_to\\_Congress.pdf](https://www.cseppportal.net/SiteCollectionDocuments/2008_CSEPP_Report_to_Congress.pdf). In 2006, Congress passed legislation effective April 1, 2007, that placed CSEPP back within FEMA's role. See Security and Accountability for Every Port Act of 2006 (SAFE Port Act), Pub. L. No. 109-347, 120 Stat. 1884 (codified as amended in scattered sections of 6, 33, and 46 U.S.C.).

<sup>58</sup> See generally SAFE Port Act, Pub. L. No. 109-347, 120 Stat. 1884. The Department of Defense Authorization Act of 1986, which requires the Army to provide maximum protection for the environment and the general public in destroying the nation's chemical warfare agent stockpile, does not provide an implied private right of action just because it is mandatory in tone and was passed to benefit the general public. 50 U.S.C.A. § 1521; Chem. Weapons Working Group, Inc. v. U.S. Dep't of the Army, 111 F.3d 1485, 1493 (10th Cir. 1997).

<sup>59</sup> The President delegated authority to adjudicate CERCLA emergency response claims to the EPA. Exec. Order No. 12,580, 52 Fed. Reg. 2923 (Jan. 23, 1987). The EPA has claims procedures for use by commercial entities and individuals and other procedures applicable to reimbursements sought by local governments. See generally ENVTL. APPEALS BD., REVISED GUIDANCE ON PROCEDURES FOR SUBMISSION AND REVIEW OF CERCLA SECTION 106(B) REIMBURSEMENT PETITIONS (2004), available at <http://www.epa.gov/eab/cercla-guidance2004.pdf>. EPA claims procedures require the claimant to first pursue reimbursement from the responsible party. 40 C.F.R. § 307.30 (2009). Therefore, if the release occurred on a military installation, the claimant should first make a demand on that military department.

<sup>60</sup> See *infra* Part II.G for information regarding claims against military departments.

<sup>61</sup> See 42 U.S.C. § 5157 (2006).

<sup>62</sup> See *id.* § 5148 (identifying a cause of action for misuse of Stafford Act funds, not the underlying act causing the emergency or disaster); *id.* § 5156. Claims against the federal

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## II

### BARRIERS TO RECOVERY FROM THE FEDERAL GOVERNMENT AND WAYS TO OVERCOME THEM

Given the Stafford Act's limitations, individuals and entities, including local governments, businesses, and individual persons, need other tools to recover from the federal government and the contractor. Both federal and state laws provide either a means of recovery or protective measures for resources damaged by a chemical release. In federal law, statutory remedies come as a waiver of sovereign immunity.<sup>63</sup> A statutory waiver of sovereign immunity also enables recovery under state law.<sup>64</sup>

#### A. *Barrier to Recovery: Unitary Executive*

Enforcing legal liability against the United States raises barriers that do not exist in private disputes. In particular, the doctrines of unitary executive and sovereign immunity could prevent enforcing the legal liability of the federal government in a chemical release from a federal facility. A major legal obstacle in compelling the cleanup of federal facilities has been the unitary executive theory.<sup>65</sup> This theory, which has been advocated since the 1980s, holds that the entire executive branch of the federal government is one legal entity, and therefore one federal agency or department cannot sue another.<sup>66</sup> The basis for this theory is that any dispute within the executive branch can be resolved by the President, so there is no amenable case or controversy for the court to resolve.<sup>67</sup> Under the unitary executive theory, the Environmental Protection Agency (EPA) cannot bring a judicial enforcement action against a sister federal agency such as the Department of Defense (DOD).<sup>68</sup> Though the Justice Department has conceded that the EPA may assess civil penalties against other federal

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government would be brought under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b)(1), 2671–80 (2006), though such claims are barred where the government actor is exercising a discretionary function. *Id.* § 2680(a).

<sup>63</sup> See *St. Tammany Parish ex rel. Davis v. FEMA*, 556 F.3d 307, 314–18 (5th Cir. 2009).

<sup>64</sup> See, e.g., *MacPherson v. Dep't of Admin. Servs.*, 130 P.3d 308, 319 (Or. 2006).

<sup>65</sup> See de Saillan, *supra* note 5, at 77. See also STEPHEN DYCUS, NATIONAL DEFENSE AND THE ENVIRONMENT 42, 158–59 (1996).

<sup>66</sup> DYCUS, *supra* note 65. See *Myers v. United States*, 272 U.S. 52, 135 (1926).

<sup>67</sup> *Myers*, 272 U.S. at 135; see also de Saillan, *supra* note 5, at 77.

<sup>68</sup> De Saillan, *supra* note 5, at 77.

agencies in administrative proceedings outside the jurisdiction of the federal courts,<sup>69</sup> in the thirty-seven years that the EPA has been in existence it has never initiated a judicial action against any other federal agency.<sup>70</sup> The difficulty posed by the unitary executive theory is particularly apparent in the cleanup of federal facilities. Even if the EPA does want to force a federal agency to clean up a federal facility, Department of Justice policy prevents the EPA from bringing actions against another agency.<sup>71</sup>

Though a dominant legal theory, especially during the past administration, the unitary executive theory has critics.<sup>72</sup> The Constitution does not inhibit, and even invites, the three branches to share power in creative ways.<sup>73</sup> Additionally, Congressional acts providing for enforcement by the EPA or other federal executive bodies against federal agencies provide a legislative basis to assist in recovery following a chemical release.

### ***B. Barrier to Recovery: Sovereign Immunity***

The doctrine of sovereign immunity is another U.S. legal doctrine presenting long-held barriers to filing suit against the United States. Sovereign immunity is a principle of law, inherited from England and rigidly applied in the United States, which states that no suit may be brought against the sovereign without his consent.<sup>74</sup> Only Congress

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<sup>69</sup> *Id.* (citing 21 U.S. Op. Off. Legal Counsel 109 (1997)).

<sup>70</sup> *Id.* Consider one court's take on the situation:

To ensure the President's [authority] over the Executive Branch, the Constitution and its judicial gloss vests [the President] with the powers of appointment and removal, the power to demand written opinions from executive officers. . . . In the particular case of EPA, Presidential authority is clear since it has never been considered an "independent agency," but always part of the Executive Branch.

*Sierra Club v. Costle*, 657 F.2d 298, 405–06 (D.C. Cir. 1981) (citation omitted).

<sup>71</sup> See *Colorado v. U.S. Dep't of the Army*, 707 F. Supp. 1562, 1570 (D. Colo. 1989). For more discussion of federal cleanups and CERCLA, see Ingrid Brunk Wuerth, *Challenges to Federal Facility Cleanups and CERCLA Section 113(h)*, 8 TUL. ENVTL. L.J. 353, 360 (1995).

<sup>72</sup> Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1737 (1996). Opinions of a divided U.S. Supreme Court demonstrate the tension between legal theories related to control one branch may exercise over another. See *Morrison v. Olson*, 487 U.S. 654 (1988).

<sup>73</sup> Flaherty, *supra* note 72, at 1737 n.47 (referring to U.S. Supreme Court Justice White's position regarding the separation of powers).

<sup>74</sup> *United States v. Shaw*, 309 U.S. 495, 500–01 (1940).

can waive the immunity of the United States,<sup>75</sup> and legislative enactments granting the waiver generally are construed strictly.<sup>76</sup> Historically, due to sovereign immunity, the United States government has not been held legally responsible for the torts of its employees, at the expense of the innocent victims of those torts.<sup>77</sup> According to one infamous example, in 1945 a U.S. Army bomber airplane, piloted by a serviceman flying low over New York, struck the Empire State Building killing and seriously injuring a number of people and causing extensive property damage.<sup>78</sup> The doctrine of sovereign immunity prevented the victims from recovering any damages from the U.S. government.<sup>79</sup>

### *C. Overcoming Sovereign Immunity: The Federal Tort Claims Act*

Twelve months after the airplane crash into the Empire State Building, the FTCA became law.<sup>80</sup> The FTCA constitutes a broad waiver of the immunity of the United States from suit in tort. It conferred jurisdiction upon the U.S. district courts over claims for damages resulting from:

[I]njury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.<sup>81</sup>

However, there are several statutory and common law exceptions to the FTCA.<sup>82</sup> When a claim is not barred by one of these exceptions and state law would provide a remedy for the claim if it had been brought against a private party in state court, individuals, states,

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<sup>75</sup> *Id.*

<sup>76</sup> *McMahon v. United States*, 342 U.S. 25, 27 (1951).

<sup>77</sup> *See, e.g., The Western Maid*, 257 U.S. 419 (1922).

<sup>78</sup> The statute that became the FTCA was under consideration and underwent various revisions for nearly thirty years prior to this crash. *Dalehite v. United States*, 346 U.S. 15, 24 n.9 (1953), *overruled in part by Rayonier, Inc. v. United States*, 352 U.S. 315 (1957).

<sup>79</sup> 1–2 LESTER S. JAYSON & ROBERT C. LONGSTRETH, *HANDLING FEDERAL TORT CLAIMS* § 2.01 (2009); *Comm'rs of the State Ins. Fund v. United States*, 72 F. Supp. 549, 551 (S.D.N.Y. 1947) (implementing the newly enacted FTCA and recounting subsequent recovery by victims of the Empire State Building incident).

<sup>80</sup> 28 U.S.C. §§ 1346(b)(1), 2671–80 (2006).

<sup>81</sup> *Id.* § 1346(b).

<sup>82</sup> *See infra* Part II.D.

counties, municipalities, and like political entities may institute an action against the United States in district court.<sup>83</sup>

After exhausting the administrative remedy,<sup>84</sup> the claimant may seek to recover from a tort by filing a complaint in federal court under the FTCA. For private actors, federal courts have exclusive jurisdiction over civil actions based on claims arising under the FTCA,<sup>85</sup> and these actions must be brought in the jurisdiction where the plaintiff resides or the tortious event occurred.<sup>86</sup> Although there are no punitive damages available under the statute,<sup>87</sup> the FTCA permits recovery of compensatory and pecuniary damages for damage or loss to property, personal injury, and death.<sup>88</sup> The amounts permitted in settlements under the FTCA are limited. U.S. Attorneys are authorized to settle claims for an amount up to \$1,000,000, and in some cases more.<sup>89</sup> It is important to note that the FTCA provides damages for injuries, not reimbursement for response costs. In one example, the Ninth Circuit Court of Appeals affirmed that, where the U.S. Forest Service caused a forest fire and the state expended over \$25,000 to fight and extinguish the fire, the district court lacked jurisdiction under the FTCA to award damages because the state did not claim injury or loss of property.<sup>90</sup>

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<sup>83</sup> See 1–5 JAYSON & LONGSTRETH, *supra* note 79, § 5.03[6]; *United States v. Washington*, 351 F.2d 913 (9th Cir. 1965) (states); *Oregon ex rel. State Forester v. United States*, 308 F.2d 568 (9th Cir. 1962) (states); *Cascade County, Mont. v. United States*, 75 F. Supp. 850 (D. Mont. 1948) (counties); *City of San Francisco v. United States*, 615 F.2d 498 (9th Cir. 1980) (municipalities); *Lakeland R-3 Sch. Dist. v. United States*, 546 F. Supp. 1039 (W.D. Mo. 1982) (like political entities).

<sup>84</sup> The FTCA requires exhaustion of administrative remedies prior to filing a negligence action “for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any [federal employee] while acting within the scope of his office or employment.” 28 U.S.C. § 2675(a); *McNeil v. United States*, 508 U.S. 106, 107 (1993). The claimant must file within six months after the final denial of the claim. If the agency fails to act within six months after receiving the administrative claim, the claimant may sue in the district court without waiting for final agency action. The United States is the proper defendant, not the federal agency involved. 28 U.S.C. § 2679(a).

<sup>85</sup> 28 U.S.C. § 1346(b).

<sup>86</sup> *Id.* § 1402(b).

<sup>87</sup> *Id.* § 2674.

<sup>88</sup> See 2–10 JAYSON & LONGSTRETH, *supra* note 79, § 10.04 (listing damages awarded by different courts in FTCA actions). An award may be reduced by comparative negligence attributable to the plaintiff. *Id.*

<sup>89</sup> 28 C.F.R. pt. 0, subpt. Y, app. (2009).

<sup>90</sup> *Oregon ex rel. State Forester v. United States*, 308 F.2d 568, 569 (9th Cir. 1962). The state sued under a statute that characterized the cost as a debt rather than a tort. *Id.* A similar statute today is chapter 477.068 of the Oregon Revised Statutes, which requires

### *D. Exceptions to the Federal Tort Claims Act*

There are several express exceptions to the FTCA that present barriers as absolute as sovereign immunity. With limited exception, the FTCA permits suit only on claims for “injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the [g]overnment while acting within the scope of his office or employment.”<sup>91</sup> Statutory exceptions are explicitly listed at 28 U.S.C. § 2680, and some of these are discussed below. Among the exceptions to the FTCA, the discretionary function exception is the most frequently used and perhaps poses the highest hurdle.<sup>92</sup>

#### *1. Discretionary Function*

Under the FTCA, the federal government is free from liability for negligent acts or omissions regarded as discretionary functions.<sup>93</sup> These exclusions include claims arising from the performance of discretionary functions or duties.<sup>94</sup> The purpose of the exclusion is to “prevent judicial “second-guessing” of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.”<sup>95</sup> Decisions involving the allocation and deployment of limited governmental resources are the

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anyone causing a forest fire to pay the cost of extinguishing it. OR. REV. STAT. § 477.068 (2009). Still, “authority exists that if contamination causes actual property damage, and thus a valid cause of action under the FTCA, the cost of removing the contamination may be considered a measure of damages to the property.” Millard, *Disaster Claims: Claims for Emergency Response Services*, ARMY LAW., July 1995, at 72, 74 (citing *New York v. United States*, 620 F. Supp. 374, 378 (D.C.N.Y. 1985)).

<sup>91</sup> 28 U.S.C. § 1346(b)(1) (2006).

<sup>92</sup> *Id.* § 2680(a).

<sup>93</sup> *Id.*; *Dalehite v. United States*, 346 U.S. 15 (1953), *overruled in part by Rayonier, Inc. v. United States*, 352 U.S. 315 (1957) (concerning an element not related to the construction of 28 U.S.C. § 2680(a)); *United States v. Varig Airlines*, 467 U.S. 797, 813 (1984). There is also an exception for intentional torts. 28 U.S.C. § 2680(h).

<sup>94</sup> 28 U.S.C. § 2680(a).

<sup>95</sup> *Berkovitz ex rel. Berkovitz v. United States*, 486 U.S. 531, 536–37 (1988) (quoting *Varig Airlines*, 467 U.S. at 814). The West synopsis of the case explains:

[D]iscretionary function exception to [FTCA] did not bar claim alleging that, under authority granted by regulations, the Food and Drug Administration adopted policy of testing all lots of oral polio vaccine for compliance with safety standards and preventing the public distribution of any lot that failed to comply, and that, notwithstanding that mandatory policy, FDA knowingly approved release of unsafe lot.

*Id.*; see also 2-11 JAYSON & LONGSTRETH, *supra* note 79, § 11.02.

type of administrative judgment that the discretionary function exception was designed to immunize from suit.<sup>96</sup> The U.S. Supreme Court employs a two-step analysis to determine whether the challenged conduct falls within the discretionary function exception. First, the Court determines whether the challenged actions “involve an element of judgment or choice.”<sup>97</sup> This requires an inquiry into the nature of the conduct, not the status of the actor.<sup>98</sup> This requirement is not satisfied where a “federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow.”<sup>99</sup> If an element of choice or judgment is involved, the Court employs step two of the analysis: determining whether the judgment is of the kind that the discretionary function was designed to shield.<sup>100</sup> Only those “decisions grounded in social, economic, and political policy” will be protected by the discretionary function exception.<sup>101</sup>

There are many examples of cases where the courts have determined whether the discretionary function barred suit against the federal government under the FTCA, and some of these cases involve federal facilities. The discretionary function exception to the waiver of sovereign immunity under the FTCA barred claims against the United States concerning a contaminated ninety-three acre site at the Rocky Mountain Arsenal in Colorado.<sup>102</sup> The Tenth Circuit found that how the Army, Shell, and the EPA “were to go about containing the spread of contamination before further damage could occur while still protecting public health touched on policy choices, not the least of which involved the ‘translation’ of CERCLA’s general health and

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<sup>96</sup> Fang v. United States, 140 F.3d 1238, 1242 (9th Cir. 1998), *cited in* Graham v. FEMA, 149 F.3d 997, 1006 (9th Cir. 1998) (requiring additional findings to support sovereign immunity defense where disaster relief applicants sued FEMA for ending an individual and family grant program despite declaration that the states were a major disaster area and FEMA’s obligation to pay states for noncancellable costs incurred by states before the termination date).

<sup>97</sup> United States v. Gaubert, 499 U.S. 315, 322 (1991) (quoting *Berkovitz*, 486 U.S. at 536).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* (quoting *Berkovitz*, 486 U.S. at 536).

<sup>100</sup> *Id.* at 322–23.

<sup>101</sup> *Id.* at 323 (quoting *Varig Airlines*, 467 U.S. at 814).

<sup>102</sup> Daigle v. Shell Oil Co., 972 F.2d 1527, 1541 (10th Cir. 1992) (explaining that residents in an area adjoining a CERCLA hazardous waste cleanup site sued the Army for damage allegedly caused by airborne pollutants released during joint cleanup by the Army and Shell Oil).

safety provisions into ‘concrete plans.’”<sup>103</sup> However, the discretionary function did not bar suit in *Starrett v. United States*, where the plaintiffs, who owned and lived on land adjacent to a naval submarine base in Washington State, alleged that chemicals produced during the demilitarization of missiles leached into the groundwater and entered their well water.<sup>104</sup> To overcome the discretionary function, the *Starrett* court stated that the landowners would have to show that the government violated a “specific mandatory” requirement.<sup>105</sup> The landowners contended that the provisions of four regulations, including an executive order, C.F.R. provisions, a naval document on waste disposal, and the Navy’s 1957 *Manual on Naval Preventative Medicine*, were specific and mandatory requirements. The court found that the executive order constituted the required specific and mandatory direction to the Navy and did not consider the other regulations.<sup>106</sup> In *Soldano v. United States*, the discretionary function did not shield the National Park Service from suit for establishing a thirty-five miles per hour speed limit at a location where the road’s stopping-sight distance was no greater than 180 feet, and standards specified a speed limit of no more than twenty-five miles per hour for roads like the one in question.<sup>107</sup> The variety of documents used in *Starrett* show that, to avoid dismissal based on discretionary function exception, full discovery of documents is necessary to find any directives related to procedures followed or not followed before a chemical release.

## 2. Exclusive Remedy Provision

The FTCA also provides that any remedy against the United States under 28 U.S.C. § 1346(b) is exclusive of any other civil action or proceeding for money damages.<sup>108</sup> The trend of court decisions has

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<sup>103</sup> *Id.* at 1538 (citing *Allen v. United States*, 816 F.2d 1417, 1427 (10th Cir. 1987)). The FTCA discretionary function exception applied to decisions made regarding how to clean up the site, but under Colorado law, the plaintiffs did have a claim against Shell, the contractor, that cleanup of a ninety-three acre toxic lake was an abnormally dangerous activity possibly leading to strict liability for damages. *Id.* at 1543.

<sup>104</sup> 847 F.2d 539, 540 (9th Cir. 1988).

<sup>105</sup> *Id.* at 541.

<sup>106</sup> *Id.* (indicating that there is a presumption of discretionary immunity when a statute or regulation permits the exercise of choice at an operational level; however, this can be overcome where there is a showing that safety concerns were not adequately considered).

<sup>107</sup> 453 F.3d 1140, 1148 (9th Cir. 2006).

<sup>108</sup> 28 U.S.C. § 2679 (2006).

been to hold that the existence of another remedy against the United States, apart from the FTCA, does not itself preclude suit under the FTCA, unless it is wholly evident that the other remedy was intended by Congress to be the exclusive remedy.<sup>109</sup> For example, the Federal Water Pollution Control Act provides an exclusive remedy for a claim against the United States for the recovery of expenses incurred in the course of cleaning up an oil spill that allegedly resulted from the negligence of the United States.<sup>110</sup> However, the non-cleanup cost claims, which are based on the negligence of government employees involved in oil spills, are cognizable under the FTCA.<sup>111</sup> In litigation related to a chemical release, as with any litigation to recover damages, multiple claims are necessary to ensure complete recovery based on the various available statutes and remedies. The FTCA exclusive remedies provision requires a similar approach, that is, ensuring that claims for recovery are based both on the FTCA and on remedies not available under the FTCA.

### 3. *Independent Contractor as Government Actor*

The FTCA specifically excludes from the term “federal agency” any contractor with the United States,<sup>112</sup> and “courts have consistently held that the United States is not liable for the torts of its independent contractors.”<sup>113</sup> However, the government is liable for its own negligence in the same manner that an employer of an independent contractor is held liable for the employer’s own negligence under the applicable local law.<sup>114</sup> And, when the government contracts for the performance of hazardous work, it owes a nondelegable duty to third parties to ensure that adequate safety precautions have been taken.<sup>115</sup> Under federal statute regarding a contract for handling hazardous wastes from defense facilities, a contractor “will reimburse the [f]ederal [g]overnment for all liabilities incurred by, penalties

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<sup>109</sup> 2-11 JAYSON & LONGSTRETH, *supra* note 79, § 11.05.

<sup>110</sup> *See* Clean Water Act, 33 U.S.C. § 1321(i) (2006), *cited in* Platte Pipe Line Co. v. United States, 846 F.2d 610, 612 (10th Cir. 1988).

<sup>111</sup> *Id.*

<sup>112</sup> 28 U.S.C. § 2671 (2006).

<sup>113</sup> 1-8 JAYSON & LONGSTRETH, *supra* note 79, § 8.03[7] (referencing many federal courts of appeals cases).

<sup>114</sup> 28 U.S.C. § 1346(b)(1) (2006); *Emelwon, Inc. v. United States*, 391 F.2d 9, 11 (5th Cir. 1968).

<sup>115</sup> *McCall v. U.S. Dep’t of Energy ex rel. Bonneville Power Admin.*, 914 F.2d 191, 195 (9th Cir. 1990).

assessed against, costs incurred by, and damages suffered by the [g]overnment that are caused by” a contractor’s “breach of any term or provision of the contract” and “any negligent or willful act or omission of the contractor.”<sup>116</sup> The majority of courts have enforced indemnification and hold harmless agreements between potentially responsible parties (PRP), allowing them to allocate environmental liability among themselves as they see fit; however, rules governing indemnification agreements within government contracts are quite restrictive.<sup>117</sup> Executive Order 10,789 provides that when a government contractor has acquired advance approval from the Secretary of the Army for risks that the contract defines as unusually hazardous, the contractor shall be held harmless and indemnified against claims or losses not compensated by insurance.<sup>118</sup> Executive Order 10,789 also authorizes the Secretary of Defense and the secretaries of the branches of the armed services to enter into contracts without regard to provisions of law if such contracts will facilitate the national defense.<sup>119</sup> “[N]ational defense’ means programs for military and energy production or construction, military . . . assistance to any foreign nation, . . . stockpiling, space, and any directly related activity.”<sup>120</sup> The term “includes emergency preparedness activities conducted pursuant to title VI of [the Stafford Act].”<sup>121</sup> Emergency preparedness covers activities to “minimize the effects of a hazard” and to effectuate emergency repair or restoration of “vital utilities and facilities destroyed or damaged by the hazard.”<sup>122</sup> However, Executive Order 10,789 does not protect a

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<sup>116</sup> 10 U.S.C. § 2708(a)(1) (2006) (applying to both contractors and subcontractors).

<sup>117</sup> See, e.g., Exec. Order No. 10,789, 23 Fed. Reg. 8897 (Nov. 14, 1958), *reprinted as amended in* 50 U.S.C. § 1431 (2006); see generally Warren G. Foote, *The Chemical Demilitarization Program—Will It Destroy the Nation’s Stockpile of Chemical Weapons by December 31, 2004?*, 146 MIL. L. REV. 1 (1994). Foote’s article provides excellent background on the development of the demilitarization framework and process.

<sup>118</sup> Exec. Order No. 10,789, *supra* note 117, at Part I(1A)(a). Under Part I(1) of this executive order and the National Defense Contractors Act, 50 U.S.C. § 1431 (2006), the President may authorize the Department of Defense to modify a contract, which includes providing for indemnification, whenever such action would facilitate the national defense.

<sup>119</sup> Exec. Order No. 10,789, *supra* note 117, at Part I(2).

<sup>120</sup> 50 U.S.C. app. § 2152(14) (2006).

<sup>121</sup> *Id.*

<sup>122</sup> 42 U.S.C. § 5195a (2006).

contractor from losses or claims by the United States caused by the contractor's willful misconduct or lack of good faith.<sup>123</sup>

In applying Executive Order 10,789 to recovery from a chemical release, a local government, business, or individual may be able to obtain relief from a government contractor depending on the conduct of the contractor and on the agreement between the contractor and the government. Once the source of the release is traced to the action or inaction of a government contractor, the potential claimant would need to obtain and review the contract between the contractor and the government. The potential claimant should carefully examine any provisions regarding the contractor's liability, as well as any information related to the contractor's willful conduct or lack of good faith.

#### 4. *Feres Doctrine*

Another important doctrine barring FTCA claims is the *Feres* doctrine. This common law doctrine says that the United States cannot be held liable for injuries sustained by military personnel incident to service, regardless of whether recovery is sought directly in an action by the injured individuals or their heirs or indirectly in a third party claim.<sup>124</sup> The *Feres* doctrine can bar suit even in cases involving torts committed by civilian employees of the federal government.<sup>125</sup> The Ninth Circuit analyzes on a case-by-case basis whether the *Feres* doctrine bars an action.<sup>126</sup> For example, the *Feres* doctrine barred an action brought by an active duty service member who sustained injuries while participating in a recreational activity on the base because she was on authorized liberty and not engaged in

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<sup>123</sup> Exec. Order No. 10,789, *supra* note 117, at Part I(1A)(b)(2). One author uses Tooele Chemical Disposal Facility as an example to demonstrate the basic relationship between the government and the private contractor in munitions incinerator operations. Foote, *supra* note 117, at 48–56.

<sup>124</sup> *Feres v. United States*, 340 U.S. 135 (1950).

<sup>125</sup> *United States v. Johnson*, 481 U.S. 681 (1987).

<sup>126</sup> The court related the following:

In *Johnson* this court looked to the following four factors to determine whether an activity is incident to military service:

(1) the place where the negligent act occurred, (2) the duty status of the plaintiff when the negligent act occurred, (3) the benefits accruing to the plaintiff because of his status as a service member, and (4) the nature of the plaintiff's activities at the time the negligent act occurred.

*Bon v. United States*, 802 F.2d 1092, 1094 (9th Cir. 1986) (citing *Johnson v. United States*, 704 F.2d 1431, 1436–41 (9th Cir. 1983)).

official duties.<sup>127</sup> However, in another example, the *Feres* doctrine did not bar an action to recover from injuries resulting from “independent post-service negligence” when the government failed to warn a veteran exposed to radiation or to monitor his condition, even though the government learned of the danger after the serviceman left the service.<sup>128</sup> If there is a state law duty to warn, said the Ninth Circuit, there would be an FTCA action based on that state law duty.<sup>129</sup> The *Feres* doctrine could be applied to military personnel and civilian agency employees working in the area of a chemical release. Given the effectiveness of the *Feres* doctrine in barring recovery, individuals working at a federal facility would need to consider the alternatives to bringing a claim in order to recover from a chemical incident. Proactive measures such as reviewing insurance plans and taking protective action assume a more significant role in possible *Feres* doctrine cases.

#### ***E. The Federal Tort Claims Act and Tort Actions in State Law***

The FTCA requires that an action constitute a tort under the applicable state law.<sup>130</sup> Using a federal facility at UMAD in Oregon as an example, the following paragraphs discuss torts, beginning with negligence, that would likely form the basis of a suit in the case of a chemical release at a federal facility. Even as a stand alone source of remedies, state laws, though they vary among the states, provide important potential avenues for recovery, especially where attempts to coordinate recovery under federal law do not succeed. State law remedies are generally available against private actors, such as government contractors whose contracts do not immunize them from liability. And in some cases, such as those where liability is associated with ultrahazardous activities, like the incineration of chemical weapons in the case of UMAD, state law remedies may provide more effective recovery. State statutes and common law vary, however, and it is essential to review the elements of a given state law to see what claims are available and what limits apply.

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<sup>127</sup> *Id.* at 1093.

<sup>128</sup> *Broudy v. United States*, 722 F.2d 566, 570 (9th Cir. 1983) (permitting a widow to bring suit under the FTCA for failure of the government to warn or monitor her husband, a former serviceman, for cancer related to his exposure to radiation while ordered to work in proximity to nuclear tests in Nevada), *aff'd sub nom. In re Consol. U.S. Atmospheric Testing Litig.*, 820 F.2d 982 (9th Cir. 1987).

<sup>129</sup> *Id.*

<sup>130</sup> 28 U.S.C. § 2674 (2006).

Further, where a release comes from a federal facility, either the FTCA or its cousin, the MCA, will be the principal potential means of recovery, and, therefore, it will be necessary to orchestrate bringing claims under both state and federal law.

### *I. Negligence*

To bring a suit alleging negligence in Oregon the complaint must demonstrate:

(1) that defendant's conduct caused a foreseeable risk of harm, (2) that the risk is to an interest of a kind that the law protects against negligent invasion, (3) that defendant's conduct was unreasonable in light of the risk, (4) that the conduct was the cause of plaintiff's harm, and (5) that plaintiff was within the class of persons and plaintiff's injury was within the general type of potential incidents and injuries that made defendant's conduct negligent.<sup>131</sup>

A significant challenge in negligence cases involves the fourth element, causation. To meet the causation requirement the plaintiff must show that "but for" defendant's conduct, the plaintiff would not have been injured.<sup>132</sup> In establishing causation, the lawyer must establish that the injury is the result of defendant's action; however, the lawyer does not have to identify the specific threshold levels of exposure necessary to cause the harm or injury at issue.<sup>133</sup> For example, in a case involving the *New Carissa*, concerning recovery of damages for shellfish beds tainted by oil pollution following the grounding of the oil tanker off Coos Bay, the defense argued that there were no studies establishing the threshold levels of oil necessary to cause harm to shellfish.<sup>134</sup> However, the court ultimately held that a showing of causation could be made without the identification of the threshold levels.<sup>135</sup>

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<sup>131</sup> *Graham v. Multnomah County*, 972 P.2d 1215, 1216 (Or. Ct. App. 1999) (quoting *Solberg v. Johnson*, 760 P.2d 867, 870 (Or. 1980)) (emphasis omitted).

<sup>132</sup> *Joshi v. Providence Health Sys.*, 149 P.3d 1164, 1168–69 (Or. 2006). See also Richard G. Rumrell, *Use of Circumstantial Evidence to Prove an Environmental Case Against the Federal Government Under the Federal Tort Claims Act*, 7 COOLEY L. REV. 389 (1990).

<sup>133</sup> *Clausen v. M/V New Carissa*, 339 F.3d 1049, 1059 (9th Cir. 2003).

<sup>134</sup> *Id.* at 1061 (finding that plaintiff's expert ruling out low salinity as a cause of oyster mortality, and therefore concluding that oil exposure caused demise of oysters where there was oil found in every specimen, was sufficiently reliable as required by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592–93 (1993)).

<sup>135</sup> *Clausen*, 339 F.3d at 1061.

In the case of personal injury, *Redlands Soccer Club Inc. v. Department of the Army*<sup>136</sup> provides perhaps the most commonly cited example of tracing causation. In *Redlands Soccer*, plaintiffs sought damages to pay for monitoring medical conditions, alleging that Army operations had previously contaminated a soccer field, an area where the public was now known to frequent and use.<sup>137</sup> In Oregon, however, conduct that results only in a significantly increased risk of injury that requires medical monitoring does not give rise to a claim for negligence.<sup>138</sup>

Briefly stated, these cases demonstrate the importance of determining what level of proof would be required to establish causation if it were necessary to bring suit to recover on the theory that a party's negligence was responsible for a chemical release and the subsequent harm. Promptly investing in expert, perhaps forensic, data collection on the terrain is highly advisable if there is a chemical release and subsequent concern for personal injury from exposure.<sup>139</sup> When the scope of the impact of a chemical release is smaller, it may be easier to collect the necessary data. However, when the scope is broader and it is necessary to determine the impact on locations hundreds of miles away from the place of the incident, the data is at least as important and maybe that much more difficult to obtain. Adequate monitoring, especially of airborne substances or contaminated water, is the key to obtaining this necessary data.

## 2. *Negligent Failure to Warn*

Oregon common law has found a failure to warn as grounds for a possible action in negligence.<sup>140</sup> In order to prove this claim, the plaintiff must show: (1) the defendant could reasonably foresee there

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<sup>136</sup> 55 F.3d 827 (3d Cir. 1995).

<sup>137</sup> *Id.* at 851 (denying summary judgment and permitting plaintiffs to proceed on the issue of whether present injuries, including need for special medical monitoring, have been caused by their exposure to any toxic substances the Army may have deposited in the landfill under the park in which they played).

<sup>138</sup> See *Lowe v. Phillip Morris USA, Inc.*, 183 P.3d 181 (Or. 2008) (upholding the Oregon Court of Appeals' decision that a cigarette smoker was not entitled to a negligence finding when there was no evidence presented of present physical harm and the plaintiff alleged that the harm created the need for medical monitoring).

<sup>139</sup> See Bill Charles Wells, *The Grin Without the Cat: Claims for Damages from Toxic Exposure Without Present Injury*, 18 WM. & MARY J. ENVTL. L. & POL'Y REV. 285 (1994), for a more comprehensive discussion of proving damages caused by exposure to chemicals.

<sup>140</sup> *Fuhrer v. Gearhart-By-The-Sea, Inc.*, 760 P.2d 874, 877 (Or. 1988).

was an unreasonable risk of harm, (2) the defendant knew or should have known of the dangerous condition, (3) the defendant had a duty to warn or protect, (4) the defendant did not warn of the risk, and (5) the plaintiff is injured as a result of the failure to warn.<sup>141</sup> In the example of a release at UMAD, the CSEPP mission is to assist state and local governments in carrying out functions relating to off-post emergency preparedness and response. Fulfilling the CSEPP mission includes setting up and supporting a warning system and creating a legal relationship that requires the Department of Homeland Security and FEMA to warn of off-post chemical releases, with the Department of the Army responsible for on-post activities.<sup>142</sup> A failure of the warning system provides sufficient grounds for bringing a negligence claim against whichever party caused the warning system to malfunction.

### 3. *Toxic Torts*

A “toxic tort” is “a tort claim that results from the exposure of the plaintiff to toxic (chemical or radioactive) substances because of the defendant’s actions.”<sup>143</sup> Toxic tort actions are often brought as claims of negligence,<sup>144</sup> but may also include other claims such as strict liability or abnormally dangerous substances. However, claims other than negligence are beyond the FTCA.<sup>145</sup> Oregon does not have a toxic tort *per se*; rather, efforts to recover from toxic torts are based on claims of negligence, strict liability, and abnormally dangerous substances. Oregon law defines toxic substances as “any substance, other than radioactive substance, that has the capacity to produce personal injury or illness to humans through ingestion, inhalation, or absorption through any body surface.”<sup>146</sup> The Consumer Product Safety Commission uses the same definition,<sup>147</sup> and the Federal Toxic Substances Control Act defines a toxic substance as one whose “manufacture, processing, distribution in commerce, use, or disposal of the chemical substance with respect to which such application was

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<sup>141</sup> *Id.* at 878.

<sup>142</sup> 50 U.S.C.A. § 1521(c)(4) (West 2009).

<sup>143</sup> Wells, *supra* note 139, at 287.

<sup>144</sup> *Id.*

<sup>145</sup> 28 U.S.C. § 1346(b) (2006); 2-11 JAYSON & LONGSTRETH, *supra* note 79, § 11.07 (quoting *Martinez v. Fenn*, 702 F. Supp. 126, 127 (D.S.C. 1988)).

<sup>146</sup> OR. REV. STAT. § 453.005(18) (2009).

<sup>147</sup> 16 C.F.R. § 1500.3(b)(5) (2009).

made, or that any combination of such activities, presents or will present an unreasonable risk of injury to health or the environment.”<sup>148</sup> The C.F.R. designates a list of specific elements and compounds that qualify as toxic.<sup>149</sup> For an acute exposure toxic tort case, such as the catastrophe that occurred at the Union Carbide plant in Bhopal, India, the factual issues are similar to those of a bus or airplane incident.<sup>150</sup> A single chemical release could also initiate a series of releases, which would be classified as a continuing tort.<sup>151</sup>

#### 4. Nuisance and Trespass

Nuisance and trespass actions may also be brought to recover damages for the deposit of substances on a person’s land. A trespass action may be brought where there is an invasion of a possessor’s interest in the exclusive possession of land, and a nuisance action may be brought where there is an invasion of a landowner’s use and enjoyment of the landowner’s land.<sup>152</sup> Defendants might be liable for intentional trespass or nuisance if they knew, or should have known, that their actions would result in chemical substances entering a person’s property.<sup>153</sup> Examples of cases in Oregon that were found to be trespass and nuisance include, but are not limited to, actions based on noise, vibration, odors, smoke, dust, mist from irrigation, use of pesticides, and use of crop production substances.<sup>154</sup> For example, in *Lunda v. Matthews*, a cement plant was found liable for damages and was enjoined from operations where its operation unreasonably

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<sup>148</sup> 15 U.S.C. § 2604(f)(3)(B) (2006).

<sup>149</sup> See, e.g., 40 C.F.R. § 68.130 (2009).

<sup>150</sup> Wells, *supra* note 139, at 288.

<sup>151</sup> See DEP’T OF THE ARMY, PAMPHLET NO. 50-6, NUCLEAR AND CHEMICAL WEAPONS AND MATERIAL: CHEMICAL ACCIDENT OR INCIDENT RESPONSE AND ASSISTANCE (CAIRA) OPERATIONS (2003) [hereinafter AP 50-6], available at [http://www.army.mil/usapa/epubs/pdf/p50\\_6.pdf](http://www.army.mil/usapa/epubs/pdf/p50_6.pdf).

<sup>152</sup> *Carvalho v. Wolfe*, 140 P.3d 1161, 1162 (Or. Ct. App. 2006) (citing *Martin v. Reynolds Metals Co.*, 342 P.2d 790, 792 (Or. 1959)).

<sup>153</sup> *Lunda v. Matthews*, 613 P.2d 63, 66 (Or. Ct. App. 1980).

<sup>154</sup> OR. REV. STAT. § 30.932 (2009); see also *McElwain v. Georgia-Pacific Corp.*, 421 P.2d 957, 961 (Or. 1966) (finding punitive damages consideration was appropriate where a mill did not do everything reasonably possible to prevent trespass of effluents emitted from a mill stack); *Martin*, 342 P.2d at 790 (finding that operation of a plant causing gases and particulates to become airborne and settle upon plaintiff’s land, rendering it unfit for raising livestock, created an action for trespass even where particles were invisible).

interfered with nearby homeowners' use of their properties.<sup>155</sup> Oregon law provides for damages and abatement, or even an injunction, when defendants are liable for nuisance.<sup>156</sup> Applying this to chemical release, it would be necessary to examine state law to see whether nuisance and trespass actions are recognized in a given state for the intrusion of invisible substances. It would be possible to do this in advance as a part of an exercise. In addition, exercises simulating releases on federal facilities could include tracing the footprint of the impact of chemical releases to determine the scope of the release.

##### 5. *Abnormally Dangerous Activity*

*Koos v. Roth* provides the Oregon criteria for deciding whether an activity qualifies as ultrahazardous or abnormally dangerous. In Oregon, the factors considered in determining ultrahazardous or abnormally dangerous activity, which were set forth in *Koos* are:

- (a) Whether the activity involves a high degree of risk of some harm to the person, land or chattels of others;
- (b) Whether the gravity of the harm which may result from it is likely to be great;
- (c) Whether the risk cannot be eliminated by the exercise of reasonable care;
- (d) Whether the activity is not a matter of common usage;
- (e) Whether the activity is inappropriate to the place where it is carried on; and
- (f) The value of the activity to the community.<sup>157</sup>

Aerial chemical spraying and ground-based spraying have both been found to be abnormally dangerous activities.<sup>158</sup> Under the theory of abnormally dangerous activities, the plaintiff may recover damages for injury to property and for personal injury, including emotional distress. In addition, the court may award special and punitive

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<sup>155</sup> 613 P.2d at 67 (affirming the injunction and liability of cement plant operators for trespass and nuisance where dust, debris, fumes, and operational noise interfered with nearby homeowners' use and possession of their land).

<sup>156</sup> OR. REV. STAT. § 105.505 (2009).

<sup>157</sup> 652 P.2d 1255, 1260 n.3 (Or. 1982) (quoting RESTATEMENT (SECOND) OF TORTS § 520 (Tentative Draft No. 10, 1964)). Under the Restatement (Third) of Torts:

- (a) An actor who carries on an abnormally dangerous activity is subject to strict liability for physical harm resulting from the activity.
- (b) An activity is abnormally dangerous if: (1) the activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors; and (2) the activity is not one of common usage.

RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 20 (2005).

<sup>158</sup> *Loe v. Lenhardt*, 362 P.2d 312, 318 (Or. 1961); *Speer & Sons Nursery, Inc. v. Duyck*, 759 P.2d 1133, 1134–35 (Or. Ct. App. 1988).

damages against private defendants.<sup>159</sup> Conforming with safety regulations is not a defense to a strict liability claim for ultrahazardous activities because those safety regulations address the duty of care owed by the defendant to others, and strict liability is not based on lack of care or fault.<sup>160</sup> If, however, a state has specifically authorized the abnormally dangerous activity through legislative approval, which implies a grant of immunity, the defendant cannot be held strictly liable for resulting damage.<sup>161</sup> Statutes pertaining to federal facilities, such as the UMAD and its operations of incinerating chemical weapons, should be examined for such statements of immunity. However, absent special circumstances indicating an intent to confer immunity from strict liability, the normal interpretation of a legislative act is to authorize the plaintiff to proceed and to hold the defendant strictly responsible if the activity results in harm to those in the vicinity.<sup>162</sup>

#### *F. Statute of Limitations Defenses to Torts*

Two statutes of limitations come into play in a tort action brought under the FTCA. Although state law provides the substantive basis for suit,<sup>163</sup> the FTCA has its own statute of limitations. The claimant

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<sup>159</sup> See *McGregor v. Barton Sand & Gravel, Inc.*, 660 P.2d 175, 180–81 (Or. Ct. App. 1983) (finding plaintiffs were entitled to punitive damages where defendants left a problem uncorrected for four years, resulting in serious property damage and the danger of ongoing and new problems, including landslides if the conditions were not remedied).

<sup>160</sup> *McLane v. Nw. Natural Gas Co.*, 467 P.2d 635, 640–41 (Or. 1970).

<sup>161</sup> See George W. Conk, *Will the Post 9/11 World Be a Post-Tort World?*, 112 PENN ST. L. REV. 175, 208–12 (2007) (stating that statutory immunity for strict liability, such as is found in the Stafford Act and the FTCA, is based on discretionary function and discussing a stronger state act, New York's State Defense Emergency Act, which extends more immunity to work done in emergency situations, but does not extend immunity to the point of eliminating strict liability, in part because the emergency does not relieve the duty of reasonable care).

<sup>162</sup> *McLane*, 467 P.2d at 641. The Oregon State Bar provides publications with additional discussions on toxic torts in Oregon. See Gregory E. Skillman & Danna C. Fogarty, *Toxic Torts*, in TORTS, 22-1 to -23 (Oregon State Bar Continuing Legal Education ed., 2006 & Supp. 2006).

<sup>163</sup> State law statutes of limitations would apply to private actions. For example, in the case of a release from UMAD, actions claiming negligence and other torts causing personal injury must be filed within two years of the date of the injury under Oregon law. OR. REV. STAT. § 12.110(1) (2009). For a continuing tort action brought to recover for poisoning by chemicals emanating from an aluminum reduction plant, the claim was not barred where the action was filed within two years after the plaintiffs' last exposure to the chemicals. *Reynolds Metals Co. v. Yturbide*, 258 F.2d 321, 332–33 (9th Cir. 1958). In Oregon, no action for negligence may be brought more than ten years after the date of the

has two years to file an administrative claim.<sup>164</sup> Once the agency disposes of the claim, the claimant has six months to sue.<sup>165</sup> It is possible that the statute of limitations for CERCLA could prevent bringing an FTCA suit if one waits until after the CERCLA remediation process has begun to bring an action. Therefore, it is better to begin the process of exhausting remedies by filing a claim and beginning the Army claims process to meet the FTCA statute of limitations.<sup>166</sup> If CERCLA does apply, delayed discovery of an injury may toll the statute of limitations.<sup>167</sup> The CERCLA statute of limitations preempts state statutes of limitations if the state limitations period provides for an earlier commencement date than federal law.<sup>168</sup> The statute provides that:

(a)(1) In the case of any action brought under [s]tate law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the [s]tate statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute.

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(b)(4)(A) [T]he term “federally required commencement date” means the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(1) of this section were caused or contributed to by the hazardous substance or pollutant or contaminant concerned.<sup>169</sup>

The discovery rule commonly applied to federal courts is that the plaintiff knows or reasonably should know of a claim “when the

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act or omission. OR. REV. STAT. § 12.115(1) (2009). The Oregon statute of limitations for trespass or nuisance actions is six years from the date of the injury. *Id.* § 12.080(3).

<sup>164</sup> 28 U.S.C. § 2401(b) (2006).

<sup>165</sup> *Id.* § 2675. In Oregon, the statute of limitations runs when a person knows or reasonably should know these three elements exist: harm, causation, and tortious conduct. *Fed. Deposit Ins. Corp. v. Smith*, 980 P.2d 141, 146 (Or. 1999), *answer to certified question conformed to by* 189 F.3d 472 (9th Cir. 1999).

<sup>166</sup> For further discussion of the intersection of CERCLA and the FTCA, see *infra* notes 262–72 and accompanying text.

<sup>167</sup> *O’Connor v. Boeing N. Am., Inc.*, 311 F.3d 1139, 1147 (9th Cir. 2002).

<sup>168</sup> 42 U.S.C. § 9658(a)(1) (2006).

<sup>169</sup> *Id.* § 9658(a)(1), (b)(4)(A).

plaintiff knows both the existence and the cause of his injury.”<sup>170</sup> Even if a CERCLA claim is not brought, the later statute of limitations might apply since the purpose of § 9658 was to deal with the inadequacies of many state tort systems regarding the delayed discovery of the effect of a release of a toxic substance.<sup>171</sup> The legislative history of the Superfund Amendments and Reauthorization Act of 1986 confirms this result, indicating that after receiving recommendations concerning the inadequacy of state laws, Congress fully intended § 9658 to alter the statute of limitations rules applicable to state law claims, regardless of whether plaintiffs also asserted CERCLA claims.<sup>172</sup> The Ninth Circuit referred to this legislative history and used additional analysis to find that § 9658 preempted the Oregon state statute of repose for negligence.<sup>173</sup>

### *G. The Military Claims Act*

The MCA offers another means to recover from the federal government in the event of a chemical release.<sup>174</sup> The MCA covers claims including property damage, personal injury, or death caused by either a civilian officer or an employee of the Army, Navy, or Air Force acting within the scope of her employment or caused otherwise incident to noncombat activities of that department.<sup>175</sup> Claims covered under the FTCA are not cognizable under the MCA.<sup>176</sup> In the event that representatives of the military department deny that negligence alleged in an FTCA claim occurred, the claim would in many instances be eligible for processing under the MCA.<sup>177</sup> Claimants who may obtain relief under the MCA include all persons who suffer personal injury or death, except military or civilian personnel when the injury or death occurs incident to their service.<sup>178</sup>

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<sup>170</sup> See *United States v. Kubrick*, 444 U.S. 111, 113 (1979).

<sup>171</sup> See *id.* at 119 n.6.

<sup>172</sup> See H.R. CONF. REP. NO. 99-962, at 222-23 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276 (discussing need for liberalization of state statutes of limitations); H.R. REP. NO. 99-253(I), at 285 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2960 (viewing provision as “[s]tate procedural reform” and contemplating that federal rule would apply even in actions brought in state court).

<sup>173</sup> *McDonald v. Sun Oil Co.*, 548 F.3d 774, 782 (9th Cir. 2008).

<sup>174</sup> See 32 C.F.R. §§ 536.73-.82 (2009).

<sup>175</sup> Military Claims Act, 10 U.S.C. § 2733 (2006).

<sup>176</sup> 32 C.F.R. § 536.74(b).

<sup>177</sup> 10 U.S.C. § 2733(b)(2); 1-1 JAYSON & LONGSTRETH, *supra* note 79, § 1.04.

<sup>178</sup> 10 U.S.C. § 2733(b).

These personal injury claims may allege damages resulting from pain and suffering, loss of time, earnings, or services, diminished earning capacity, permanent injury, anticipated medical expenses, death benefits, or other theories of damages available in a suit at law.<sup>179</sup> A claim arising from “noncombat activities” is one that arises from “[a]uthorized activities essentially military in nature, having little parallel in civilian pursuits, which historically have been considered as furnishing a proper basis for payment of claims.”<sup>180</sup> Examples of noncombat activities include: “practice firing of missiles and weapons; training and field exercises, and military maneuvers, including the operation of aircraft and vehicles; use and occupancy of real estate; [and] movement of combat and other vehicles designed for military use.”<sup>181</sup> A claim under the MCA must be brought within two years after the claim accrues.<sup>182</sup>

The Secretaries of the Army, Navy, Air Force, Marine Corps, or Coast Guard have the authority to pay settlements up to \$100,000 per claim where a person has been injured or killed or his property has been damaged and the MCA authorizes payment of the claims.<sup>183</sup> If the Secretary determines a claim exceeding \$100,000 is meritorious, the Secretary may pay \$100,000 and report the amount in excess of \$100,000 to the Treasury for payment under a different statute.<sup>184</sup> In addition to the MCA’s capped settlement awards, remedies are further limited because the statute precludes judicial review.<sup>185</sup> Claims under the MCA must be settled to result in recovery; unlike the FTCA, the MCA provides only an administrative process and does not permit

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<sup>179</sup> 32 C.F.R. § 536.77.

<sup>180</sup> DEP’T OF THE ARMY, ARMY REG. NO. 27-20, LEGAL SERVICES: CLAIMS 108 (2008) [hereinafter AR 27-20], available at [http://www.army.mil/usapa/epubs/pdf/r27\\_20.pdf](http://www.army.mil/usapa/epubs/pdf/r27_20.pdf).

<sup>181</sup> DEP’T OF THE ARMY, PAMPHLET NO. 27-162, LEGAL SERVICES: CLAIMS PROCEDURES 114 (2008) [hereinafter AP 27-162], available at [http://www.army.mil/usapa/epubs/pdf/p27\\_162.pdf](http://www.army.mil/usapa/epubs/pdf/p27_162.pdf).

<sup>182</sup> 10 U.S.C. § 2733(b)(1). Exceptions exist for wartime, when the statute of limitations is tolled, and in a case of partial negligence, when the claim would succeed or be barred depending on the law of the state where the release occurred. *Id.* The date a claim accrues is the date on which the claimant is aware of the injury and its cause. 32 C.F.R. § 536.47 (2009).

<sup>183</sup> 10 U.S.C. § 2736(a) (2006).

<sup>184</sup> *Id.* § 2733(d); 31 U.S.C. § 1304 (2006) (authorizing additional payment).

<sup>185</sup> *Hata v. United States*, 23 F.3d 230, 232 (9th Cir. 1994). Judicial review is available only as to constitutional violations and as to violations of clear statutory mandate. *Id.* at 233.

appeals to federal court to review the factual agency determinations.<sup>186</sup>

#### ***H. Administrative Remedies: The Army Claims Process***

Administrative remedies must be exhausted prior to filing an action under the FTCA.<sup>187</sup> Each department of the armed services has regulations outlining procedures for filing an administrative claim. For the purpose of illustration in this article, the Army regulations will be used, though the military departments and administrative agencies vary. Regulations applying to Army claims are intended to ensure that claims are investigated properly, claims are adjudicated according to applicable law, and valid recoveries and affirmative claims are pursued against carriers, third-party insurers, and tortfeasors.<sup>188</sup>

Army Regulation (AR) 27-20 sets forth the policies and legal principles for investigating, processing, and settling claims against, and in favor of the United States.<sup>189</sup> Intended to be used as a guiding policy for the detailed procedures in the Department of the Army Pamphlet 27-162, the regulations apply to the Active Army and Department of Defense civilian employees, among others.<sup>190</sup> In the example of a chemical release, the Army would follow a plan known as the Chemical Accident or Incident Response and Assistance (CAIRA) plan. Disaster claims plans are already drafted to deal with chemical accidents or incidents and should be followed.<sup>191</sup> Chemical accident or incident plans include provisions for immediate response and such plans set up a special claims office to process claims on location.<sup>192</sup> The special claims processing office should be staffed with a claims judge advocate with delegated authority to pay claims of \$25,000 or less for MCA claims and \$50,000 or less for FTCA claims.<sup>193</sup> The special claims processing office should have adequate investigatory, administrative, and logistical support, which should

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<sup>186</sup> 10 U.S.C. § 2735 (2006); *Hata*, 23 F.3d at 232–33.

<sup>187</sup> 28 U.S.C. § 2675(a) (2006).

<sup>188</sup> 32 C.F.R. § 536.1 (2009).

<sup>189</sup> AR 27-20, *supra* note 180, at i.

<sup>190</sup> *Id.* at 1.

<sup>191</sup> AP 50-6, *supra* note 151, at 53–54.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 55.

include support in the areas of damage assessment, finance, and accounting.<sup>194</sup>

### 1. *Claims*

The Army claim is the same claim that would be used for an FTCA action should the administrative claim be denied, therefore care must be taken to present the claim properly and fully. In the Army claims process, a claim is a writing that contains a sum certain for each claimant and that is signed by each claimant or by an authorized representative.<sup>195</sup> The writing must contain enough information to permit investigation.<sup>196</sup> Normally a claim will be presented on a Standard Form (SF) 95, and when it is not, the claimant will be asked to fill out an SF 95 to facilitate processing the investigation and the claim.<sup>197</sup> The claimant cannot later demand more money than the initial administrative claim, unless the additional sum is justified by evidence discovered after the administrative claim was filed;<sup>198</sup> consequently, the certainty of the sum requested must be carefully reviewed before submitting the claim. To be payable, a claim must be filed no later than two years from the date the claim accrues, as determined by federal law.<sup>199</sup> The accrual date is the date on which

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<sup>194</sup> *Id.*

<sup>195</sup> 32 C.F.R. § 536.26 (2009).

<sup>196</sup> *Id.*

<sup>197</sup> See generally GEN. SERVS. ADMIN., STANDARD FORM NO. 95, CLAIM FOR DAMAGE, INJURY, OR DEATH (2007), available at <http://www.gsa.gov/Portal/gsa/ep/formslibrary.do?formType=SF> (follow "Claim for Damage, Injury, or Death" hyperlink; then follow "SF95\_e.pdf" hyperlink). Claims personnel are to render assistance at the initial contact to discuss all aspects of the claims, determine which statutes or procedures apply, and advise claimants of the remedies. AR 27-20, *supra* note 180, at 13. When a claims office receives a claim that clearly fails to state a sum certain, a claims attorney should immediately notify the claimant or the claimant's counsel, by telephone if necessary, that the purported claim fails to satisfy the jurisdictional requirements of the FTCA. Bodensteiner, *Tort Claims Note: Requirement for a Sum Certain*, ARMY LAW., July 1992, at 41. Small claims procedures may be used "whenever a claim may be settled for \$5,000 or less." 32 C.F.R. § 536.33 (2009). Such "procedures are designed to save processing time and eliminate the need for most of the documentation otherwise required." *Id.* The process requires only completion of the form DA 1668. AP 27-162, *supra* note 181, at 19; see generally U.S. DEP'T OF DEFENSE, DA FORM NO. 1668, SMALL CLAIMS CERTIFICATE, available at <http://www.usa-federal-forms.com/usa-fedforms-dod-da/dod-da-1668-nonfillable.pdf>.

<sup>198</sup> 28 U.S.C. § 2675(b) (2006).

<sup>199</sup> 32 C.F.R. § 536.47.

the claimant is aware of the injury and its cause.<sup>200</sup> A properly filed claim stops the running of the statute of limitations on the date it is received by the appropriate federal agency.<sup>201</sup> The claimant is not required to know the negligent or wrongful nature of the act or omission giving rise to the claim.<sup>202</sup>

While timely filling out and filing a written claim is key to obtaining any administrative remedy or damages under the FTCA, adequately accounting for the needed sum is an important limiting factor in recovery. Army personnel are supposed to assist in filing claims; however, for high value cases, assessing the sum certain, along with establishing causation, may require the most preparation.

## 2. *Constitutional Tort and Real Estate Claims*

Some potential FTCA claims may be covered as Fifth Amendment takings, payable as real estate claims. The Tucker Act<sup>203</sup> provides original jurisdiction in the Court of Federal Claims over causes of action alleging property loss caused by a taking under the Fifth Amendment, where the intrusion on the land is a continuous invasion by noise, gas, smoke, or water emanating from a government property.<sup>204</sup> Federal regulations also permit takings claims to be paid in an altered form as real estate claims.<sup>205</sup> Depending on the facts, a real estate claim may be payable as a trespass claim under AR 27-20.<sup>206</sup>

Inverse condemnation refers to a claim against a governmental agency to recover the value of property taken by the agency when no formal exercise of the power of eminent domain was completed by

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<sup>200</sup> *Id.* For purposes of the FTCA, a tort claim accrues when a "plaintiff has discovered both his injury and its cause." *United States v. Kubrick*, 444 U.S. 111, 120 (1979). Yet, the Ninth Circuit rejects mandatory inclusion of the discovery regarding who inflicted the injury. *Dyniewicz v. United States*, 742 F.2d 484, 486 (9th Cir. 1984).

<sup>201</sup> 32 C.F.R. § 536.26; 47.

<sup>202</sup> 32 C.F.R. § 536.47.

<sup>203</sup> 28 U.S.C. § 1346 (2006).

<sup>204</sup> AP 27-162, *supra* note 181, at 27.

<sup>205</sup> 32 C.F.R. § 536.42; AP 27-162, *supra* note 181, at 62.

<sup>206</sup> AP 27-162, *supra* note 181, at 27. Such claims usually arise during a training exercise or an emergency deployment. *Id.* If the real property is occupied for thirty days or less, the claim will be generally for trespass; if occupation is for thirty-one or more days, it will generally produce a real estate claim. *Id.* Claims for consequential property damage by civilian employees may only be considered in the Court of Federal Claims pursuant to 28 U.S.C. § 1491. *Id.* at 14.

the agency.<sup>207</sup> In such cases, claims may be brought under the takings clause of the Fifth Amendment of the U.S. Constitution and similar provisions of state constitutions.<sup>208</sup> Federal case law does support a finding of inverse condemnation from military related activities.<sup>209</sup> Those impacted by a chemical release from a federal facility would have to evaluate possible federal and state inverse condemnation claims and determine whether an administrative claim would be more likely to succeed and more financially viable given the required levels of proof.

### 3. *Environmental Claims*

Claims for property damage, personal injury, or death arising in the United States and based on contamination by toxic substances found in the air or ground must be reported by the U.S. Army Claims Service (USARCS) to the Environmental Law Division of the Army Litigation Center, and the Environmental Torts Branch of the U.S. Department of Justice.<sup>210</sup> The Department of the Army recognizes two types of environmental claims.<sup>211</sup> “The first type asserts damage or injury resulting directly from the contamination; these claims are processed under [Army Regulation (AR) 27-20].”<sup>212</sup> According to Army regulations, most environmental claims do not involve claims under AR 27-20.<sup>213</sup> The second and more common type of claim

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<sup>207</sup> *Lincoln Loan Co. v. State ex rel. State Highway Comm’n*, 545 P.2d 105, 106 n.1 (Or. 1976) (citing *Thornburg v. Port of Portland*, 376 P.2d 100, 101 n.1 (Or. 1962)).

<sup>208</sup> Section 18 of Oregon’s Constitution serves as an example:

Private property or services taken for public use; just compensation. Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor except in the case of the state, without such compensation first assessed and tendered; provided, that the use of all roads, ways and waterways necessary to promote the transportation of the raw products of mine or farm or forest or water for beneficial use or drainage is necessary to the development and welfare of the state and is declared a public use.

OR. CONST. art. I, § 18.

<sup>209</sup> *United States v. Causby*, 328 U.S. 256, 262 (1946); *Branning v. United States*, 654 F.2d 88, 102 (Ct. Cl. 1981); *Thornburg*, 376 P.2d at 106. These cases deal with facts based on overflight noise from planes and applying case law outside this context may be difficult. For another application of inverse condemnation to military activity, see Richard M. Lattimer, Jr., *Myopic Federalism: The Public Trust Doctrine and Regulation of Military Activities*, 150 MIL. L. REV. 79, 147 (1995).

<sup>210</sup> 32 C.F.R. § 536.35 (2009).

<sup>211</sup> AP 27-162, *supra* note 181, at 27.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

“seeks to recover the costs of or, damages attributable to, the necessary ‘cleanup’ response; these claims are processed under the Defense Environmental Restoration Account (DERA).”<sup>214</sup> The line between the two types is “difficult to draw, requiring close coordination between claims and environmental personnel.”<sup>215</sup> The Administrative Claims Officer (ACO) must review toxic tort claims to “determine whether to refer them to environmental personnel for processing under DERA.”<sup>216</sup> When the ACO is “presented with a claim alleging damage or injury resulting from the release of a hazardous substance into the common environment, the ACO . . . must determine whether CERCLA procedures may abate the release or ameliorate both its short-term and long-term effects.”<sup>217</sup> However,

[i]f the installation elects to abate a release of contamination or ameliorate its effects, whether as the result of a claim or not, its legal staff must inform the command and the civilian community that the Army is acting under the mandate of the Installation Restoration Program and not because of potential tort liability.<sup>218</sup>

### III CERCLA

An incident releasing a reportable quantity of a chemical that would constitute a hazardous substance may trigger the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA),<sup>219</sup> as amended by the Superfund

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<sup>214</sup> *Id.* EPA regulations require the claimant to first pursue reimbursement from the responsible party, so if the release occurred on a military installation, the claimant should first make a demand on the Army. 40 C.F.R. § 307.30 (2009). The Department of Defense “has responsibility to take all action necessary with respect to releases where . . . the sole source of the release is from[] any facility or vessel under the jurisdiction, custody, or control of DOD.” *Id.* § 300.175(b)(4).

<sup>215</sup> AP 27-162, *supra* note 181, at 27.

<sup>216</sup> *Id.* at 27–28.

<sup>217</sup> *Id.* at 28.

<sup>218</sup> *Id.*

<sup>219</sup> 42 U.S.C. §§ 9601–9675 (2006). CERCLA defines “hazardous substance” by referring to other federal statutes: the definition includes hazardous waste regulated by the Solid Waste Disposal Act, any toxic pollutant listed under the Clean Water Act, hazardous air pollutants listed under the Clean Air Act, any hazardous chemical substance or mixture identified under the Toxic Substances Control Act, and any substance designated under 42 U.S.C. § 9602. *Id.* § 9601(14).

Amendments and Reauthorization Act (SARA) of 1986.<sup>220</sup> CERCLA generally applies to a release of a hazardous substance into the environment from a facility.<sup>221</sup> A “release” means “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing” of any hazardous substances into the environment, “including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance.”<sup>222</sup> In *Pakootas v. Teck Cominco Metals, Ltd.*, the court noted that “passive migration of hazardous substances into the environment from where hazardous substances have come to be located is a release under CERCLA.”<sup>223</sup> The court found that there were several events that could be potentially characterized as releases:

First, there is the discharge of waste from the Trail Smelter into the Columbia River in Canada. Second, there is the discharge or escape of the slag from Canada when the Columbia River enters the United States. And third, there is the leaching of heavy metals and other hazardous substances from the slag into the environment at the Site.<sup>224</sup>

For these reasons, the court held that the leaching of hazardous substances from the slag at the site was a CERCLA release.<sup>225</sup> *Pakootas* underscores the significance of groundwater contamination, which has emerged recently as a focus of natural resource damage lawsuits.<sup>226</sup> U.S. Department of the Interior regulations have assigned

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<sup>220</sup> Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended at 42 U.S.C. §§ 9671–9675 (2006)). Also, imminent and substantial endangerment provisions provide an important avenue to press for enforcement of environmental cleanup or other precautions under the various environmental statutes other than CERCLA. *See generally* de Saillan, *supra* note 5 (covering imminent endangerment provisions in depth).

<sup>221</sup> 42 U.S.C. § 9602.

<sup>222</sup> *Id.* § 9601(22).

<sup>223</sup> 452 F.3d 1066, 1075 (9th Cir. 2006), *cert. denied*, 128 S. Ct. 858 (2008). In *Coeur d’Alene Tribe v. Asarco, Inc.*, the natural, passive movement and migration of hazardous substances in rivers was found to be a “release” for purposes of CERCLA liability in a natural resources damages lawsuit. 280 F. Supp. 2d 1094, 1113 (D. Idaho 2003), *modified in part sub nom.* *United States v. Asarco, Inc.*, 471 F. Supp. 2d 1063 (D. Idaho 2005).

<sup>224</sup> *Pakootas*, 452 F.3d at 1075.

<sup>225</sup> *Id.*

<sup>226</sup> *See* Victoria L. Peters, Senior Assistant Attorney Gen., Colo. Dep’t of Law, Remarks at the Law Seminars International Conference on Natural Resource Damages: New Developments and Emerging Strategies (July 17, 2008). *See generally* 43 C.F.R. § 11.62(c) (2009).

a specific injury definition for groundwater that includes instances where hazardous substance concentrations exceed certain water quality standards or where the concentrations are sufficient to cause injuries to other resources.<sup>227</sup>

CERCLA sets up a comprehensive scheme for the cleanup of hazardous waste sites, and imposes liability for cleanup costs on the parties responsible for the release or potential release of hazardous substances into the environment.<sup>228</sup> CERCLA imposes retroactive strict liability on past and present owners and operators of a facility where a release of a hazardous substance has occurred as well as persons who generate, dispose of, or arrange for the disposal of a hazardous substance.<sup>229</sup> A responsible party may seek to avoid liability for cleanup and recovery costs under CERCLA by establishing that the incident was caused solely by “(1) an act of God; (2) an act of war; [or] (3) an act or omission of a third party.”<sup>230</sup> There is little authority regarding CERCLA’s act of war provision. However, the Ninth Circuit Court of Appeals addressed this provision in *United States v. Shell Oil Company*, where the United States and the State of California commenced litigation against Shell and other oil companies to recover cleanup costs incurred at various waste dumpsites from aviation fuel refineries operated during World War II.<sup>231</sup> In an attempt to avoid CERCLA liability, the companies asserted the act of war defense, arguing that because the aviation fuel had been produced during wartime, they were not responsible for the waste product resulting from the production of the fuel.<sup>232</sup>

The most viable defense for a party faced with liability arising from a terrorist attack might be CERCLA’s third party defense. This defense asserts, *inter alia*, that the party took due care and precautions against the foreseeable acts or omissions of the third party, as well as the foreseeable consequences of the third party’s acts or omissions.<sup>233</sup>

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<sup>227</sup> 43 C.F.R. § 11.62(c)(1)(i)–(iv).

<sup>228</sup> *Pakootas*, 452 F.3d at 1072.

<sup>229</sup> See 42 U.S.C. §§ 9601(20), 9607(a) (2006).

<sup>230</sup> *Id.* §§ 9601(35), 9607(b); Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended at 42 U.S.C. §§ 9671–9675 (2006)); see also OR. REV. STAT. § 465.257 (2009) (permitting contribution costs from a liable third party under Oregon law).

<sup>231</sup> 294 F.3d 1045, 1048 (9th Cir. 2002).

<sup>232</sup> *Id.*

<sup>233</sup> Antonio J. Rodriguez, *When Your Ship is in the Bull’s Eye: The Maritime Transportation Security Act and Potential Vessel Owner Liability to Third Parties*

Any person other than the federal government, states, and political subdivisions may assert claims for the costs of response actions.<sup>234</sup> Federal regulations provide the appropriate forms and procedures for presenting claims for necessary response costs as authorized by CERCLA section 112(b)(1).<sup>235</sup>

Where CERCLA does not permit states and political subdivisions to bring actions, private individuals and entities may need to bring their own actions. Given CERCLA's complexity, this statute should be included in response planning, especially planning conducted for private actors because they are the most likely to be impacted by a chemical release. Such planning could be part of exercises, especially given CERCLA's provisions favoring settlement.<sup>236</sup> The regulations provide procedures for presenting claims to the EPA for the following:

[R]esponses to a release or substantial threat of release of a hazardous substance into the environment . . . for responses to a release or substantial threat of release of any pollutants or contaminants into the environment, which may present an imminent and substantial danger to public health or welfare; and . . . for response actions undertaken pursuant to settlement agreements in which the [f]ederal [g]overnment agrees to reimburse a portion of the cost.<sup>237</sup>

Under CERCLA, "remedy" and "remedial action" are defined as:

[T]hose actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment.<sup>238</sup>

The remedial action prevents further contamination by a chemical release and is important to minimizing the release's harmful impact.

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*Resulting from a Terrorist Attack*, 17 U.S.F. MAR. L.J. 241, 276 (2004–2005) (citing 33 U.S.C. § 2703(a)(3) (2006)).

<sup>234</sup> 40 C.F.R. § 307.20 (2009). "Response," as defined by CERCLA section 101(25), means "remove, removal, remedy, and remedial action, all such terms . . . including enforcement activities related thereto." *Id.* § 307.14. Such claims are presented to the Hazardous Substance Superfund established by § 9507 of the Internal Revenue Code of 1986. 26 U.S.C. § 9507 (2006).

<sup>235</sup> 40 C.F.R. § 307.10.

<sup>236</sup> See *infra* notes 274–80 and accompanying text.

<sup>237</sup> 40 C.F.R. § 307.11.

<sup>238</sup> 42 U.S.C. § 9601(24) (2006).

The terms also include the cost of permanent relocation of residents, businesses, and community facilities where the President determines that such relocation is more cost effective than, and environmentally preferable to, the transportation, storage, treatment, destruction, or disposition offsite of hazardous materials, or is otherwise necessary to protect public health.<sup>239</sup>

#### A. CERCLA and Federal Facilities

CERCLA provisions apply to federal facilities.<sup>240</sup> Additionally, the Defense Environmental Restoration Program (DERP) was created to carry out all response actions with respect to releases of hazardous substances from Department of Defense facilities.<sup>241</sup> Any person in charge of the facility must notify the National Response Center of a release of a hazardous substance, depending on the reportable quantity, as soon as the person has knowledge of the release.<sup>242</sup> A facility will be evaluated and ranked, and facilities that score above a certain level may be placed on the National Priorities List (NPL).<sup>243</sup> Only NPL sites are eligible for DERP financed remedial action.<sup>244</sup> If a site is not listed on the NPL, DERP financed remedial action would not be available, though private rights of action under state law may provide a remedy.<sup>245</sup>

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<sup>239</sup> *Id.* Typical installation contamination situations include groundwater contamination arising from industrial operations or chemical storage and chance exposure to military chemical munitions. AP 27-162, *supra* note 181, at 28.

<sup>240</sup> 42 U.S.C. § 9620(a) (2006).

<sup>241</sup> 10 U.S.C. § 2701(a), (c) (2006). To fund DERP, the Department of Defense has an Environmental Restoration Account, funds of which may be used to carry out the environmental restoration functions of the Army. *Id.* § 2703(a). This account is the sole source of funds for all phases of an environmental remedy at a site under the Army's jurisdiction. *Id.* § 2703(g).

<sup>242</sup> DEP'T OF THE ARMY, ARMY REG. NO. 50-6, NUCLEAR AND CHEMICAL WEAPONS AND MATERIAL: CHEMICAL SURETY 35 (2008), *available at* [http://www.army.mil/USAPA/epubs/pdf/r50\\_6.pdf](http://www.army.mil/USAPA/epubs/pdf/r50_6.pdf). Reportable quantities of hazardous substances are listed in Table 302.4 of 40 C.F.R. § 302.4 (2009).

<sup>243</sup> 40 C.F.R. § 300.425 (2009).

<sup>244</sup> *Id.* § 307.14. It is important to distinguish between "remedial action" and "removal," which have distinct definitions under CERCLA. 42 U.S.C. § 9601(23)-(24) (2006). Removal includes the cleanup or removal of hazardous substances from the environment, security fencing, temporary evacuation and housing of individuals not otherwise provided for, and emergency assistance provided under the Stafford Act. *Id.* § 9601(23).

<sup>245</sup> *See de Saillan, supra* note 5, at 76.

Under CERCLA, “[s]tate laws concerning removal and remedial action, including [s]tate laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States.”<sup>246</sup> This applies, however, only to federal facilities that “are not included on the National Priorities List.”<sup>247</sup> According to one court’s interpretation, Congress opted to expose the United States to liability under state laws regarding removal and remedial action only where the site at issue is not included on the NPL.<sup>248</sup> After placement on the NPL, CERCLA requires preparation of a remedial investigation feasibility study and selection by the EPA of a remedy that assures protection of human health and the environment.<sup>249</sup>

Section 113(h) of CERCLA withdraws federal court jurisdiction to hear challenges to “removal or remedial action selected under [CERCLA section 104], or to review any order issued under [section 106(a)].”<sup>250</sup> A CERCLA removal action includes “such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances.”<sup>251</sup> Some courts have recognized that a remedial investigation feasibility study satisfies this definition.<sup>252</sup> This bar applies to citizen suits and other actions.<sup>253</sup> For

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<sup>246</sup> 42 U.S.C. § 9620(a)(4) (2006).

<sup>247</sup> *Id.*

<sup>248</sup> *Warminster Twp. Mun. Auth. v. United States*, 903 F. Supp. 847, 850 (E.D. Pa. 1995) (dismissing a suit brought under state law by a Pennsylvania municipality against the United States contending that one of its water wells was contaminated as a result of the release of hazardous substances from the nearby Naval Warfare Center; holding that the suit was barred by sovereign immunity and also by the statute of limitations since the continuing tort argument failed and the municipality failed to bring an appropriate administrative action within two years of discovery of the harm).

<sup>249</sup> 42 U.S.C. § 9620(e). The remedial investigation examines the existence and extent of the release, the source and nature of the hazardous substances involved, and the extent of the danger to the public health or welfare or to the environment. *Id.* § 9604(b)(1). The remedial investigation’s purpose “is to collect data necessary to adequately characterize the site for the purpose of developing and evaluating effective remedial alternatives.” 40 C.F.R. § 300.430(d)(1) (2009). The feasibility study is meant “to ensure that appropriate remedial alternatives are developed and evaluated such that relevant information concerning the remedial action options can be presented to a decision-maker and an appropriate remedy selected.” *Id.* § 300.430(e)(1).

<sup>250</sup> 42 U.S.C. § 9613(h) (2006).

<sup>251</sup> *Id.* § 9601(23).

<sup>252</sup> *Razore v. Tulalip Tribes*, 66 F.3d 236, 239 (9th Cir. 1995); *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1019 (3rd Cir. 1991) (finding that CERCLA’s section 113(h) precluded challenge under the National Historic Preservation Act § 106, 16 U.S.C. § 470f (2006)).

example, in *McLellan Ecological Seepage Situation v. Perry*, CERCLA's section 113(h) barred a citizen suit by individuals brought under other non-CERCLA statutes that challenged ongoing CERCLA cleanup actions.<sup>254</sup> Section 113(h) of CERCLA identifies five exceptions to the withdrawal of federal jurisdiction, and a citizen suit concerning past actions and based on a right of action conferred in another statute is not one of the recognized exceptions.<sup>255</sup>

Conclusions about the section 113(h) bar to challenges for federal facilities vary. A preliminary assessment is carried out at a federal facility under the National Contingencies Plan, NPL, or another applicable remedial plan. The section 113(h) bar applies to federal facilities not listed on the NPL if a cleanup has been initiated under section 120.<sup>256</sup> Listing a federal facility on the NPL has significant consequences to local communities that are different from those that result from bringing actions regarding a CERCLA regulated cleanup of privately owned property, at least in the Ninth Circuit. The Ninth Circuit Court of Appeals has found that once a federal facility is placed on the NPL, challenges to federal site cleanups are not subject to the section 113(h) bar.<sup>257</sup> Therefore, unlike private properties, a

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<sup>253</sup> 42 U.S.C. § 9659 (2006) (permitting any person to bring a civil action against any person including a state or the federal government in violation of standards, regulations, orders, etc., effective under CERCLA, or against the President or the EPA for failure to perform a nondiscretionary duty under CERCLA).

<sup>254</sup> 47 F.3d 325, 331 (9th Cir. 1995).

<sup>255</sup> *Id.* at 330.

<sup>256</sup> 42 U.S.C. § 9613(h) (2006). *Cf.* *Pollack v. U.S. Dep't of Def.*, 507 F.3d 522, 526 (7th Cir. 2007) ("Section 120(e) requires the administrators of federal agencies that own property on this list to perform a remediation study and then to undertake any necessary remediation. Cleanup efforts of federal NPL Superfund sites therefore arguably *are* initiated under [section] 120, rather than [sections] 104 or 106."); *OSI, Inc. v. United States*, 525 F.3d 1294, 1299 (11th Cir. 2008) (declining to decide whether a remedial action on a federal facility that *was* listed on the NPL would be "selected under" § 9620 and thus not subject to § 9613(h)'s jurisdictional bar).

<sup>257</sup> *See, e.g., Fort Ord Toxics Project, Inc. v. California EPA*, 189 F.3d 828 (9th Cir. 1999) (noting that section 113(h) would not preclude challenges to a CERCLA remedial action, because such actions are conducted under section 120's grant of authority); *Pollack*, 507 F.3d at 526 ("No other circuit has cited *Fort Ord*, but a district court confronting the same argument in the context of a *non-NPL* federal property . . . concluded . . . that the cleanup was authorized by [sections] 104 or 106 rather than [section] 120, and was therefore subject to [section] 113(h)."); *Shea Homes Ltd. P'ship v. United States*, 397 F. Supp. 2d 1194, 1202–03 (N.D. Cal. 2005) (applying section 113(h) bar to federal facilities at issue regarding cleanup of the Hanford Nuclear Reservation); *Heart of Am. Nw. v. Westinghouse Hanford Co.*, 820 F. Supp. 1265, 1279 (E.D. Wash. 1993) ("This court implicitly followed *Werlein* in its *In re Hanford* decision by finding that section 113 barred plaintiffs' claims for abatement, remediation, and medical surveillance."); *Werlein*

federal facility can be listed on the NPL, and the government can be in the midst remediation, and challenges may still be brought during the process. An agreement that is enforceable even in the face of the section 113(h) bar is one of the exceptions, and the surer alternative. However, while the issue might evolve differently in the courts, presently local communities in the Ninth Circuit have precedent that supports raising a challenge, under section 120, to a government cleanup of a federal facility after a chemical release.

The significance of the section 113(h) bar to federal court jurisdiction has arisen recently regarding another federal facility. Plaintiffs sought to use various federal environmental laws to force the federal government to clean up property adjacent to Dugway Proving Grounds near Tooele, Utah, after the property had been contaminated by federal military operations.<sup>258</sup> The Tenth Circuit found that the action was a challenge that would “undoubtedly interfere with the [g]overnment’s ongoing removal efforts” and was therefore barred by CERCLA’s section 113(h).<sup>259</sup>

A similar timing issue arises under CERCLA’s section 113, which states that, with respect to any federal facility identified under section 120, “an action for damages . . . must be commenced within [three] years after the completion of the remedial action.”<sup>260</sup> An action for damages may not commence “(i) prior to [sixty] days after the [f]ederal or [s]tate natural resource trustee provides . . . a notice of intent to file suit, or (ii) before selection of the remedial action if the President is diligently proceeding with a remedial investigation and feasibility study under . . . [section 120].”<sup>261</sup> A claimant must file an administrative claim within two years from the date of accrual, that is, the date on which the claimant is aware of the injury and its cause.<sup>262</sup> The claimant has up to six months after the agency has mailed the denial to file an action in federal court under the FTCA.<sup>263</sup> The

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v. United States, 746 F. Supp. 887, 892 (D. Minn. 1990), *vacated in part*, 793 F. Supp. 898 (D. Minn. 1992); *In re Hanford Nuclear Reservation Litig.*, 780 F. Supp. 1551, 1561, 1565 (E.D. Wash. 1991), *abrogated by* O’Connor v. Boeing N. Am., Inc., 311 F.3d 1139 (9th Cir. 2002).

<sup>258</sup> Cannon v. Gates, 538 F.3d 1328, 1335 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 1669 (2009).

<sup>259</sup> *Id.* at 1335–36.

<sup>260</sup> 42 U.S.C. § 9613(g)(1)(B).

<sup>261</sup> *Id.*

<sup>262</sup> 28 U.S.C. § 2401(b) (2006).

<sup>263</sup> *Id.*

failure of the given agency to make final disposition of the claim after it is filed shall be deemed a final denial.<sup>264</sup> Therefore, it may be difficult to determine the point in time when the action should be brought. The barrier presented by the statute of limitations may preclude recovery for latent injuries even if the response action is initiated under section 120.

One solution to the statute of limitations problem lies in presenting the claim as a continuing tort. Such a claim would maintain that hazardous conditions continue to exist and cause injury to the landowner so that the landowner's cause of action against the United States under the FTCA could continue to accrue for statute of limitations purposes until removal of toxic chemicals is accomplished.<sup>265</sup> In *Arcade Water District v. United States*, an FTCA action was brought against the United States for damages incurred from the operation of a U.S. laundry, which was shut down prior to the suit but continued to contaminate a nearby well.<sup>266</sup> The court held that "Arcade may elect to treat the nuisance as continuing, entitling Arcade to an action not for permanent damages, but rather for only those damages suffered in the two years preceding the filing of its FTCA claim."<sup>267</sup> The *Arcade* court went on to say that "[i]n continuing nuisance cases, '[r]ecovery is limited . . . to actual injury suffered prior to commencement of each action.'"<sup>268</sup> Finally, the court stated that "should Arcade prevail, Arcade may bring successive actions for its periodic damages so long as the nuisance continues but remains impermanent."<sup>269</sup> The continuing tort also exists in Oregon common law. For example, in *Holdner v. Columbia City*, the negligent upkeep of ditches and culverts, which caused injury or loss from time to time, resulted in an ongoing nuisance or trespass.<sup>270</sup> Continuing torts do not have a statute of limitations; rather, such torts remain timely not because the limitation period is tolled, but because the cause of action continues to accrue.<sup>271</sup> In *Holdner*, an

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<sup>264</sup> *Id.* § 2675.

<sup>265</sup> *Hoery v. United States*, 324 F.3d 1220, 1224 (10th Cir. 2003).

<sup>266</sup> 940 F.2d 1265, 1266 (9th Cir. 1991).

<sup>267</sup> *Id.* at 1269.

<sup>268</sup> *Id.* (citing *Baker v. Burbank-Glendale-Pasadena Airport Auth.*, 705 P.2d 866, 869 (1985)).

<sup>269</sup> *Id.*

<sup>270</sup> 627 P.2d 4, 9 (Or. Ct. App. 1981).

<sup>271</sup> *Id.*

administrative complaint was timely filed with respect to those claims, and the district court had jurisdiction over the subsequent FTCA claim.<sup>272</sup> Notice of a claim filed at any time during the continuance of the conduct or within 180 days after the conduct has ceased is timely.<sup>273</sup> However, as with other state law claims, efficacy of the continuing tort legal theory depends on each state and should be carefully evaluated before relying on it to recover for harm incurred. In Oregon, a failure to correct allegedly negligent conduct that results in increasing harm does not turn a discrete and separately actionable act into a continuing tort.<sup>274</sup> This is especially true in the absence of an active, continuous relationship between the parties.<sup>275</sup>

Another solution is to incorporate damages into a settlement agreement, which will then be enforceable during CERCLA remediation as one of the exceptions listed in section 113(h).<sup>276</sup> Most site investigations and cleanups are resolved through a negotiated settlement that results in a consent decree or consent order governing the scope of work to be performed at the facility.<sup>277</sup> CERCLA supports and provides incentives for settlement by excepting settlements from judicial review once remediation has begun.<sup>278</sup> And, CERCLA protects contribution and covenants not to sue.<sup>279</sup> States and political subdivisions may assert claims based on applicable

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<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> Boardmaster Corp. v. Jackson County, 198 P.3d 454, 465–66 (Or. Ct. App. 2008).

<sup>275</sup> *Id.*

<sup>276</sup> The five exceptions to this withdrawal of federal jurisdiction are: (1) an action to recover response costs under section 107, (2) an action to enforce an order issued under section 106 or to recover a penalty for violation of such order, (3) an action for reimbursement under section 106, (4) a citizen suit action regarding a remedial action except removal, and (5) an action where the United States has moved to compel remedial action. 42 U.S.C. § 9613(h) (2006).

<sup>277</sup> Donald A. Haagensen & Margaret B. Stern, *Environmental Cleanup Liability*, in ENVIRONMENTAL AND NATURAL RESOURCES LAW 2.13 (Oregon State Bar Continuing Legal Education ed., 2002 & Supp. 2006). See 42 U.S.C. § 9622 (2006); David M. Shelton, Cooper Industries v. Aviall Services: *Destroying the Incentive for Negotiated Settlements and Undermining the Increased Use of Alternative Dispute Resolution Under the Comprehensive Environmental Response, Compensation, and Liability Act*, 22 OHIO ST. J. ON DISP. RESOL. 839, 843–47 (2007) (noting the *Aviall* decision limiting a PRP's ability to obtain contribution from other PRPs undermines the EPA's goal of encouraging the use of alternative dispute resolution to reach negotiated settlements).

<sup>278</sup> 42 U.S.C. §§ 9613(f)(2), 9622(f).

<sup>279</sup> *Id.*

settlement agreements.<sup>280</sup> If there is an agreement, case law supports barring CERCLA's section 113(h) exception suits. In *Heart of America Northwest v. Westinghouse Hanford Co.*, the Eastern District of Washington found that section 113(h) denied the court jurisdiction to hear an action brought under the Resource and Recovery Conservation Act (RCRA).<sup>281</sup> The court characterized the interagency agreement designed to comply with RCRA and CERCLA as "a single integrated CERCLA remedial plan," therefore barring any RCRA enforcement actions.<sup>282</sup>

Private parties seeking CERCLA's full remedy to recover from a chemical release must strategize timing when bringing claims under different statutes. While timing for cleanup of a federal facility is at least *de jure* easier under *Fort Ord Toxics Project, Inc. v. California EPA*, cleanup on nonfederal property in the Ninth Circuit and in other circuits should be coordinated with FTCA and any other statutory remedy.<sup>283</sup> To prevent the risk of having a claim barred by a statute of limitations, a party would need to file an administrative action first.<sup>284</sup> Completing preparation before filing the claim will greatly assist in settlement. It would also be important to file the claim for the cleanup of private lands prior to entering into a settlement that may prevent later challenge under § 9613(h).<sup>285</sup> The time required to discover the harm and file the administrative claim may push the statute of limitations of the administrative action, making timely follow up from an incident a significant part of obtaining the maximum recovery possible.

In addition to response costs, CERCLA's natural resource damages provisions provide for restoration of injured, destroyed, or lost natural resources, including the reasonable costs of a damage assessment.<sup>286</sup> The measure of damages is the cost of restoring injured resources to their baseline condition, compensation for the interim loss of injured resources pending recovery, and the reasonable cost of a damage

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<sup>280</sup> 40 C.F.R. § 307.20(a) (2009).

<sup>281</sup> 820 F. Supp. 1265, 1283 (E.D. Wash. 1993).

<sup>282</sup> *Id.* at 1279, 1283. The court found there was a comprehensive CERCLA cleanup under sections 104 and 120. *Id.* at 1283; *see supra* text accompanying note 255 regarding applying the section 113(h) bar to actions against federal facilities.

<sup>283</sup> *See* 189 F.3d 828, 831 (9th Cir. 1999).

<sup>284</sup> *See* 42 U.S.C. § 9612 (2006).

<sup>285</sup> *See generally* Cannon v. Gates, 538 F.3d 1328, 1332 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 1669 (2009).

<sup>286</sup> 42 U.S.C. § 9607(a) (2006).

assessment.<sup>287</sup> The statute requires the President to notify the appropriate natural resource trustees of potential damage to natural resources resulting from releases under CERCLA investigation.<sup>288</sup> Natural resource trustees are responsible for restoring injured natural resources. The two major areas of trustee responsibility under CERCLA are the assessment of injury to natural resources and the restoration of natural resources injured or services lost due to a release or discharge.<sup>289</sup>

To meet these responsibilities, the statute provides several mechanisms. The trustees can sue in court to obtain compensation from the PRPs for natural resource damages and the costs of assessment and restoration planning.<sup>290</sup> The trustees can also participate in negotiations with PRPs to obtain PRP-financed or PRP-conducted assessments and restorations of natural resource damages.<sup>291</sup> CERCLA also expressly allows any person to bring a citizen suit against any party, including the United States or any governmental agency, who violates CERCLA.<sup>292</sup> Breaching any of the provisions of an agreement under section 120 that relate to federal facilities may also constitute a violation, though the claim would not be for money damages, but for ensuring compliance with the CERCLA mandate. This provision waives the sovereign immunity of the United States, making the government liable as any private person would be for releases of contaminants.<sup>293</sup> The statute includes individuals, corporations, states, municipalities, and other entities in its definition of a “person” who may bring a citizen suit against the United States.<sup>294</sup> However, note that any suit brought under CERCLA against a state must overcome the precedent established in *Seminole*

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<sup>287</sup> 43 C.F.R. § 11.15 (2009).

<sup>288</sup> 42 U.S.C. § 9604 (2006). “Natural resource trustee” under CERCLA “means any [f]ederal natural resources management agency designated in the NCP and any [s]tate agency designated by the Governor of each [s]tate, pursuant to section 107(f)(2)(B) of CERCLA, that may prosecute claims for damages under section 107(f) or 111(b) of CERCLA; or an Indian tribe, that may commence an action under section 126(d) of CERCLA.” 43 C.F.R. § 11.14(rr). Rather than wait for notification, if a possible natural resource trustee is aware of a chemical release, that possible trustee should assert trusteeship in good faith.

<sup>289</sup> 42 U.S.C. § 9607(f).

<sup>290</sup> *Id.* § 9613.

<sup>291</sup> *Id.*

<sup>292</sup> *Id.* § 9659(a).

<sup>293</sup> *Id.* § 9659(a)(1).

<sup>294</sup> *Id.* § 9601(21).

*Tribe of Florida v. Florida*; for all claims except Fourteenth Amendment violations, a state must have waived its sovereign immunity under the Eleventh Amendment to the U.S. Constitution before it can be sued in federal court.<sup>295</sup> Therefore, a potential plaintiff should look to state hazardous substances law for recovery from the state. CERCLA includes a national security exemption for Department of Energy or Department of Defense federal facilities, which consists of an order from the President regarding a specific site for up to one year and renewable yearly.<sup>296</sup> However, no exemption may be made due to lack of appropriation unless the President specifically requested it and Congress failed to make the appropriation.<sup>297</sup>

### ***B. Emergency Response Costs***

Local governments can seek EPA reimbursement for certain emergency response costs.<sup>298</sup> The EPA will accept only one reimbursement request for a single response, which includes all of the temporary emergency measures that all local governments or agencies conduct in response to a single hazardous substance release.<sup>299</sup> States, however, may not request such reimbursement.<sup>300</sup> Also, local governments can receive up to \$25,000 to help lighten financial burdens related to emergency response to hazardous waste substance releases, and this reimbursement does *not* replace funding that local governments normally provide for emergency response.<sup>301</sup> Allowable costs include disposable materials and supplies acquired to use in response to the incident, rental of equipment used to respond to the specific incident, decontamination of equipment contaminated during the response, laboratory costs of analyzing samples taken during the response, and evacuation costs.<sup>302</sup>

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<sup>295</sup> 517 U.S. 44 (1996).

<sup>296</sup> 42 U.S.C. § 9620(j) (2006).

<sup>297</sup> *Id.*

<sup>298</sup> 40 C.F.R. § 310.1 (2009).

<sup>299</sup> *Id.* § 310.6.

<sup>300</sup> *Id.*

<sup>301</sup> *Id.* § 310.1; *see also* 42 U.S.C. § 9623 (2006).

<sup>302</sup> 40 C.F.R. § 310.11; *cf. id.* § 310.12.

### C. Cost Recovery

Federal law and Oregon's cost recovery law authorize private parties that incur cleanup costs to seek contribution from other responsible parties;<sup>303</sup> however, the state of the law in this area is driven by case law and is uncertain. The Ninth Circuit has recognized an implied right of contribution under 42 U.S.C. § 9607.<sup>304</sup> "Right of contribution" means that a PRP is responsible only for that portion of the liability it equitably should bear and is entitled to hold other PRPs severally, or individually, liable for each of their respective, equitable shares of the total costs.<sup>305</sup> Under the federal scheme, however, as interpreted in *Cooper Industries v. Aviall Services*, a PRP may not seek contribution under CERCLA from another PRP unless the federal government has previously initiated a civil action under 42 U.S.C. § 9606, or § 9607.<sup>306</sup> *Aviall* demonstrated a disincentive for a private party to assume cleanup with the idea that it could then ask for contribution from another PRP. However, the Supreme Court's decision in *Aviall* does not affect the right of any person to bring a state law claim for remedy. For example, any party can seek contribution under Oregon's environmental cleanup law.<sup>307</sup>

## IV

### TRIBAL RECOVERY OPTIONS

The presence of an Indian tribe's interest presents other options for community recovery in the event of a chemical release from a federal facility. Under Oregon and federal law, tribes must be included in the planning and implementation of recovery efforts.<sup>308</sup> In addition to fulfilling a legal mandate, the inclusion of the tribes serves a practical purpose as well: it furthers the policy of having government-to-government relations with each Indian tribe, a policy that both

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<sup>303</sup> 42 U.S.C. § 9607 (2006); OR. REV. STAT. § 465.257 (2009).

<sup>304</sup> *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1301 (9th Cir. 1997), *overruled by* *United States v. Atlantic Research Corp.*, 551 U.S. 128 (2007), *as recognized in* *Kotrous v. Goss-Jewett Co.*, 523 F.3d 924 (9th Cir. 2008).

<sup>305</sup> *See Cooper Indus. v. Aviall Servs.*, 543 U.S. 157, 162–63 (2004).

<sup>306</sup> *Id.* at 164–65.

<sup>307</sup> OR. REV. STAT. § 465.325(6)(a) (2009).

<sup>308</sup> *See* Policy on Government-to-Government Relations with Native American Tribal Governments, 61 Fed. Reg. 42,255, 42,255–56 (Aug. 14, 1996); OR. REV. STAT. §§ 182.164, 190.110 (2009).

Oregon and the United States have adopted.<sup>309</sup> An excellent example of this government-to-government relationship in practice is the UMAD CSEPP site, which is unique in that it is the only CSEPP site in the country that involves the formal and active participation of an Indian tribe, the Confederated Tribes of the Umatilla Indian Reservation (CTUIR).<sup>310</sup> The CTUIR entered Memoranda of Understanding (MOUs) with the Army and local governments defining aspirations, roles, and responsibilities regarding the federal facility at UMAD, which is in the process of incinerating a stockpile of chemical weapons.<sup>311</sup> Contrast this with the Tooele Army Depot, which operates a demilitarization program of a far larger percentage of the national stockpile of chemical weapons near the Goshute Indian reservations.<sup>312</sup> Restricting use of tribal resources may be viewed as abrogating treaty rights.<sup>313</sup> In addition to the sovereign status of tribes, the rural location of a site and presence of an Indian tribe triggers responsibilities under federal law<sup>314</sup> and serves to implement state and federal environmental justice policies.<sup>315</sup> Tribes may be

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<sup>309</sup> See Policy on Government-to-Government Relations with Native American Tribal Governments, 61 Fed. Reg. at 42,255–56; OR. REV. STAT. §§ 182.164, 190.110.

<sup>310</sup> OREGON CSEPP, 2007 ANNUAL REPORT (2007), available at [http://www.csepp.net/\\_reports\\_/2007\\_ORCSEPP\\_Annual\\_Report.pdf](http://www.csepp.net/_reports_/2007_ORCSEPP_Annual_Report.pdf).

<sup>311</sup> See OR. DEP'T OF ENVTL. QUALITY, 2006 ANNUAL GOVERNMENT-TO-GOVERNMENT REPORT ON TRIBAL RELATIONS 8–9 (2006), available at <http://www.deq.state.or.us/programs/tribal/2006TribalReport.pdf>.

<sup>312</sup> See Tooele Army Depot (TEAD), <http://www.globalsecurity.org/military/facility/tooele.htm> (last visited Jan. 9, 2010).

<sup>313</sup> See Allen Sedik, Nat'l Resource Damage Assessment & Restoration Program Manager, Bureau of Indian Affairs, Remarks at the Law Seminars International Conference on Natural Resource Damages: New Developments and Emerging Strategies (July 17, 2008).

<sup>314</sup> See generally Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994). This is particularly relevant because six of nine CSEPP sites have a history of polluting and impacting a disproportionate number of minorities and people living below the poverty level. SUZANNE MARSHALL, KY. ENVTL. FOUND., CHEMICAL WEAPONS DISPOSAL AND ENVIRONMENTAL JUSTICE (1996), <http://www.cwwg.org/EJ.html>. Title VI of the Civil Rights Act has been invoked to address environmental justice. See Scott Michael Edson, Note, *Title VI or Bust? A Practical Evaluation of Title VI of the 1964 Civil Rights Act as an Environmental Justice Remedy*, 16 FORDHAM ENVTL. L. REV. 141 (2004). Cf. 42 U.S.C. § 2000d (2006) (“No person in the United States shall . . . be subjected to discrimination under any program or activity receiving [f]ederal financial assistance.”). The EPA regulations associated with Title VI create a process for private individuals to file administrative complaints if they believe they have suffered discrimination in violation of EPA’s regulations. 40 C.F.R. § 7.120 (2009).

<sup>315</sup> Or. Exec. Order No. EO-97-16 (Aug. 1, 1997); S.B. 420, 74th Or. Legis. Assem. (Or. 2007); MARSHALL, *supra* note 314.

designated as natural resource trustees under CERCLA, and the statute affords tribes an extended statute of limitations period.<sup>316</sup>

The federal government has a trust responsibility to Indian tribes, and common law shapes the extent of the federal government's obligation. In *United States v. Mitchell (Mitchell I)*,<sup>317</sup> *United States v. Mitchell (Mitchell II)*,<sup>318</sup> *United States v. Navajo Nation*,<sup>319</sup> and *United States v. White Mountain Apache Tribe*,<sup>320</sup> the Supreme Court created an analytic framework for determining the government's obligation in specific instances.<sup>321</sup> Given the high level of regulation and responsibility of the federal government over federal facilities, it is important to examine whether a chemical release would trigger this trust responsibility. An Indian tribe generally has the same rights against the federal government as any other person under the FTCA.<sup>322</sup> However, one court has held that an Indian tribe may bring an FTCA action against the United States in a *parens patriae* capacity.<sup>323</sup>

Under CERCLA, an Indian tribe based in the area impacted by the release would likely be designated a natural resource trustee for natural resources belonging to, managed by, controlled by, appertaining to, or held in trust for the benefit of such tribe, or belonging to a member of such tribe if the resources are subject to a trust restriction on alienation.<sup>324</sup> In *Coeur D'Alene Tribe v. Asarco, Inc.*, the Tribe was trustee for all of the lands within its reservation.<sup>325</sup> In the case of the UMAD, assuming the release occurred on federal land within the boundaries of UMAD, a chemical release could impact the surrounding area, including the Columbia River, which

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<sup>316</sup> 42 U.S.C. § 9626(d) (2006) (giving tribes effectively an additional two years beyond the period applicable to federal trustees in most cases).

<sup>317</sup> 445 U.S. 535 (1980).

<sup>318</sup> 463 U.S. 206 (1983).

<sup>319</sup> 537 U.S. 488 (2003).

<sup>320</sup> 537 U.S. 465 (2003).

<sup>321</sup> See *supra* notes 317–20.

<sup>322</sup> See *Hatahley v. United States*, 351 U.S. 173, 180–82 (1956) (imposing liability for damages in a suit brought under the FTCA by eight Navajo families whose horses, which were grazing on public lands of the United States, were destroyed by federal agents).

<sup>323</sup> *Quechan Indian Tribe v. United States*, 535 F. Supp. 2d 1072, 1116–17 (S.D. Cal. 2008).

<sup>324</sup> 42 U.S.C. § 9607(f)(1) (2006).

<sup>325</sup> 280 F. Supp. 2d 1094, 1117 (D. Idaho 2003), *modified in part sub nom.* *United States v. Asarco, Inc.*, 471 F. Supp. 2d 1063 (D. Idaho 2005).

tribal members access to exercise treaty rights, such as treaty fishing rights.<sup>326</sup> The CTUIR would likely be a natural resource trustee. A tribe serving as a natural resource trustee may change the damages analysis since valuation methods may not be appropriate for tribal use of resources and the standards of food consumption may not be appropriate to the Indian population.<sup>327</sup>

Various federal laws protect cultural resources and provide statutory tools for tribes and others advocating tribal rights to cultural resources. Agencies also have their own specific policies vis-à-vis tribes and cultural resources. The EPA's Indian policy includes provisions ensuring protection of cultural resources.<sup>328</sup> The Department of the Army's policy on cultural resources is to "[e]nsure that installations make informed decisions regarding the cultural resources under their control in compliance with public laws, in support of the military mission, and consistent with sound principles of cultural resources management."<sup>329</sup> In fact, the Army regulations cite a list of federal laws that apply to the Army Cultural Resources Management Program.<sup>330</sup>

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<sup>326</sup> Treaty Between the United States and the Walla-Walla, Cayuses, and Umatilla Tribes and Bands of Indians in Washington and Oregon Territories, *proclaimed* April 11, 1859, 12 Stat. 945. Documents such as the Response Plan refer to this ceded land; further analysis is needed to determine what rights the Tribe could enforce regarding UMAT land.

<sup>327</sup> Sedik, *supra* note 313. For example, changing fish consumption standards due to CTUIR efforts. The Oregon Environmental Quality Commission unanimously approved the DEQ "to pursue rule revisions that will set new water quality standards for toxic pollutants in Oregon. The new standards will be based on a new 'fish consumption rate' that is much more protective of human health than the existing rate." Press Release, State of Or. Dep't of Env'tl. Quality, Environmental Quality Commission Approves New "Fish Consumption" Rate for Revising Water Quality Standards (Oct. 23, 2008), *available at* <http://www.deq.state.or.us/news/prDisplay.asp?docID=2770>. Accounting for cultural use of natural resources by tribes in damages determinations has been a discussion topic in the Department of the Interior. See DEP'T OF THE INTERIOR, NATURAL RESOURCE DAMAGE ASSESSMENT AND RESTORATION FEDERAL ADVISORY COMMITTEE MEETING 2 (2006), *available at* [http://restoration.doi.gov/pdf/facamtg4\\_summary.pdf](http://restoration.doi.gov/pdf/facamtg4_summary.pdf). For scientific information on cultural use of natural resources, see BARBARA L. HARPER ET AL., OR. ST. U., REGIONAL TRIBAL EXPOSURE SCENARIOS BASED ON MAJOR ECOLOGICAL ZONES AND TRADITIONAL SUBSISTENCE LIFESTYLES (2007), <http://www.hhs.oregonstate.edu/ph/tribal-grant-main-page>.

<sup>328</sup> WILLIAM D. RUCKELSHAUS, EPA, EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS (1984), *available at* <http://www.epa.gov/tribal/pdf/indian-policy-leavitt-pr.pdf>.

<sup>329</sup> DEP'T OF THE ARMY, ARMY REG. NO. 200-1, ENVIRONMENTAL QUALITY: ENVIRONMENTAL PROTECTION AND ENHANCEMENT 28 (2007) [hereinafter AR 200-1], *available at* [http://www.usapa.army.mil/pdffiles/r200\\_1.pdf](http://www.usapa.army.mil/pdffiles/r200_1.pdf).

<sup>330</sup> *Id.*

At the present time, and any time the Army or any federal agency would take action with regard to a chemical release from the UMAD, the agency must comply with these statutes; one prominent example of this type of statute is the NHPA.<sup>331</sup> The purpose of the NHPA is to preserve the history and prehistory of this country by protecting historical and cultural properties.<sup>332</sup> Section 470(f) of the NHPA requires federal agencies to consider the impact of “their undertakings on historic properties.”<sup>333</sup> During the section 470(f) process, the agency must “identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.”<sup>334</sup>

Implementing CERCLA, however, may interfere and even prevent implementing the NHPA. In *Boarhead Corporation v. Erickson*, section 113(h) was found to bar claims under the NHPA during the remedial investigation/feasibility study phase of CERCLA cleanup.<sup>335</sup> The best option is to begin and continue negotiations regarding cultural resources, which would, at a minimum, lead to a cultural resources inventory of properties protected by the NHPA. This would be in compliance with the NHPA and would take place before an event occurs that forces further federal agency action.

In the event of a chemical release, in order to ensure protection of cultural resources, a settlement could explicitly include provisions reflecting the EPA’s Indian policy.<sup>336</sup> Agreements may include provisions for protection of cultural resources and specifically incorporate a departmental policy, such as the Army policy regarding cultural resources. In the meantime, MOUs and other collaborative agreements made between tribes, other entities, and the federal government may include provisions to inventory and assess the cultural resources at a federal facility.

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<sup>331</sup> See 16 U.S.C. §§ 470 to 470x-6 (2006). Although Army regulations explicitly implement the duties of various federal statutes applying to cultural resources, AR 200-1, *supra* note 329, the Army has yet to consult with CTUIR, let alone do any planning with regard to cultural resources and the Umatilla Army Depot. Interview with Teara Farrow, CTUIR Cultural Resources Program Manager (Sept. 19, 2008).

<sup>332</sup> 16 U.S.C. § 470(b).

<sup>333</sup> 36 C.F.R. 800.1(a) (2009) (referring to 16 U.S.C. § 470).

<sup>334</sup> *Id.*

<sup>335</sup> *Boarhead Corp. v. Erickson*, 923 F.2d 1011 (3d Cir. 1991) (involving an NHPA complaint that EPA failed to conduct a section 106 review as required under NHPA and that regulations did not meet any of the five exceptions to CERCLA’s section 113(h) withdrawal of federal jurisdiction during CERCLA cleanup action).

<sup>336</sup> See RUCKELSHAUS, *supra* note 328.

## V

## OPPORTUNITIES FOR PROACTIVE PREPARATION

Recent research states that “4,618 [Department of Defense] installations will require environmental cleanup.”<sup>337</sup> Although in recent years there has been more pressure to use the national security exemption in federal environmental laws to avoid the requirements of those laws,<sup>338</sup> there are opportunities to prepare for recovery from a chemical release. Funding cleanup of the many installations is likely a lower priority given current armed conflicts that also requiring funding, but recent stimulus funding provides an additional possibility.<sup>339</sup> Also, the CSEPP process provides a framework where some proactive planning has taken place, and may include more guidance in the future which may also aid in recovery in non-CSEPP related incidents. Ultimately, it is the engagement of those who stand to be injured by a chemical release, prior to such an event, that enables the best proactive planning.

Communities, private companies, and individuals have several tools at their disposal that would allow for recovery in the event a chemical release affects them or their property, real or personal. The Stafford Act is an important first tool to consider, though litigants would need to establish at the outset of a case that a chemical release triggered the Act’s provisions. Maximizing recovery under this law requires coordinating claims from the release if it is considered one incident. The Army claims process, the FTCA, and the MCA provide the basis for legal claims against the federal government and allow for damage payments for personal injury and property damage.

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<sup>337</sup> De Saillan, *supra* note 5, at 46 (citing U.S. DEP’T OF DEF., DEFENSE ENVIRONMENTAL PROGRAMS FISCAL YEAR 2006 ANNUAL REPORT TO CONGRESS 13, 14 figs.15, 16, & 17 (2007), available at [https://www.denix.osd.mil/portal/page/portal/denix/environment/ARC/FY2006DEP/Defense%20Environmental%20Programs\\_1.pdf](https://www.denix.osd.mil/portal/page/portal/denix/environment/ARC/FY2006DEP/Defense%20Environmental%20Programs_1.pdf)). Note, for example, the additional five billion dollars recently allocated to clean up the Hanford Nuclear Reservation under the American Recovery and Reinvestment Act of 2009. Pub. L. No. 111-5, § 201, 123 Stat. 115, 140 (2009).

<sup>338</sup> *Id.* at 47. Stephen Dycus expressed a different interpretation of the military’s attention to environmental matters. DYCUS, *supra* note 65, *passim*. Dycus states that government officials responsible for the nation’s defense have become far more sensitive in recent years to the importance of faithful compliance with environmental laws, and have learned that pollution prevention costs less than cleaning up later and protects the environment for future generations. *Id.* at 187. In a more recent article, Professor Dycus describes the opposite trend emerging. See Stephen Dycus, *Osama’s Submarine: National Security and Environmental Protection After 9/11*, 30 WM. & MARY ENVTL. L. & POL’Y REV. 1 *passim* (2005).

<sup>339</sup> De Saillan, *supra* note 5, at 46.

Recovering from environmental damage and restoring natural resources require DERA funds triggered by CERCLA. A great deal of coordination may be necessary given the CERCLA restriction of judicial review during CERCLA remediation, unless one is dealing with a matter of a federal facility located in the Ninth Circuit and can rely upon the *Fort Ord* opinion. And, it may be that a settlement remains the preferred alternative to remediate the land. In any case, a timely filing of the administrative action is necessary and wise to preserve the possibility of recovery under the FTCA.

At the same time, other federal environmental statutes and various state statutes provide remedy against private parties, such as a government contractor who acts outside of the protections of a government contract through willful or bad faith conduct. Further, remedies available to others, such as Indian tribes, may benefit the local communities in the affected area by offering added tools to restore natural resources, protect cultural resources, and enforce rights to protect persons and property.

Rinaldo Campana exhorts attorneys “to engage and interact” with all of the agencies because that will allow attorneys “to set out the legal responsibilities and procedural requirements that local governments, private companies and [their] employees need to follow before, during, and after an incident.”<sup>340</sup> Limitations of the various statutes, court interpretations of these statutes, timing issues, and other restrictions provide good reasons to include legal recovery for a possible chemical release alongside other health and emergency preparedness exercises.

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<sup>340</sup> Campana, *supra* note 22, at 251.

