

**ENVIRONMENTAL BUSINESS COMMITTEE
WHITE PAPER**

**INDEMNIFICATION ISSUES RELATIVE TO ENVIRONMENTAL
RESTORATION WORK FOR THE DEPARTMENT OF DEFENSE AND
ENVIRONMENTAL PROTECTION AGENCY**

Department of Defense

EBC believes that the important role played by experienced environmental cleanup firms at DOD facilities is being negatively impacted by the massive and unpredictable liabilities facing such firms¹. EBC firmly believes that indemnification and other risk transfer policies specific to DOD facilities are necessary due to the unique risks posed by DOD facilities. Specifically, DOD is the owner and operator of the facilities where activities are performed by EBC members in accordance with Defense Environmental Restoration Program and other federal and state requirements. Under the federal Superfund law, primary responsibility for the sites rests with DOD as the owner and/or operator of the facilities, and EBC member risks and liabilities exist because of the joint and several, as well as strict, liability provisions of the federal Superfund law and differing state laws. Traditional contractors do not qualify for Superfund Section 119 indemnification, or require classifications such as in the interest of the national defense in order for the activities to qualify for the indemnification that is authorized under Public Law 85-804.

EBC believes that the DOD environmental restoration program will be expedited and improved by the enactment of a federal standard of liability for all DOD environmental restoration activities. Further, the federal standard of liability and risk sharing program should be consistent with the following principles:

1. Federal law should specify that firms providing environmental cleanup and restoration services to DOD are subject to a uniform, and national, federal standard of liability in lieu of the varying state statutes.
2. The uniform federal standard of liability should be one of comparative negligence. Concepts such as joint and several, and strict, liability properly belong only with the parties who own or operate the disposal sites, and who are otherwise liable as responsible parties under applicable statutes.
3. Federal indemnification with reasonable deductible provisions should be provided for the hazardous waste liabilities incurred by environmental restoration firms to the extent that such liabilities are not compensated by insurance. Such indemnification will spur the development of a meaningful insurance market because it will add an element of certainty to which insurance underwriting criteria can be applied. DOD should be required to reimburse firms for the cost of reasonable commercial insurance in accordance with commonly accepted principles.

¹ House Report 101-665 and Senate Report 101-384

4. The potential liabilities of environmental cleanup firms should be subject to a federal statute of repose. The statute of repose should specify that the firms' legal exposure would be for a period of four years from the date the work at the site is completed and accepted by DOD. This is consistent with limitations in state laws for design professionals and recognizes that, after a certain time period has elapsed, it is not reasonable to hold the firm responsible for future events.
5. DOD should limit the overall liability of environmental cleanup firms to a specific, and reasonably calculable, dollar amount for all DOD environmental restoration activities. This would be consistent with DOE policies established under the interim final Management and Operating (M&O) contractor accountability rule (56 FR 5064) which limits liabilities to the fee or profit earned by a firm during the applicable six month evaluation period.

Environmental Protection Agency

The EBC believes that an indemnification program should be adopted by EPA for response action contractors (RACs) and should be consistent with these principles:

1. The indemnification should cover losses qualifying under SARA Section 119 but not compensated by insurance. Exclusions beyond those required by Section 119 should not be used.
2. The indemnification contract language should track closely with time-tested federal indemnity clauses such as EPAAR 1552.228-70 or FAR 52.228-7.
3. The limit of indemnification should allow coverage for catastrophic damage claims in the toxic tort system reasonably foreseeable for Superfund sites. The indemnification should be able to cover claims in the range of \$200 million, at a minimum.
4. In order not to discriminate against small firms, the upper limit of indemnity should not vary with firm size.
5. In order not to discriminate against small firms, the risk retention or "deductible" to be paid by a RAC should be scaled to contract size. The risk retention should be in the range of \$10,000 to \$100,000 per occurrence.
6. The duration of the indemnity should be coincident with the duration of the uninsured risk which results from this work, like occurrence form insurance coverage.
7. Working sessions to develop contract language should discuss related liability concerns, such as:
 - Exclusion of warranty claims for RAC work.
 - Prompt and current payment of indemnity claims, particularly of defense costs.
 - Limitation of liability for future response costs.