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Resources, Community, and
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The Honorable John D. Dingell
Chairman, Subcommittee on Oversight
and Investigations
Committee on Energy and Commerce
House of Representatives

The Honorable Thomas A. Luken
Chairman, Subcommittee on Transportation
and Hazardous Materials
Committee on Energy and Commerce
House of Representatives

The Honorable Ron Wyden
Committee on Energy and Commerce
House of Representatives

As requested in your letter of September 16, 1988, and subsequent discussions with your offices, we have examined the policies and practices of the Departments of Energy and Defense regarding (1) payment of contractor Resource Conservation and Recovery Act (RCRA) penalties and associated legal costs, (2) reductions in contractor award fees for noncompliance with environmental regulations, and (3) contractor reporting of violations or potential violations under RCRA.

As arranged with your offices, unless you publicly announce its contents earlier, we will make no further distribution of this report until 30 days after the date of this letter. At that time, we will send copies to other appropriate House and Senate Committees; the Secretaries of Energy and Defense; the Administrator, Environmental Protection Agency; the Office of Management and Budget; and other interested parties.

This work was prepared under the direction of Richard L. Hembra, Director, Environmental Protection Issues, who may be reached at (202) 275-6111 if you or your staff have any questions. Other major contributors to this report are listed in appendix II.

J. Dexter Peach
Assistant Comptroller General

Executive Summary

Purpose

The federal government produces millions of tons of hazardous waste each year. Over the years, some of this waste has seeped into groundwater supplies and contaminated the land with severe consequences. The Resource Conservation and Recovery Act of 1976 (RCRA) sought to prevent contamination from occurring by placing regulatory controls on handlers of hazardous waste. However, compliance with RCRA regulations at federal facilities has been a serious and chronic problem. One possible reason for compliance problems that surfaced during congressional hearings was that federal agencies may have policies and practices that give contractors that operate their facilities little incentive to comply with RCRA.

As a result, two Subcommittee Chairmen and a member of the House Committee on Energy and Commerce requested that GAO examine the potential for improving contractor compliance with RCRA and, among other things, the policies and practices of the Department of Defense (DOD) and the Department of Energy (DOE) regarding (1) agency payment of contractors' penalties and associated legal costs for noncompliance with RCRA and (2) reductions of contractor award fees when they fail to comply with environmental regulations.

Background

The Environmental Protection Agency (EPA) or EPA-authorized states inspect hazardous waste handlers periodically to determine if handlers are complying with RCRA. If violations are found, enforcement actions, including assessing penalties, may be taken against the owner or operator of the facility. The facility owner/operator may resolve these enforcement actions, including charged violations and assessed penalties, by entering into settlement agreements with EPA or a state. Assessing penalties is an important aspect of enforcement because penalties are intended to deter the violator from violating the law again and convince others that they should comply. While federal procurement regulations generally do not allow agencies to pay their contractors' penalties and related legal costs, the regulations provide for several exceptions that allow such payments. The regulations do not specifically address agencies' payment of contractors' settlement payments.

One type of contract used at contractor-operated federal facilities is the cost-plus-award-fee contract. This type of contract is used when an agency determines that the likelihood of meeting the contract's objectives will be enhanced by motivating the contractor toward exceptional performance by financially rewarding success through payment of award fees. The amount of the award fee to be paid is determined by the

contracting agency's judgment about the contractor's performance when measured against criteria stated in the contract.

Results in Brief

DOD and DOE contractors have been charged with nearly identical RCRA violations. DOD holds its contractors accountable for these charged violations and does not pay any resulting penalties, settlement payments, or legal costs unless the contractors can demonstrate that these costs resulted from circumstances beyond the contractors' control. In contrast, DOE does not hold its contractors financially accountable for similar charged violations. Although legally permissible, if DOE continues its current policy and practice of paying its contractors' penalties, settlement payments, and legal costs, GAO believes DOE will reduce contractors' incentives to comply with RCRA.

Although both DOD and DOE consider contractors' environmental performance in the award-fee process to varying degrees, neither agencies' regulations or guidelines require such consideration. As a result, environmental performance was a distinct evaluation area in only half of the award-fee determinations we reviewed. In the remaining half, environmental performance was considered in other broader evaluation areas, such as management. In most of the award-fee determinations we reviewed, the contractors' environmental performance was rated as satisfactory or better and the contractors received the majority of the available award fees. Without written policies requiring consideration of environmental performance, there is no assurance that it will be considered in future award-fee determinations to provide award-fee contractors with additional incentives to comply with environmental laws and regulations.

Principal Findings

Payment of Contractors' Penalties, Settlement Payments, and Legal Costs

DOD's and DOE's policies and practices regarding paying contractors' RCRA penalties, settlement payments, and related legal costs are significantly different. DOD generally requires its contractors to pay such costs because it believes that since its contractors are aware of their RCRA compliance responsibilities, the contractors should be held accountable for costs resulting from charged RCRA violations. While DOD acknowledges that some cases may warrant DOD payment of contractor RCRA penalties, settlement payments, and related legal costs, it believes that these

cases would be limited to circumstances where a contractor notified DOD of a compliance problem that required DOD's assistance to be resolved, but the contractor incurred a penalty, settlement payment, or legal costs because such assistance was not provided.

DOD's practice has been consistent with its policy. Between April 1983 and March 1989, about one-third of the EPA and state inspections of DOD contractor-operated facilities have resulted in charged RCRA violations. On the basis of these inspections, EPA and the states have assessed nine penalties against DOD contractors, six of which have been resolved through settlement agreements in which the contractors agreed to pay $888,000. DOD has not paid any of these contractors' penalties, settlement payments, or related legal costs.

In contrast, DOE's policy and practice is to pay its contractors' RCRA penalties, settlement payments, and related legal costs. DOE maintains that the uniquely technical and hazardous work its contractors perform warrants a special relationship in which DOE shields the contractors from virtually all financial risks and liabilities. According to DOE officials, DOE will pay a contractor's penalty or settlement payment unless the costs were incurred for criminal behavior on the part of the contractor's top management.

Between April 1983 and March 1989, one out of three EPA and state inspections have resulted in charged RCRA violations at DOE contractor-operated facilities. In this period, EPA and the states have assessed six penalties against DOE contractors for charged RCRA violations. Two of the six penalties assessed against DOE contractors—totaling $295,000—have been resolved through settlement agreements. DOE has paid these contractors' settlement payments and an additional $528,639 for related legal costs.

Treatment of Contractors' Environmental Performance in the Award-Fee Process

Neither DOD nor DOE regulations or guidelines require consideration of contractors' environmental performance in the award-fee process. However, in all eight DOD and DOE award-fee determinations we reviewed, contractors' environmental performance was considered to some extent. In four of these determinations, environmental performance was a distinct evaluation area and accounted for between 20 and 30 percent of the award-fee determination. In the remaining four determinations, environmental performance was one of several elements considered in broader evaluation areas, such as management or health and safety.

In six of the eight award-fee determinations we reviewed, the contractors' environmental performance was rated satisfactory or better even though the contractors were cited for repeated RCRA violations. In these six determinations, the contractors received satisfactory or better ratings in the remaining evaluation areas and received the majority of the available award fees. For example, one contractor was cited by EPA and a state for 17 RCRA violations yet received an "excellent" rating for environmental management. The agency's evaluation stated that the contractor's RCRA violations and 14 other environmental weaknesses were outweighed by the contractor's 20 other environmental program accomplishments. In the remaining two determinations, the contractor's entire award fee was withheld primarily because of its poor environmental management.

Recommendations

To ensure that DOE's contractors are held accountable for charged RCRA violations and resulting costs, GAO recommends that the Secretary of Energy, in consultation with appropriate congressional oversight committees, initiate a rulemaking to revise DOE's current policy and practice of paying for penalties, settlement payments, and legal costs incurred by its contractors. Recognizing that there may be limited circumstances warranting such payment, the revised policy should include criteria that detail when such payments should or should not be allowed.

To help maximize award-fee contractors' incentives to comply with environmental laws and regulations, GAO recommends that the Secretaries of Defense and Energy initiate a rulemaking to revise DOD and DOE regulations to require all award-fee contracts to include environmental performance as a distinct evaluation area.

Agency Comments

GAO discussed the information presented in this report with DOD, DOE, and EPA officials. Their comments are included where appropriate. As requested, GAO did not obtain official comments from the agencies.

Contents

Figures

Abbreviations

DOD	Department of Defense
DOE	Department of Energy
EPA	Environmental Protection Agency
FAR	Federal Acquisition Regulation
GAO	General Accounting Office
RCRA	Resource Conservation and Recovery Act
TSDs	Treatment, Storage, and Disposal Facilities

Introduction

Proper handling and management of hazardous wastes is an issue of national concern. Over the years, improperly handled hazardous wastes have seeped into groundwater supplies, polluted lakes and streams, and escaped into the air causing damage to the environment and adverse human health effects. Improper handling of hazardous waste and its consequences has not only been limited to private facilities but has also been a serious problem at federally owned facilities. The cleanup costs associated with past mismanagement of hazardous waste at federally owned facilities is estimated in the billions of dollars.[1]

In responding to concerns over the handling of hazardous waste, the Congress enacted the Resource Conservation and Recovery Act of 1976 (RCRA). RCRA, among other things, requires the Environmental Protection Agency (EPA) to implement a comprehensive regulatory program for managing hazardous wastes from its generation to final disposal. To ensure that all handlers are complying with the RCRA requirements, EPA has the authority to conduct inspections. For those handlers who violate RCRA requirements, EPA has enforcement power, including issuing compliance orders, assessing civil penalties, and initiating actions for criminal penalties. RCRA also provides for states to administer their own hazardous waste programs if authorized by EPA. To receive authorization from EPA, a state program must be at least equivalent to the federal program and provide for adequate enforcement. States may, however, impose more stringent regulations and provide broader coverage than the federal program's.[2]

Government-Owned/ Contractor-Operated Facilities

The federal government produces millions of tons of hazardous waste each year and owns facilities throughout the country that treat, store, and dispose of this waste. Many of these federally owned treatment, storage, and disposal facilities (TSDs) are operated by contractors who are responsible for managing the day-to-day operations and for complying with RCRA requirements. Although several federal agencies own facilities that are operated by contractors, the Department of Defense (DOD) and the Department of Energy (DOE) own most of these contractor-operated facilities. DOD and DOE began hiring contractors to operate their facilities in the 1940s when the Second World War dictated the need for a massive increase in weapon production capabilities and placed the

[1]In a July 1988 report, we estimated that environmental restoration at DOE's nuclear weapons complex will cost up to $65 billion. Nuclear Health and Safety: Dealing With Problems in the Nuclear Defense Complex Expected to Cost Over $100 Billion (GAO/RCED-88-197BR, July 6, 1988).

[2]This report refers to state hazardous waste requirements as RCRA requirements.

country in the race for the atomic bomb. By hiring contractors to operate federal facilities, the government was able to tap into the scientific, technological, and managerial expertise of the private sector. This government/contractor relationship has continued to the present. As of March 1989, DOD owned 41 contractor-operated TSD facilities. Within DOD, the Army owns 24 of these TSDs, the Air Force 11, and the Navy 6. DOE owns 26 contractor-operated TSDs.

Although there are similarities between DOD's and DOE's contractor-operated TSD facilities, there are also some notable differences. Both DOD and DOE contractor-operated facilities are often large and complex. For example, a DOD-owned/contractor-operated facility for the manufacturing of explosives occupies 13,800 acres of land and has 2.2 million square feet of floor space. A DOE contractor-operated nuclear weapons research, development, and production facility is located on 6,550 acres of federal land and contains about 130 structures with about 2.63 million square feet of floor space. While DOD's facilities are primarily geared toward the manufacturing of non-nuclear weapons and ammunition, DOE's research, fuel processing, and weapons production activities involve working with nuclear materials.

The government/contractor relationship also varies from facility to facility. While all contracts are required to adhere to federal acquisition regulations and are entered into, administered, or terminated by agency contracting officers, contract payment arrangements vary widely. For example, the regulations state that it may be appropriate for a nonprofit contractor to only receive reimbursement of incurred costs, while a for-profit contractor may receive a fixed-fee with reimbursement of incurred costs. Another type of contract is the cost-plus-award-fee contract. This type of contract is used when an agency determines that the likelihood of meeting the contract's objectives will be enhanced by motivating the contractor toward exceptional performance by financially rewarding success through payment of award fees. The amount of the award fee to be paid is determined by the contracting agency's judgmental evaluation of the contractor's performance in terms of criteria stated in the contract. DOD and DOE have 10 and 14 cost-plus-award-fee contractors, respectively.

RCRA Inspections and Enforcement at Contractor-Operated Federal Facilities

RCRA authorizes EPA or EPA-authorized states to periodically inspect hazardous waste handlers to determine if the handlers are complying with RCRA requirements. EPA must, and states may, annually inspect all federal TSD facilities, including those operated by contractors.

EPA classifies the violations it or the states find during these inspections as either Class I or Class II violations. A Class I violation is a serious violation that involves a release, or represents a serious potential for release, of hazardous waste into the environment. Examples of Class I violations include failure to (1) analyze and identify the actual hazardous wastes being managed at a facility, (2) install and operate an adequate groundwater monitoring system, and (3) install controls to ensure that hazardous wastes are safely transported and accounted for when moved between one facility and another. Class II violations are generally less serious than Class I violations. Examples of Class II violations include failure to maintain a copy of a closure plan at the facility or submit required biennial reports on waste management activities.

When violations are found at TSD facilities, RCRA provides for three types of enforcement actions that may be taken against the facility owner or operator: administrative, civil, and criminal. Administrative actions are nonjudicial actions brought by EPA and may include issuing administrative or compliance orders that may be accompanied by a public hearing with EPA and are enforceable through the courts. Penalties of up to $25,000 per day per violation may be administratively assessed. Civil actions are formal lawsuits filed in court and may result in temporary or permanent injunctions and/or an assessment of penalties (up to $25,000 per day per violation). Criminal enforcement actions are formal, prosecutorial actions that can result in the imposition of penalties up to $50,000 per day and/or imprisonment of up to 5 years. When hazardous waste handlers knowingly commit a violation that seriously endangers the public health, they are, upon conviction, subject to a penalty of up to $250,000 ($1 million for organizations) and/or imprisonment of up to 15 years. Although the law provides for all three types of actions, most enforcement actions are administrative or civil. Authorized states can take similar enforcement actions under their own authorities.

Although RCRA and state laws provide EPA and authorized states a full range of enforcement actions, the use of these enforcement actions at federal facilities has been a very controversial issue over the years. Historically, when violations have occurred at federally owned/contractor-operated facilities, EPA and the states have directed many enforcement actions against the federal agency that owns the facility. However, the

Justice Department maintains that one federal agency cannot bring a lawsuit, issue unilateral orders, or impose penalties against another federal agency. In light of Justice's position, EPA usually negotiates Federal Facility Compliance Agreements with the offending agencies to bring the facility back into compliance with RCRA. If EPA and the agency cannot reach agreement, the dispute may be elevated to Justice or the Office of Management and Budget for resolution.

States also have fewer enforcement options available to take against federal agencies than those available to take against private parties. Justice maintains, and the courts generally agree, that states cannot impose RCRA penalties against federal agencies. Specifically, the states' ability to impose such penalties hinges on the question of whether RCRA clearly and unambiguously waives federal immunity from such penalties. While federal courts are currently divided on this issue, four of the six courts that have reviewed this issue have ruled that states cannot impose RCRA penalties against federal agencies.[3]

EPA and the states, however, may use the full range of enforcement actions against contractors that operate federal facilities. When contractors have enforcement actions taken against them, they may resolve these actions, including the charged violations and assessed penalties, by entering into settlement agreements with EPA or a state. Under these agreements, the contractors may deny that a violation occurred but nonetheless agree to take certain actions requested by EPA or the state. Also, the contractors may agree to make payments, which may be classified as reimbursements or administrative costs, rather than as penalties. For example, in a settlement agreement between a DOD contractor and a state, the contractor agreed to resolve two notices of violation and a compliance order by taking several actions, including installing groundwater wells and discontinuing certain waste disposal practices. While the contractor did not admit to wrongdoing, it agreed to pay the state $125,000 in contributions and reimbursements.

Objectives, Scope, and Methodology

Problems with RCRA compliance at contractor-operated federal facilities were examined during 1988 hearings held by the House Committee on Energy and Commerce. One problem that surfaced during those hearings was that federal agencies may have policies and practices that reduce

[3]On February 22, 1989, H.R. 1056 was introduced which provides for EPA and the states to issue RCRA orders and penalties against federal agencies. On July 19, 1989, the bill passed the House of Representatives and as of August 4, 1989, is pending in the Senate.

contractors' incentives to comply with RCRA. For example, the hearings disclosed that in cases where government contractors have violated RCRA requirements and EPA or the states have taken enforcement actions against them, some agencies may be paying their contractors' penalties and legal costs incurred for RCRA violations.

Concerned about this and other problems, the Chairmen, Subcommittees on Oversight and Investigations and on Transportation and Hazardous Materials and Representative Wyden of the House Committee on Energy and Commerce asked us to examine the policies and practices of DOD and DOE regarding

- payment of contractor RCRA penalties and associated legal costs,
- reductions of contractor award fees for noncompliance with environmental regulations, and
- contractor reporting of violations or potential violations under RCRA.

To address our objectives, we obtained information from EPA, DOD, and DOE on the universe of DOD and DOE TSDs that are contractor-operated. We then reviewed EPA's Hazardous Waste Data Management System to compile the compliance and enforcement history of this TSD universe from April 1983 through March 1989. Because EPA's data system only contains RCRA Class I violations which, as previously stated, are generally the most serious RCRA violations, we only obtained compliance and enforcement information on this class of violations. To determine whether enforcement actions were directed against federal agencies owning the TSDs or the contractors operating them, we asked EPA regional officials to identify which actions were taken against contractors. We also asked EPA regional officials to (1) confirm the data we obtained from EPA headquarters' data system on assessed penalty amounts and (2) provide related enforcement and settlement documents for the enforcement actions taken against the contractors. We did not, however, assess the appropriateness of the enforcement actions or settlement agreements. We also reviewed DOD, DOE, and EPA reports prepared pursuant to the Federal Manager's Financial Integrity Act.

To determine agency policies regarding payment of contractor RCRA penalties, settlement payments, and associated legal costs, we reviewed relevant federal statutes and acquisition regulations as well as applicable DOD and DOE directives and contract clauses. To determine agency practices concerning payment of contractor RCRA penalties, settlement payments, and associated legal costs, we discussed the EPA-provided information on contractor penalties with DOD and DOE officials and asked

them to identify the penalties, settlement payments, and related legal costs the agencies paid or planned to pay and their rationale for paying or not paying.

To address DOD's and DOE's policies regarding reductions of contractor award fees for noncompliance with environmental regulations, we reviewed applicable federal, DOD, and DOE acquisition regulations and guidelines. To determine the agencies' practices regarding this issue, we identified the universe of DOD and DOE award-fee TSD contractors and examined in-depth a number of award-fee determinations. We selected those contractors that had enforcement actions taken against them for repeated RCRA violations. Of the 10 DOD and 14 DOE cost-plus-award-fee TSD contractors, 1 DOD and 3 DOE contractors had RCRA enforcement actions taken against them for repeated charged RCRA violations. The charged violations and enforcement actions for these four contractors spanned eight award-fee determinations covering the periods from April 1, 1984, through December 31, 1988. We then reviewed the award-fee evaluation criteria, ratings, and narrative for the periods in which the contractors were cited for RCRA violations. We did not, however, verify if DOD and DOE considered all cases of contractor noncompliance with environmental laws, other than RCRA, in the award-fee determinations. Details on the eight award-fee determinations are presented in appendix I. A separate GAO review is ongoing that is evaluating a contractor's award-fee determinations at a major DOE facility.

To address DOD's and DOE's policies regarding contractor reporting of charged and potential RCRA violations, we reviewed applicable DOD and DOE regulations, orders, and contract terms and discussed these policies with agency officials. To determine the agencies' practices regarding contractor reporting, we obtained and reviewed several written reports prepared by contractors that have had enforcement actions taken against them. We defined charged violations as those identified during EPA or state inspections and defined potential violations as problems requiring DOD or DOE assistance and/or funding to avoid their becoming actual violations.

Our work was conducted between September 1988 and May 1989 in accordance with generally accepted government auditing standards. The DOD work was performed at the Office of the Assistant Secretary of Defense for Environment and at Army, Navy, and Air Force headquarters procurement, environment, and legal offices. We also obtained information from selected field and installation officials. The DOE work

was performed at the Procurement and Assistance Management Directorate, Environmental Guidance and Compliance Office, and Office of General Counsel. This work was supplemented with information obtained from DOE field Operations Offices. We also discussed DOD and DOE policies and practices with agency contracting officers and their contractors. The EPA work was performed at the Office of Federal Activities and the Office of Waste Programs Enforcement. This work was supplemented with information obtained from EPA's regional offices.

We discussed our findings with DOD, DOE, and EPA officials and incorporated their comments, where appropriate. However, as requested, we did not obtain official agency comments on this report.

Contractors Should Pay Penalties Assessed for RCRA Violations

RCRA provides for imposing penalties to deter noncompliance with the act's requirements. While the Federal Acquisition Regulation (FAR)[1] generally does not allow agencies to pay their contractors' penalties and related legal costs, it provides for several exceptions that allow such payments. The FAR does not specifically address agencies' payment of contractors' settlement payments. DOD's policy is based on the FAR's restrictions, and its practice has been to not pay its contractors' RCRA penalties, settlement payments, and associated legal costs. In contrast, DOE's policy is based on the FAR's provisions allowing such payments, and its practice has been to pay its contractors' settlement payments and related legal costs. While DOE's policy and practice of paying for its contractors' penalties, settlement payments, and legal costs is legally permissible, it reduces contractors' accountability and incentives to comply with RCRA and may negate EPA's current initiative of seeking enforcement actions, including penalties, against contractors who violate RCRA requirements at federal facilities.

RCRA and FAR Penalty Provisions

The Congress, the courts, EPA, and the states have long recognized that penalties are an effective mechanism to enforce the law. The primary purpose of a penalty is to deter the violator from violating the law again and to convince others that they should comply. Recognizing the important role penalties play in compliance, the Congress provided for administrative, civil, and criminal penalties against violators of RCRA. These penalties can range from $25,000 per day of noncompliance up to $1,000,000 for criminal acts.

In implementing the Congress' intent to deter noncompliance with RCRA, EPA developed guidelines for compliance and enforcement officials to use in assessing RCRA administrative and civil penalties. The goals of the guidelines are (1) deterrence, (2) fair and equitable treatment of the regulated community, and (3) swift resolution of environmental problems. To meet these goals, the guidelines state that penalty assessments should be based on the (1) potential for harm, (2) extent of deviation from statutory or regulatory requirements, (3) economic benefits the violator gained from noncompliance, (4) good faith (or lack thereof) efforts to comply, (5) degree of willfulness and/or negligence, (6) history of noncompliance, (7) ability to pay, and (8) other unique factors.

[1]The FAR contains codified and uniform procurement policies and procedures for all executive agencies. Agencies may also develop their own regulations implementing or supplementing the FAR.

Although the FAR generally prohibits federal agencies from paying contractor penalties and related legal costs, it provides for exceptions that allow such payments. Since 1960, federal procurement regulations have generally prohibited agencies' payment of contractors' penalties resulting from violations of federal, state, and local laws and regulations. The regulations do provide, however, for exceptions that allow such payments when the penalties are incurred as a result of compliance with specific provisions of the contract or written instructions from the contracting officer. In addition, the DOD Authorization Act of 1986 contains a provision that prohibits contractors' submission of several categories of cost, including penalties (again with exceptions). The act also directed the Secretaries of Defense and Energy to prescribe implementing regulations but allows the Secretaries to "establish appropriate definitions, exclusions, limitations, and qualifications." According to the act's conference report, this latter provision was inserted to provide DOD and DOE some flexibility for unique circumstances warranting payment of contractor costs otherwise prohibited in the act. Neither the FAR nor the act specifically addresses agency payment of contractor costs resulting from settlement agreements reached between contractors and other parties.

The FAR was recently amended[2] to generally prohibit agency payment of legal costs resulting from violations of federal or state laws or regulations. However, if the violation charged is eventually resolved through a settlement agreement between the contractor and the federal government, the contractor may have his legal costs paid if stipulated in the agreement. The contracting agency may pay legal costs incurred in connection with any proceeding brought by a state if the contracting officer determines the costs resulted from a specific term or condition of the contract or specific written instructions from the agency.[3] Interim rules implementing these provisions were published in the Federal Register on March 29, 1989, became effective April 17, 1989, and may be revised following the public comment period.

On June 8, 1989, H.R. 2597 was introduced, which if enacted would, among other things, restrict the circumstances under which agencies could pay contractor penalties, legal costs, and settlement payments incurred for RCRA violations. The bill provides for an exception if the contractor could not correct the violation without agency authorization

[2]The revisions were based, in part, upon the requirements of the Major Fraud Act of 1988.

[3]Government payments are generally restricted to 80 percent of the contractor's legal costs.

or funding, the contractor timely notified the agency of the conditions that caused the violation, and the agency did not provide the needed authorization or funding. As of August 4, 1989, the bill is pending.

DOD Does Not Pay Contractor Penalties, Settlement Payments, or Related Legal Costs

DOD's policy and practice is to not pay penalties, settlement payments, or related legal costs for RCRA violations charged against its contractors. DOD's policy is based on the FAR's restrictions and on the premise that contractors are aware of their RCRA compliance responsibilities and should be financially responsible for violations that occur during the normal day-to-day management of its facilities. DOD's practice has been consistent with its policy. DOD has not paid any of the penalties, settlement payments, or related legal costs incurred by its contractors for charged RCRA violations.

DOD's Policy

DOD's policy regarding payment of contractor RCRA penalties and settlement payments is based on the FAR's penalty provision. Even though the DOD Authorization Act of 1986 allowed the Secretary to establish exclusions, limitations, and qualifications in DOD's implementing regulations concerning payment of contractor penalties, DOD's final rule—published in the Federal Register on April 9, 1986—did not provide for exceptions beyond those stated in the act and the FAR. DOD has adopted a similar policy regarding payment of related contractor legal costs and will generally not pay such costs. According to DOD procurement and legal officials, the FAR's exception provisions were not intended and, in most cases, should not apply to a contractor's violation of a well-known law such as RCRA. Instead, these officials view the exception as being applicable to circumstances where either DOD directed its contractor to not comply with a regulation or where its contractor received a penalty for a violation for which it was not responsible. According to these officials, in these cases DOD would pay its contractors' penalties. For example, if DOD directs its contractors to not comply with a state or local ordinance because it believes the government and its contractors are exempt, or if a contractor notified DOD of a compliance problem that could only be resolved with DOD's assistance and DOD did not provide the needed assistance, DOD would pay any resulting penalties assessed against the contractor. DOD procurement and legal officials stated that DOD does not distinguish between contractor penalties and settlement payments. Accordingly, DOD's policy is to not pay contractors' settlement payments.

DOD's Practice

DOD's practice is consistent with its policy of not paying contractors' penalties, settlement payments, and related legal costs incurred for RCRA violations charged against its contractors that DOD determines were the contractors' responsibility. Since 1983, EPA and the states have assessed penalties in nine cases against DOD contractors for charges of RCRA violations. Of these nine cases, six cases were resolved through settlement agreements and three remained unresolved and were being contested by the contractors. As shown in table 2.1, EPA and the states in the six resolved cases assessed $1,513,000 in contractor penalties for charges of RCRA violations. Of this amount, the contractors have paid $888,000 and agreed to pay an additional $25,000 in the future. The remaining $600,000 would only be paid if the contractor did not meet the terms of the settlement agreement. Of the five cases in which settlement documents were available, the payments were classified as contributions or administrative charges and not as penalties in all but one case. In each of the six resolved cases, DOD did not pay any of the contractors' penalties, settlement payments, or related legal fees.

Table 2.1: Payments Made for RCRA Violations Charged Against DOD Contractors, July 1985 - August 1988
(Dollars in Thousands)

Service	Dollar amount of payments	Amount paid by contractor	Amount paid by DOD
Air Force	$1,020	$520[a]	$0
	125	125	0
Army	28[b]	28[b]	0
	5	5	0
Navy	315	190[c]	0
	20	20	0
Total	**$1,513**	**$888**	**$0**

[a]Under the terms of the settlement agreement between the state and the contractor, $500,000 of the penalty will be waived if the terms of the settlement agreement are met.

[b]Payment listed in EPA's data base but no documentation was available from EPA, the state, DOD, or the contractor on the nature of violations or settlement terms.

[c]Under the terms of the settlement agreement between the state and the contractor, the contractor will pay an additional $25,000 by 1991 and the remaining $100,000 will be waived if the terms of the settlement agreement are met.

In each of the five cases in which documentation was available, the contractor did not admit wrongdoing. The payments in each of these cases resolved charges of operational violations such as failure to install a groundwater monitoring system, improper marking and storage of hazardous waste containers, and improper designation of discharge areas and open waste pits. In the three unresolved cases, EPA has assessed contractor penalties for RCRA violations, totaling $158,250.

DOE's Policy and Practice Is to Pay Its Contractors' Penalties, Settlement Payments, and Legal Costs

DOE's policy and practice is to pay penalties, settlement payments, and related legal costs for RCRA violations charged against its contractors. DOE's policy is based on the FAR and DOE supplemental provisions that allow such payments and on a long-held view within DOE that its contractors should not face any financial risks for performing the uniquely hazardous and technical work required by the contracts. DOE's practice has been consistent with its policy in that DOE has paid its contractors' RCRA settlement payments and related legal costs.

DOE's Policy

DOE's policy is to pay for virtually all contractor penalties, settlement payments, and related legal costs. DOE traces this policy back to the World War II relationship between the Manhattan Engineer District of the War Department and industrial and academic organizations. Under this relationship, government, industry, and academic organizations worked together under emergency conditions to develop the atomic bomb. According to DOE, because this project was at the frontier of scientific and technological knowledge and involved formidable risks, only the compelling needs of the war, coupled with government protection of the contractor from financial liability, could induce even the largest of corporations to accept a role.

This relationship among government, industry, and academia continued through the war to the present day. A 1951 report to the Congress from the Atomic Energy Commission (DOE's predecessor) identified the basic principles underlying its relationship with the contractors engaged in constructing and operating Commission facilities. According to these principles, the working relationship between the Commission and its contractors resemble those between industrial companies and their branch offices. Under this relationship, contractors often face minimum control and supervision, are provided with a flexible scope of work, and are shielded from virtually all financial liability.

The principle of shielding contractors from financial liability was reaffirmed in an October 9, 1985, memorandum prepared by DOE's General Counsel and Assistant Secretary for Management and Administration. The memorandum stated that it is DOE's policy to indemnify contractors that operate their facilities for costs and liabilities incurred in the performance of their contracts unless the costs and liabilities were the result of the willful misconduct or lack of good faith on the part of the contractors' officers, directors, or supervising representatives.

In response to the DOD Authorization Act of 1986, on March 4, 1986, DOE published in the Federal Register proposed changes to its acquisition regulations. The proposed changes called for adopting the act's prohibition on paying contractor fines and penalties unless they were incurred as a result of compliance with specific terms and conditions of the contract or written instructions from the contracting officer. Several contractors objected to the proposed changes because they interpreted them as discontinuing DOE's long-standing policy of paying its contractors' penalties.

In responding to the contractors' concerns about their perceived change in DOE's policy, DOE published its final rule on January 14, 1987. The preamble to the rule stated that "the language changes were not intended to implement any DOE policy changes." The final rule expanded on the circumstances under which DOE would pay contractor penalties to include penalties incurred as a result of complying with the scope of work of the contract. In addition, DOE clarified and reaffirmed its reimbursement policy in a new section which explicitly stated that "It is DOE policy to reimburse ... contractors for fines and penalties that are incurred in the performance of their contracts" unless they were incurred as a "result of the willful misconduct or lack of good faith on the part of the contractor's corporate officers, directors or supervising representatives." According to a DOE Office of General Counsel procurement attorney, this language means that DOE will pay its contractors' penalties and legal costs in virtually all circumstances and would only withhold such payment if the contractors' top management engaged in behavior worse than "gross negligence," such as fraud or theft. DOE's regulations supplementing the FAR also provide for agency payment of contractors' settlement payments and legal costs. However, according to a DOE procurement attorney, DOE contractors will be subject to the revised FAR provisions that restrict agencies' payment of contractors' legal costs.

DOE's Practice

DOE's practice is consistent with its policy of paying its contractors' costs incurred for charged RCRA violations. Since 1983, EPA and the states have assessed penalties in six cases against DOE contractors for charged RCRA violations. Of these six cases, two cases were resolved through settlement agreements and four were unresolved and were being contested by the contractors. As shown in table 2.2, the states have in these two cases assessed $295,000 against the contractors for charges of RCRA violations. DOE has paid in full both of these assessments—both of which were

resolved through settlement agreements—and an additional $528,639 for RCRA-related contractor legal costs.

Table 2.2: Payments Made for RCRA Violations Charged Against DOE Contractors, September 1987 - February 1989 (Dollars in Thousands)

Dollar amount of payment	Amount paid by contractor	Amount paid by DOE
$275	$0	$275
20	0	20
Total $295	**$0**	**$295**

[a]Payment also resolved charges of violations of other environmental laws and the amount related to RCRA violations was not specified in enforcement or settlement documents.

In both cases shown in table 2.2, the contractor did not admit wrongdoing and the payments made under the settlement agreements were classified as administrative or settlement costs rather than penalties. The payments in both of these cases resolved charges of operational violations nearly identical to those committed by DOD contractors, including failure to obtain required permits, improper storage of hazardous wastes, and inadequate waste analysis plans.

In the four unresolved cases, EPA and the states assessed contractor penalties for RCRA violations, totaling $366,993. According to DOE procurement and field officials, absent the finding of willful misconduct or lack of good faith on the part of its contractors, DOE plans to pay any resulting contractor penalties or settlement payments following resolution of these cases.

Penalties Assessed Against Contractors Will Likely Increase in Future

Even though about one-third of EPA and state inspections from April 1983 through March 1989 resulted in charged Class I violations at DOD and DOE TSDs operated by contractors, relatively few enforcement actions have been taken against the agencies or contractors. Many of these enforcement actions have been directed against DOD and DOE rather than the contractors that operate these facilities. Because EPA and the states are increasingly recognizing that DOD and DOE contractors are often to blame for charged RCRA violations, EPA and the states are now taking a more aggressive stance against the contractors. Accordingly, the number of penalties assessed against the contractors will likely increase in the future.

Inspections and Charged Violations at DOD and DOE Contractor-Operated Facilities

About one-third of EPA and state inspections of DOD and DOE contractor-operated facilities resulted in charged Class I RCRA violations. The types of charged Class I violations found by EPA and the states include inadequate groundwater monitoring, improperly maintained hazardous wastes manifests, and nonadherence to compliance schedules. Table 2.3 shows the number of inspections that resulted in one or more charged Class I violations.

Table 2.3: Inspections and Charged Violations at Contractor-Operated TSDs, April 1983 - March 1989

Agency	Number of inspections	Number of inspections charging Class I violations	Percent
Air Force	180	52	29
Army	269	101	38
Navy	42	7	17
DOD total	**491**	**160**	**33**
DOE total	318	112	35
Total	809	272	34

Past EPA and State Enforcement Efforts at Contractor-Operated Facilities

EPA and the states have taken relatively few enforcement actions against the contractors that operate DOD and DOE TSDs. EPA's primary means of bringing federal facilities back into compliance has been the use of negotiated agreements with the agencies that own the facilities. EPA's use of these agreements stems from the Department of Justice's position that EPA cannot unilaterally order another federal agency into compliance. In addition, federal courts have generally ruled that states cannot impose penalties against federal agencies because RCRA did not explicitly waive federal immunity from such penalties.

Although EPA and the states can use the full range of enforcement mechanisms against contractors that operate federal facilities, many of the past actions have been directed against DOD and DOE rather than the contractors. As table 2.4 shows, between June 1983 and March 1989, 54 percent of the actions have been directed against DOD and DOE, 35 percent against the contractors, and 11 percent against both.

Table 2.4: Enforcement Actions Taken at DOD and DOE TSDs, June 1983 - March 1989

Agency	Number of actions v. agency	Number of actions v. contractor	Number of actions v. both	Total
Air Force	0	9	1	**10**
Army	14	7	0	**21**
Navy	0	2	0	**2**
DOD total	**14**	**18**	**1**	**33**
DOE total	19	3	6	**28**
Total	33	21	7	**61**
Percent	54	35	11	**100**

Recent EPA Initiatives in Assessing Penalties Against Contractors

Although EPA and the states have taken relatively few enforcement actions against DOD and DOE contractors, such actions will likely become more common in the future. According to EPA officials, EPA is encouraging such actions because of the growing realization that contractors are often to blame for charged RCRA violations and because EPA has greater enforcement authority against the contractors than it does against federal agencies.

Several times since early 1988, EPA has encouraged its regions and the states to increase enforcement activities against contractors responsible for RCRA violations at federal facilities. For example, in a January 25, 1988, memorandum, EPA's Assistant Administrator, Office of Solid Waste and Emergency Response strongly urged EPA's 10 Regional Administrators to use all RCRA enforcement authorities—including penalty assessments—against contractors whenever the contractor is responsible for day-to-day operations or oversight of hazardous wastes at federal facilities. In a September 8, 1988, memorandum to the regions, EPA's Director, Office of Waste Programs Enforcement, commended two regions' recent initiatives in taking enforcement actions and assessing penalties against contractors operating federal facilities.

In November 1988 EPA issued updated guidelines entitled Federal Facilities Compliance Strategy that EPA is to follow (and the states are encouraged to follow) in its compliance and enforcement activities at federal facilities. While the strategy acknowledges Justice's position that EPA cannot take unilateral enforcement actions against federal agencies, it also states that it is EPA's policy to pursue the full range of its enforcement authorities against contractors that operate federal facilities. As a follow-up to this strategy, EPA is currently developing an

enforcement policy concerning contractors that operate federal facilities. According to EPA, the policy will provide factors and considerations for EPA and the states to take into account in determining whether to take enforcement actions against contractors operating the facilities or negotiate agreements with agencies owning the facilities. EPA plans to issue the strategy in January 1990.

Conclusions

DOD and DOE contractors have been charged with nearly identical RCRA violations. DOD holds its contractors accountable for these charged violations and does not pay any resulting contractor penalties, settlement payments, or legal costs unless the contractors can demonstrate that these costs resulted from circumstances beyond the contractors' control. In contrast, DOE does not hold its contractors accountable for similar charged violations unless its contractors' top management engaged in criminal activity. Although the unique nature of DOE's work may warrant a special relationship with its contractors and DOE's policy and practice is legally permissible, if DOE continues its current policy and practice of paying its contractors' penalties, settlement payments, and legal costs, we believe DOE will reduce contractors' incentives to comply with RCRA and may negate the benefits of EPA's initiative of seeking enforcement actions against contractors that operate federal facilities.

Recommendation

To ensure that its contractors are held accountable for charged RCRA violations and resulting costs, GAO recommends that the Secretary of Energy, in consultation with appropriate congressional oversight committees, initiate a rulemaking to revise DOE's current policy and practice of paying for penalties, settlement agreements, and legal costs incurred by its contractors. Recognizing that there may be limited circumstances warranting such payment, the revised policy should include criteria that detail when such payments should or should not be allowed.

Impact of Environmental Performance on Award Fees

Award fees are intended to motivate contractors to strive for continuously excellent performance by rewarding success. Although in practice both DOD and DOE consider the contractors' environmental performance to varying degrees during the award-fee determination process, neither DOD nor DOE regulations require such consideration. In two of the eight determinations we reviewed, the contractor's entire award fee was withheld, primarily because of unsatisfactory environmental performance. For the remaining six determinations, the contractors' environmental performances were rated satisfactory or better even though the contractors had been charged with repeated RCRA violations. Although the award-fee determinations noted the charged RCRA violations, they also cited various contractor accomplishments in the environmental or evaluation area under which environmental performance was considered. The contractors' overall performances were rated as exceeding expectations and in each case, the contractors received the majority of the available award fee. While environmental performance was considered in the eight award-fee determinations we reviewed and DOE has recently announced an initiative to place greater emphasis on environmental compliance in the award-fee process, without regulations requiring consideration of environmental performance there is no assurance that it will be considered in future award-fee determinations to provide award-fee contractors with additional incentives to comply with environmental laws and regulations.

The Award-Fee Process

According to federal procurement regulations, cost-plus-award-fee contracts are aimed at motivating contractors to strive for continuously excellent performance by rewarding success. Cost-plus-award-fee contracts provide contractors payment of (1) incurred costs, (2) a base fee fixed at inception of the contract, and (3) an award amount that the contractor may earn in whole or in part. The amount of the award fee to be paid is determined by the contracting agency's judgmental evaluation of the contractor's performance in terms of criteria stated in the contract. According to the regulations, the number and types of evaluation criteria may differ widely among contracts and should motivate the contractor to improve performance in the areas rated. The regulations state, however, that improved performance in areas rated should not be at the expense of minimum acceptable performance in other areas not rated. The regulations do not require award-fee contracts to include environmental performance criteria.

DOD and DOE Regulations Do Not Require Consideration of Contractors' Environmental Performance in the Award-Fee Process

Neither DOD's nor DOE's regulations require award-fee determinations to include consideration of contractors' environmental performance. DOD's regulations pertaining to award fees state that the number and type of criteria for award-fee determinations will differ widely from one contract to another. The regulations provide examples of criteria that can be used in award-fee contracts and the examples cited are geared towards production factors such as delivery time, quality of work, and cost reduction. DOE's award-fee regulations state that the award fee should be geared toward the contractor's output. The regulations state, however, that factors that contribute to the contractor's output may also be appropriate to consider in the award-fee process. Examples cited in the regulations include equal employment opportunity and small business programs, safety, and security.

Although neither DOD nor DOE regulations and guidelines require consideration of contractors' environmental performance in determining award fees, as table 3.1 shows, in practice both agencies considered such performance to varying degrees in the eight award-fee determinations we reviewed. While all eight award-fee determinations considered the contractors' environmental performance, four used environmental performance as a distinct evaluation area and the remaining four considered environmental performance in broader evaluation areas such as management or safety and health. In the four determinations in which environmental performance was used as a distinct evaluation area, environment accounted for between 20 and 30 percent of the award-fee determinations.

Table 3.1: DOD and DOE Consideration of Environmental Performance in Eight Award-Fee Determinations

Contractor	Number of award-fee determinations reviewed	Environmental performance	
		Distinct evaluation area	Considered in broader evaluation area
DOD	1	•	1
DOE, #1	3	1	2
DOE, #2	3	3	•
DOE, #3	1	•	1
Total	**8**	**4**	**4**

DOE's guidelines provide for withholding all of the contractor's award fee if performance in any one evaluation area is less than minimally acceptable. The guidelines also state that "normally expected" contractor performance will result in the contractor receiving 50 percent of the available award fee. Accordingly, contractors who receive more than 50

percent of the available award fee are deemed to be performing above DOE's expectations.[1] DOD's regulations do not address withholding all of a contractor's award fee or what constitutes normally expected performance or award-fee amounts.

On June 27, 1989, the Secretary of Energy announced a 10-point initiative aimed at improving DOE's accountability in the areas of environment, safety, and health. One of these initiatives will modify the criteria for award fees so that no less than 51 percent of the available award fee will be based on compliance with environmental, safety, and health requirements. The initiative will also require award-fee contracts to stipulate that all of the potential award fee that may be earned will be at risk if a contractor fails in any of these three or other important award-fee categories.

Contractors Usually Receive Satisfactory or Better Ratings and Majority of Available Award Fees

Although the four DOD and DOE contractors were charged with repeated RCRA violations during the period for which we reviewed eight award-fee determinations, in six of the eight determinations (five of which were for DOE contractors and one for a DOD contractor), the contractors' environmental performances were rated satisfactory or better. Although the RCRA violations and/or other environmental problems were considered in these six award-fee decisions, environmental and other contractor accomplishments were also cited and judged to offset the problems. For example, in one of the six award-fee evaluations, the contractor was cited for five environmental management weaknesses—including charges of RCRA violations for improper recordkeeping and storage of waste containers—but was credited with 20 environmental accomplishments—including assistance in preparing a waste management plan and timely reporting of chemical releases into the environment. Despite the charged RCRA violations and other environmental weaknesses, the contractor's environmental performance was rated "excellent." In the remaining five cases, other accomplishments resulted in the contractors' overall environmental performance (or evaluation area under which environmental performance was considered) being rated satisfactory or better.[2] The contractors' ratings in the other evaluation areas—such as production, cost, and quality—were also satisfactory or better. In the

[1]One of the DOE award-fee contracts we reviewed used a different rating system in which normally expected performance would result in the contractor receiving about 70 percent of the available award fee.

[2]One of the six determinations did not use adjective ratings. In this case, the contractor received a rating of 86 (on a scale of 0-100) for the evaluation area in which environmental performance was considered.

five DOE award-fee determinations, the contractors' overall performance was rated above that which DOE normally expects and the contractors received between 55 and 77 percent of the available award fees.[3] The DOD contractor received 91 percent of the available award fee.

In the two cases where the contractor received unsatisfactory ratings for environmental performance, the contractor was faulted for inadequate monitoring, untimely reporting, and failure to correct compliance problems. In both cases, the contractor s entire award fee was withheld. In one case, the decision to withhold the entire award fee was based primarily on unsatisfactory environmental performance, and in the other case, on unsatisfactory performance in the environmental and other areas. Table 3.2 summarizes the contractors' environmental performance ratings and how the contractors fared in the award-fee determinations.

Table 3.2: Contractors' Environmental Performance Ratings and Share of Available Award Fees Received

Contractor	Award-fee determinations reviewed	Determinations with satisfactory or better environmental ratings	Determinations where contractor received majority of award fee
DOD	1	1	1
DOE, #1	3	1	1
DOE, #2	3	3	3
DOE, #3	1	1	1
Total	**8**	**6**	**6**

Appendix I presents a more detailed description of the eight award-fee determinations.

Conclusions

Although neither DOD nor DOE regulations and guidelines require consideration of contractors' environmental performance in determining award fees, both agencies consider such performance to varying degrees. DOD and DOE usually judged their contractors' environmental accomplishments to outweigh the contractors' environmental weaknesses, including charges of RCRA violations. Because we could not judge whether the cited accomplishments should or should not have outweighed these weaknesses, we were unable to assess whether DOD and DOE gave appropriate consideration to contractors' environmental performance in the award-fee process. However, because award fees are

[3]A separate GAO review is ongoing that is evaluating a contractor's award-fee determinations at a major DOE facility.

intended to motivate contractors to strive for excellent performance and these contractors have been repeatedly cited for environmental weaknesses, DOD and DOE should ensure that contractors' environmental performances are adequately considered in all award-fee determinations.

Recommendation

To help maximize award-fee contractors' incentives to comply with environmental laws and regulations, the Secretaries of Defense and Energy should initiate a rulemaking to revise DOD's and DOE's regulations to require all award-fee contracts to include environmental performance as a distinct evaluation area.

Contractor Reporting of RCRA Violations

DOD's three armed services and DOE have varying policies concerning contractor reporting of charged and potential RCRA violations. One armed service and DOE require contractors to report violations that have been cited by EPA or states (charged violations), and two services and DOE require contractors to report projects needed to avert violations (potential violations). Officials from the armed services that do not require contractor reporting stated, however, that in practice, their contractors usually report charged and potential violations. Officials from the three armed services and DOE also stated that they are generally aware of charged and potential violations through their own oversight activities and notification by EPA and the states.

Reporting Charged RCRA Violations

Our review of the armed services' and DOE's regulations and orders and our discussions with agency officials revealed that Army and DOE contractors are required to report RCRA violations that have been charged by EPA or states while Air Force and Navy contractors are not. Army regulations and contract terms require contractors to report to installation commanders all EPA and state notices of violation, administrative orders, or other enforcement actions that have been directed against the contractors. DOE orders, FAR supplements, and contract terms contain similar requirements. Because the Army contractors are not required to report charged violations in writing, however, we were unable to document whether the contractors were in fact reporting such violations. DOE field officials stated that because most EPA and state notices of violation and enforcement actions are directed against DOE (or against both DOE and the contractor), there is usually no need for the contractors to report these charged violations.

In contrast, Air Force and Navy officials stated that their services do not require contractors to report violations charged by EPA or states. According to these officials, however, the contractors usually do report charged violations, either through verbal notification or by forwarding a copy of the notice of violation or enforcement action to Air Force or Navy officials.

Armed service and DOE officials also stated that, in addition to contractor reporting, they are generally aware of charged RCRA violations at their facilities through their own oversight activities and notification by EPA and the states. While we did not verify the extent of the services' or DOE's oversight activities, the services and DOE require agency officials to monitor or conduct periodic facility inspections and evaluations. We did, however, find that EPA and some states provide the armed services

and DOE's officials copies of notices of violation and enforcement actions directed against contractors. In addition, we observed that the armed services' and DOE's headquarters, field, and installation officials with whom we spoke were usually aware of and knowledgeable about charged RCRA violations at their facilities.

Reporting Potential RCRA Violations

Our review of the three armed services' and DOE's regulations and orders revealed that, with the exception of the Navy, the services and DOE require their contractors to identify and report potential RCRA violations. The Army, Air Force, and DOE require their contractors to submit various reports that identify projects requiring agency funding to achieve compliance with environmental laws and regulations or to avoid future noncompliance. For example, the Army requires its contractors to submit a biannual "Environmental Pollution Prevention, Control, and Abatement" report. This report identifies pollution control projects that are needed to bring facilities back into compliance or avoid future noncompliance. We obtained a number of these reports that supported the statements that contractors prepare and submit these required reports.

Although the Navy does not require its contractors to prepare reports identifying potential RCRA violations, Navy officials stated that its contractors routinely notify the agency of potential violations and the projects needed to avoid them becoming actual violations. According to these officials, it is in the contractor's interest to submit such reports because if the contractor eventually receives an enforcement action for the violation, the contractor can maintain that since it had previously reported the problem and needs to the Navy, the Navy should bear responsibility for the violation. Although we did not verify the extent to which Navy contractors submit such reports, we obtained a contractor's 5-year forecast that identified projects and funding needed to meet or maintain compliance with environmental laws and regulations. Officials from the three armed services and DOE also maintained that they are generally aware of potential RCRA violations through their oversight activities and meetings and discussions with EPA, state, and contractor officials.

Impact of Contractors' Environmental Performance on Award Fees—Four Case Studies

As discussed in chapter 3, EPA and the states have charged one DOD and three DOE award-fee contractors with repeated RCRA violations and have taken enforcement actions against them. These violations and enforcement actions spanned eight award-fee determinations for the four contractors. However, because DOD and DOE determined that these charged violations were offset by the contractors' environmental or other accomplishments in six of the eight determinations the contractors received at least a satisfactory rating for environmental and overall performance and received the majority of the available award fees. A detailed description of the eight award-fee determinations follows.

Case Number 1

We reviewed one award-fee determination for this DOD contractor, covering the period January 1 through December 31, 1988. Although this award-fee contract did not list environmental performance as an explicit evaluation area, the award-fee evaluation considered this factor, among others, under the management area. Ten percent of the available award fee was allocated to the management area, while 40 percent was allocated to cost, 18 percent to safety, 12 percent to quality, and 10 percent each to production and maintenance.

On July 21, 1988, EPA issued a compliance order with a proposed $86,500 penalty against this Army contractor for alleged RCRA violations, including failure to properly mark waste containers and failure to develop and implement adequate waste analysis plans. Although the evaluation of the contractor's 1988 performance cited several contractor environmental management deficiencies—including preventable spills of hazardous materials—other management accomplishments—such as a smooth transition to a compressed work schedule—were also cited. On the basis of the evaluation of overall management performance, the contractor received a score of 86 percent in this area and received higher scores in three of the remaining five evaluation areas. As a result, the Army awarded the contractor 91 percent or $2,712,039 of the available $2,989,658 award fee in addition to the $747,414 base fee. Figure I.1 displays the available and actual base and award fees the contractor received.

Figure I.1: Available and Actual Award Fees Received, Case Number 1

Case Number 2

We reviewed three consecutive award-fee determinations for this DOE contractor, covering the period April 1, 1984, through September 30, 1985. During the period April 1 through September 30, 1984, the award-fee contract did not list environmental performance as a distinct evaluation area but listed it as one of several factors to be considered in the production area. Forty percent of the available award fee was allocated to the production area, while resources and management were each allocated 30 percent. In the following evaluation period—October 1, 1984, through March 31, 1985—environmental performance was considered under the safety and health area. Twenty percent of the available award fee was allocated to this area, 20 percent to maintenance, 15 percent to budget, engineering, and operations each, 10 percent to industrial relations, and 5 percent to security. In the next evaluation period—April 1 through September 30, 1985—environment became a distinct evaluation

area and was allocated 20 percent of the available award fee. Fifteen percent was allocated to maintenance, operations, safety/health each, 10 percent to budget, engineering, and industrial relations each, and 5 percent to security.

The contractor was the subject of a June 1984 DOE task force report. The task force criticized the contractor's emphasis on production over other areas—such as environmental protection. Concerning the contractor's environmental protection and waste management activities, the task force found that

> "There appears to be a pervasive attitude by [the contractor's] management and staff that they do not have any problems, i.e., continuing to operate obviously non-compliant facilities with no serious plan to implement corrections. There is a clear tendency in some areas for [the contractor] to sit back and wait for [DOE] to tell them exactly what is needed to accomplish tasks rather than [the contractor] considering alternatives and recommending an approach."

The task force also concluded that award-fee evaluation ratings gave the contractor the impression that its performance was almost superior, when in fact, it was not. The task force recommended changes in the award-fee process to focus the contractor's attention on and improve its performance in several areas, including environmental protection.

While the evaluation covering the period April 1 through September 30, 1984, rated the contractor's environmental management as "a low satisfactory" and noted the need for further improvement in this area, the contractor received an "excellent" rating in the production and other two evaluation areas. As a result, in addition to the $494,150 base fee, the contractor received 76 percent, or $680,826 of the available $896,650 award fee.

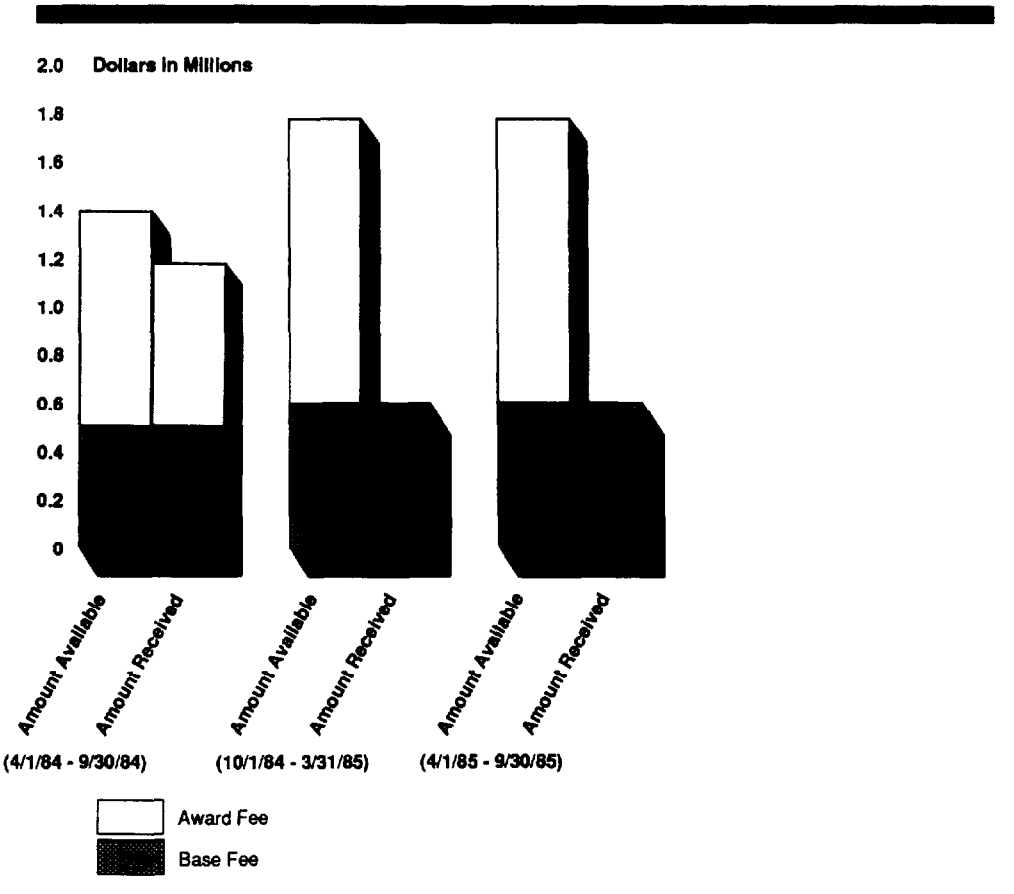
Two months into the following evaluation period—covering the period October 1, 1984, through March 31, 1985—the contractor and DOE were notified by Ohio's Attorney General of the state's intent to sue both parties for 22 alleged RCRA violations dating back to the early 1980s. The alleged violations included improper management and storage of hazardous wastes, failure to obtain required permits and licenses, and inadequate recordkeeping and reporting.

In this award-fee determination, DOE withheld all of the $1,180,000 available award fee and only paid the contractor its $590,000 base fee. The evaluation rated the contractor's overall performance as "marginal"

and stated that the decision to withhold the entire award fee was based primarily on unsatisfactory performance in the environmental area and less than standard performance in safety, maintenance, and engineering areas.

DOE withheld all of the contractor's award fee in the next determination as well and only paid the contractor its $590,000 base fee. This evaluation—covering the period April 1 through September 30, 1985—rated the contractor's overall performance as "unsatisfactory" and again stated that the decision was based primarily on the contractor's failure to maintain a minimum acceptable level of performance in environmental management. This was the contractor's final award-fee determination. In fiscal year 1986, the contractor was replaced. Figure I.2 displays the available and actual base and award fees the contractor received between April 1, 1984, and September 30, 1985.

Figure I.2: Available and Actual Award Fees Received, Case Number 2



Case Number 3

We reviewed three consecutive award-fee determinations for this DOE contractor, covering the period April 1, 1987, through September 30, 1988. During April 1 through September 30, 1987, 30 percent of the available award fee was allocated to environmental management, 25 percent to engineering/construction management, 20 percent to operations and health/safety management each, and 5 percent to community relations. In the following evaluation period—October 1, 1987, through March 31, 1988—25 percent of the available award fee was allocated to environmental management, 20 percent to production and engineering/construction each, 15 percent to waste management,[1] and 10 percent to planning/budget and safety/health management each. From April 1 through September 30, 1988, the evaluation areas and allocations remained unchanged from the preceding period.

On July 24, 1987, the state of Ohio notified DOE and the contractor that the facility was in violation of 13 RCRA requirements, including failure to adequately analyze wastes and improper storage of waste containers. On September 2, 1987, Ohio cited the facility for three RCRA violations concerning inadequate groundwater monitoring.

In the evaluation covering the period April 1 through September 30, 1987, the contractor's environmental management was rated as "satisfactory." Although the evaluation faulted the contractor for 10 environmental program weaknesses and stated that the contractor "needs to be more aggressive in managing the current RCRA program," it credited the contractor with 15 environmental program accomplishments, including issuance of an environmental training program plan. The four other evaluation areas were rated satisfactory or "excellent." As a result, the contractor's overall performance was rated satisfactory. Because the numerical rating placed the contractor in the upper-half of the satisfactory range, in addition to the $766,113 base fee, the contractor received 55 percent or $842,724 of the $1,532,225 available award fee.

During the next evaluation period—October 1, 1987, through March 31, 1988—the facility was repeatedly cited for RCRA violations by EPA and the state of Ohio. On November 10, 1987, Ohio issued a notice of violation to the facility for seven RCRA violations, including inadequate waste analysis and improper storage of waste containers. On December 21, 1987, EPA issued a notice of violation for four RCRA violations, including

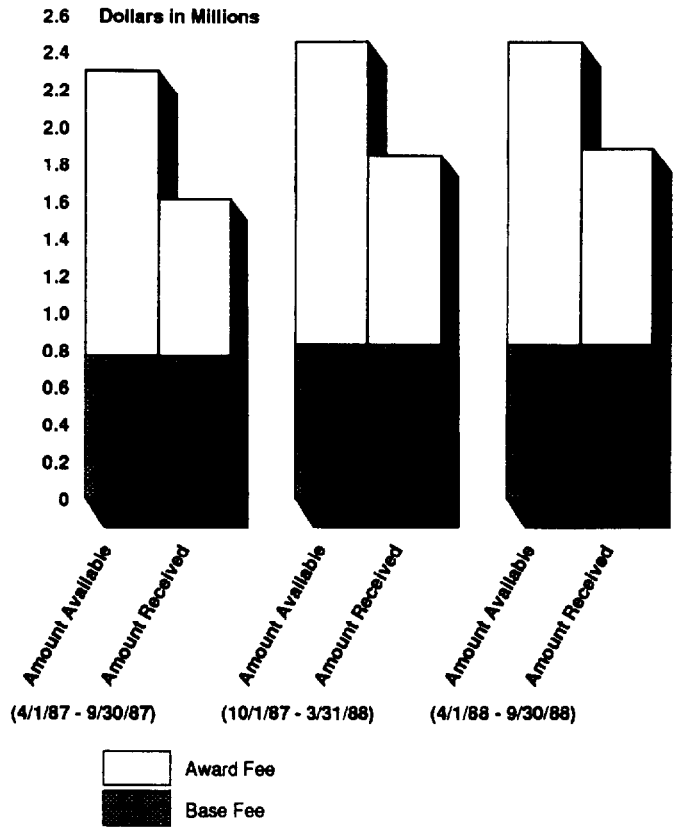
[1]Although there is some overlap between the environmental and waste management evaluation areas, waste management is primarily concerned with cost-effective mechanisms for waste minimization and remedial action programs.

improper recordkeeping and inadequate emergency planning. Two days later, Ohio issued another notice of violation for six RCRA violations, including failure to (1) complete a waste analysis plan and (2) maintain adequate aisle space between hazardous waste containers.

In the award-fee determination covering this period, the contractor's rating for environmental management increased to excellent. Although the evaluation faulted the contractor for the RCRA violations and for 4 other program weaknesses, it credited the contractor with 20 environmental program accomplishments, including timely reporting and cleanup of releases of chemicals into the environment. The contractor received excellent and satisfactory ratings in the remaining evaluation areas. As a result, the contractor's overall performance was rated satisfactory. Because the numerical rating placed the contractor in the upper-end of the satisfactory range, in addition to the $816,666 base fee, the contractor received 62 percent or $1,020,833 of the $1,633,333 available award fee.

During the next evaluation period—April 1 to September 30, 1988—the facility was again cited for RCRA violations. On April 19, 1988, EPA issued a RCRA notice of violation for failure to maintain inspection records. On July 29, 1988, Ohio issued a notice of violation for 11 RCRA violations, including inadequate recordkeeping and storage of hazardous wastes. In the award-fee determination covering this period, the contractor again received an excellent rating for environmental management. Although the evaluation faulted the contractor for the RCRA violations, it credited the contractor with 27 environmental accomplishments. The contractor again received excellent or satisfactory ratings in the other evaluation areas. Because five of the six areas were rated excellent, the contractor's overall performance was rated excellent. As a result, in addition to the $816,667 base fee, the contractor received 65 percent or $1,061,666 of the $1,633,333 available award fee. Figure I.3 displays the available and actual base and award-fee amounts the contractor received in these three award-fee determinations.

Figure I.3: Available and Actual Award Fees Received, Case Number 3



On February 9, 1989, EPA issued a compliance order against the contractor with a proposed $196,500 penalty, citing the above (and additional) RCRA violations. Because the award-fee determination covering this period has not been completed, we were unable to determine how this action affected the contractor's award fee.

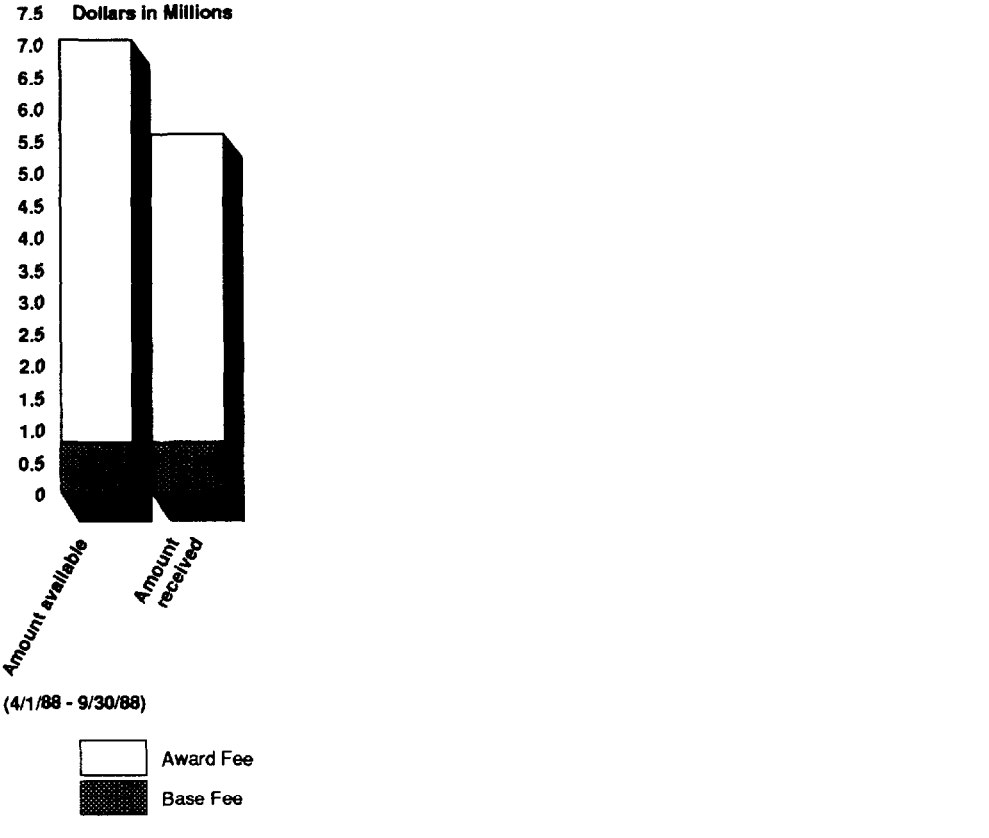
Case Number 4

We reviewed one award-fee determination for this contractor, covering the period April 1 to September 30, 1988. In this period, 20 percent of the available award fee was allocated to environment, safety, and health; 25 percent to general management; 15 percent each to production, cost, and quality; and 10 percent to chemical operations.

On May 3, 1988, Colorado issued a compliance order charging DOE and the contractor with seven RCRA violations, including failure to maintain

accurate operating records, an inadequate waste analysis plan, and improper marking of hazardous waste containers. In the evaluation period April 1 to September 30, 1988, the contractor received a "good" rating for environment, safety, and health. Although the evaluation noted problems in the contractor's RCRA program, it stated that the contractor's initiatives in this and other areas "appear to be responsive to the needs of the plant." Because the contractor was rated good, excellent, or outstanding in the remaining five evaluation areas, the contractor received, in addition to the $782,000 base fee, 77 percent or $4,790,073 of the $6,259,200 available award fee. Figure I.4 shows the available and actual base and award fees the contractor received.

Figure I.4: Available and Actual Award Fees Received, Case Number 4



On June 6, 1989, EPA and the Department of Justice initiated a criminal investigation into alleged violations at this contractor-operated facility.

The purpose of the investigation is to determine if any criminal violations have occurred in the storage, treatment, and disposal of hazardous and other wastes at the facility. The award fee has not been determined for the time period covering the investigation. We currently have another review underway which will provide a more detailed evaluation of DOE's award-fee determinations for this contractor.

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