
HOLDING THE HARMFUL HARMLESS: LESSONS FROM GOLD KING MINE

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The disaster at Love Canal focused the nation's attention on hazardous waste sites left behind by years of corporate recklessness and mismanagement. To fill the regulatory gap and prevent future incidents like Love Canal, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The statute not only empowers the EPA to retroactively hold parties responsible for the mismanagement of hazardous waste, but it also provides a funding mechanism—Superfund—to ensure that the most dangerous sites are cleaned up even when responsible parties cannot be found or, more likely, are insolvent. However, an often-overlooked provision in the CERCLA framework grants broad indemnity to contractors that render services after a release or threatened release of hazardous substances. Though the indemnity provision was originally intended to incentivize contractors to bid, by decreasing the risk of undertaking cleanup, it has been an overly utilized façade for holding all response action contractors harmless to the detriment of the public. The Gold King Mine blowout in Silverton, Colorado illustrates the failure of government contracts to serve the people who stand to lose the most in the event of an environmental disaster. This Comment discusses the failure of the privatization of government functions to address social costs through the narrative of the Gold King Mine disaster. It further proposes a path forward to greater government accountability in the cleanup of our nation's most contaminated sites.

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INTRODUCTION

“We use the river extensively. . . . Our cattle, our livestock, our medicine people use it. Our farmers rely on it, and it’s a source of drinking water. Our whole economy along the river is based on it.”¹ Navajo President Russel Begaye lamented the tragic state of the San Juan River, which winds through the

1. Alysa Landry, *Navajo Nation ‘Weeping’ as Toxic Mining Spill Flows Through Reservation*, INDIAN COUNTRY TODAY (Aug. 14, 2015), <https://indiancountrytodaymedianetwork.com/2015/08/14/navajo-nation-weeping-toxic-mining-spill-flows-through-reservation-161395> [https://perma.cc/C737-N28S].

Navajo land for 215 miles and provides the dominant source of drinking water and irrigation, after the Gold King Mine blowout in 2015.² On August 5, 2015, the private contractor hired by the Environmental Protection Agency (EPA) to manage efforts to reclaim the Gold King Mine accidentally released three million gallons of toxic waste into Cement Creek.³ Residents of Southern Colorado, New Mexico, and the Navajo Nation looked on as an acidic plume of heavy metal-laden water cascaded from the Gold King Mine into the river system where it would wreak havoc on local industry and livelihoods.⁴ The accidental release turned the public eye toward the bureaucracy's privatization of government functions—specifically, the millions of dollars invested in contracts for environmental cleanup of Superfund sites.⁵

The Gold King Mine spill was one of the largest environmental disasters the American West has seen, but it may not be the last. The months following the spill brought multiple lawsuits calling for the imposition of liability on the parties involved in the accident, accompanied by widespread concern for the reclamation⁶ of the thousands of other abandoned mines in the West.⁷ Western mining has been

2. *Id.*

3. Jonathan Thompson, *Silverton's Gold King Reckoning*, HIGH COUNTRY NEWS (May 2, 2016), <http://www.hcn.org/issues/48.7/silvertons-gold-king-reckoning> [<https://perma.cc/BL3P-LX7P>].

4. *Id.*

5. Amy Harder & Alexandra Berzon, *EPA Halts Field Work at Mine Sites After Spill*, WALL ST. J., Aug. 13, 2015, at A3.

A Superfund site is any land in the United States that has been contaminated by hazardous waste and identified by the EPA as a candidate for cleanup because it poses a risk to human health and/or the environment. These sites are placed on the National Priorities List (NPL). The NPL is the list of national priorities among the known releases or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States and its territories. The NPL is intended primarily to guide the EPA in determining which sites warrant further investigation.

Toxmap FAQ, U.S. NAT'L LIBR. OF MED., <https://toxmap.nlm.nih.gov/toxmap/faq/2009/08/what-are-the-superfund-site-npl-statuses.html> (last updated Dec. 2009) [<https://perma.cc/3W22-9B7Y>]; *see also infra* Part II.

6. When discussing the environment, reclamation is the act of restoring land that has been previously degraded by human activity or natural phenomena. *See Reclamation*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/reclamation> (last visited Nov. 10, 2017) [<https://perma.cc/955P-C2KS>].

7. PATRICIA LIMERICK ET AL., CLEANING UP ABANDONED HARDROCK MINES IN THE WEST 31 (2005).

romanticized in American history, but its legacy has left modern society with a hefty reclamation to-do list. “The [United States] Bureau of Mines estimated that 12,000 miles of the waterways of the Western United States, or about 40 percent, are contaminated by metals from acid mine drainage, mostly by abandoned mines, while 180,000 acres of lakes and reservoirs are tainted by abandoned mine runoff.”⁸ These contaminated waters are the result of approximately 50,000 abandoned mines scattered across the Western United States⁹ that carry an estimated reclamation bill upward of \$30 billion.¹⁰

The EPA is charged with the task of assessing areas of concern and developing a plan to address the worst environmental threats.¹¹ The vast workload imposed on the agency by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) requires that the EPA have the capacity to tackle multiple environmental disasters at any given time. Accordingly, the EPA has contracted environmental cleanup duties to expert private entities since the inception of Superfund,¹² though oversight and planning remains within the government. To attract private contractors, the government promises indemnity from liability under CERCLA.¹³ Without the specter of strict liability for carelessness, and with every incentive to maximize profits, there is little to prevent private contractors from prioritizing cost efficiency over safety in managing their EPA contract.

The Gold King Mine release focused the spotlight on a government contractor whose actions led to societal costs that have yet to be recovered. Prior to the Gold King cleanup, Environmental Restoration, the private contractor overseeing Gold King reclamation efforts, was involved in the cleanup and restoration of thousands of hazardous waste sites, including the reclamation of several mines.¹⁴

8. *Id.* at 2.

9. BUREAU OF LAND MGMT., ABANDONED MINE LANDS INVENTORY (2015), https://www.blm.gov/wo/st/en/prog/more/Abandoned_Mine_Lands/abandoned_mine_site.html [<https://perma.cc/PJK9-V4PH>].

10. LIMERICK ET AL., *supra* note 7.

11. *See infra* Part II.

12. *Infra* Part II.

13. *Infra* Part II.

14. *See Projects*, ENVTL. RESTORATION LLC, <http://www.erllc.com/projects.php> (last visited Mar. 18, 2017) [<https://perma.cc/Y23Z-XYU7>].

When the interim EPA project supervisor ordered Environmental Restoration to excavate the mine in a manner that was contrary to both the plan set in place and the orders of the head supervisor, Environmental Restoration should have known better than to proceed—after all, they are the EPA’s biggest Superfund contractor.¹⁵ Contractor carelessness is not unique to Superfund cleanup; it is a pervasive issue that directly impacts human lives. Nothing better illustrates this direct impact than the American prison system where private contractors profit from a low standard of care. These situations beg the question: Can the public entrust profit-motivated entities with high-stakes government functions when the livelihood of others depends upon the highest standards of care?

This Comment argues that the privatization of essential government functions can lead to undesirable consequences and further, the broad indemnification of government contractors often results in carelessness by the contractor. Part I traces the history of the Gold King Mine and the disaster triggered by years of mismanagement by the various owners, and the government and contractor mistakes that followed. Part II discusses the regulatory framework that fails to incentivize private contractors to perform services with the highest standard of care. Part III contemplates the reasons agencies contract out various government functions, and then puts those theories into context in the case of the Gold King Mine disaster. In addition to a discussion of failures in environmental contracting, Part III also uses the privatization of the American prison system, in comparison to Superfund contracting, as an illustration of the failure to account for social costs in government contracting. Finally, Part IV maps the potential paths forward—specifically, a path toward greater accountability to the public by shifting the burden of proof from the plaintiff to the contractor-defendant.

I. GOLD KING MINE HISTORY & DISASTER

The story of the Gold King Mine captures the environmental effects of the West’s mining history and provides an illustration of how the EPA’s privatization of

15. Harder & Berzon, *supra* note 5.

government functions and its broad “hold harmless” policy can be detrimental to the public.

A. *A Brief History*

The Silverton Caldera formed 26 to 30 million years ago from the volcanic eruptions in the San Juan mountains.¹⁶ Along with the massive crater that now cradles the town of Silverton and the Bonita Peak Mining District, the volcanic activity also left behind mineral-rich veins and faults which attracted over one hundred thousand miners to prospect during the mineral rushes of the 1800s.¹⁷ The Gold King Mine lode was discovered in 1887 during Silverton’s boom days and gold mining operations took place intermittently, under multiple owners, until 1924 when it went bankrupt.¹⁸ Years of attempted revival of the mine failed and, by the early 1990s, all activities at the Gold King Mine ceased.¹⁹ However, the mining permit remained active as the Level 7 Adit collected the acid mine drainage that would burst from the portal twenty-five years later.²⁰

B. *Early Efforts to Mitigate Environmental Damage*

The Colorado Department of Public Health and Environment (CDPHE), alongside the EPA, conducted a Superfund Site Assessment in the early 1990s, noting the high levels of acid mine drainage and natural mineralization of the waters, and the watershed, near Silverton.²¹ As word of the

16. THOMAS A. STEVEN & PETER W. LIPMAN, CALDERAS OF THE SAN JUAN VOLCANIC FIELD, SOUTHWESTERN COLORADO 33–34 (1976), <https://pubs.usgs.gov/pp/0958/report.pdf> [<https://perma.cc/CK75-LALP>]; see also EPA, GOLD KING MINE WATERSHED FACT SHEET, <https://www.epa.gov/sites/production/files/2015-08/documents/goldkingminewatershedfactsheetbackground.pdf> [<https://perma.cc/Y76T-3GXL>] [hereinafter FACT SHEET].

17. Jonathan Thompson, *A Gold King Mine Timeline*, HIGH COUNTRY NEWS (May 2, 2016), <http://www.hcn.org/issues/48.7/silvertons-gold-king-reckoning/a-gold-king-mine-timeline> [<https://perma.cc/8QSU-LTMQ>].

18. *Id.*

19. *Id.*

20. *Id.* “Adit” is “a horizontal or near-horizontal passage driven from the Earth’s surface into the side of a ridge or mountain for the purpose of working, ventilating, or removing water from a mine.” *Adit*, ENCYCLOPÆDIA BRITANNICA (2011); see *infra* note 34 for explanation of Level 7 Adit.

21. FACT SHEET, *supra* note 16; Thompson, *supra* note 3.

Superfund investigation of the Silverton Caldera's waters swept the small mountain town, locals feared for their livelihoods, which are heavily dependent upon tourism.²² High hopes of the reopening of the mine, however, kept longtime residents in the area and propelled local efforts to undertake cleanup.²³ Residents of the area knew that a Superfund listing would not only kill all dreams of a mining renaissance but would also stifle tourism.²⁴ "Superfund," in the minds of most, is synonymous with "danger"—and dangerous areas do not make the top of many peoples' travel lists.²⁵ Therefore, many residents in Silverton sought to avoid Superfund cleanup in the area since it would not only preclude future mining but also decrease the number of tourists who are drawn to the area for the rich mining history and would no doubt be less enamored by a large cleanup operation.²⁶ Though the state of the area's watershed qualified the site for a National Priority List (NPL) listing,²⁷ the EPA recognized recovery efforts of local officials,²⁸ and the agency agreed to leave the area off of the list as long as progress was observed in the Animas River.²⁹

Progress in the Animas River watershed remained steady until 2005, when officials first cited notable decline in water quality at the confluence of Cement Creek and the Animas River.³⁰ This launched another Superfund Site Assessment; this time, the EPA found that the Upper Cement Creek, where the Gold King Mine drainage seeped into the river system, was

22. Thompson, *supra* note 3.

23. *Id.*

24. Krista Langlois, *Why Silverton Still Doesn't Want a Superfund Site*, HIGH COUNTRY NEWS (Sept. 3, 2015), <http://www.hcn.org/articles/why-silverton-still-doesnt-want-a-superfund-site> [<https://perma.cc/5DA2-TVQY>]. For a more thorough historical narrative of Silverton's battle against Superfund listings, see GILLIAN KLUCAS, LEADVILLE (2004).

25. Langlois, *supra* note 24.

26. See Thompson, *supra* note 3.

27. FACT SHEET, *supra* note 16.

28. Out of fear of being categorized as another Love Canal, Silverton area locals sought to determine the major sources of mineralization and acidity contributing to the Silverton Caldera's river system. Thompson, *supra* note 3. Locals formed the Animas River Stakeholders Group to take water samples and determine which mines were most responsible for acid drainage. *Id.* Responsible mine owners were incentivized to mitigate their mine's contribution to the toxic river by the threat of potential Superfund designation, which would bring the federal government in and inevitably shut down any possibility of future mining in the area. *Id.*

29. FACT SHEET, *supra* note 16.

30. Water quality experts observed increased levels of acid mine drainage. *Id.*

a candidate for NPL listing.³¹ Again, Silverton succeeded in delaying the listing and the mine continued to drain into the water system.³²

C. *The Release*

In 2007, the company operating Gold King Mine went bankrupt, thereby forfeiting their reclamation bond and requiring the Colorado Division of Reclamation, Mining and Safety (DRMS) to complete the reclamation.³³ A slope failure, more commonly known as a landslide, in Level 7 of Gold King caused water buildup behind the collapsed material.³⁴ The DRMS was concerned that excessive buildup and instability could lead to a blowout; thus, the Division took multiple steps to plug the four mine portals and prevent the water from breaching the retaining wall.³⁵ In 2014, the DRMS requested that the EPA reopen and stabilize the Level 7 Adit because of concerns about continued drainage and instability.³⁶ In September 2014, DRMS, the EPA, and Environmental Restoration, the EPA's contractor, attempted an excavation to stabilize the adit but immediately suspended operations to the

31. *Id.*

32. *See id.*

33. Applications for mining activity in Colorado and other western states must be accompanied by a reclamation bond. A reclamation bond is a proof of financial security which assures the state that, if the project is abandoned before the mined land is reclaimed, the state will have money to fund the cleanup. JAMES R. KUIPERS & CATHY CARLSON, NAT'L WILDLIFE FED'N, *HARDROCK RECLAMATION BONDING PRACTICES IN THE WESTERN UNITED STATES 2* (2000), <http://www.csp2.org/files/reports/Hardrock%20Bonding%20Report%20Executive%20Summary.pdf> [<https://perma.cc/5VK2-5G67>]. This particular permit for resumed Gold King Mine operations was granted in 1986 and required that, once activities ceased, all four mine portals must be shut in—the bond was held to ensure completion of the reclamation project. Prior to the completion of the project, the mining company went bankrupt and abandoned operations, thereby forfeiting its bond. BUREAU OF RECLAMATION, *TECHNICAL EVALUATION OF THE GOLD KING MINE INCIDENT 27* (Oct. 2015), http://www.usbr.gov/docs/goldking_minereport.pdf [<https://perma.cc/L3Y8-QD2H>] [hereinafter *TECH EVALUATION*].

34. *TECH EVALUATION*, *supra* note 33, at 28–29. The Level 7 Adit was constructed in 1903 and used as the main portal for access to the Gold King Mine. Thompson, *supra* note 17 (follow interactive timeline to year 1898).

35. *TECH EVALUATION*, *supra* note 33, at 30.

36. Task Order Statement of Work from EPA, On-Scene Coordinator, EPA Region 8 Emergency and Rapid Response Servs. to Envtl. Restoration, L.L.C. (June 25, 2014) (on file with author) [hereinafter 2014 Task Order].

following year after observing seepage.³⁷

On July 25, 2015, the EPA On-Scene Coordinator (OSC),³⁸ Steven Way, requested a site visit and an opinion on how to proceed with the Gold King reclamation plan from the Bureau of Reclamation.³⁹ The site visit was set for August 2015, once Mr. Way returned from vacation.⁴⁰ While on vacation, Mr. Way ordered Environmental Restoration not to proceed with the excavation unless certain equipment was present.⁴¹ Despite Mr. Way's orders and the work plan, the interim OSC—placed in charge while Mr. Way was on vacation—agreed with two DRMS specialists and authorized Environmental Restoration to excavate.⁴² Rather than employing suggested methods, or methods used in previous excavations, Environmental Restoration dug directly into the wall retaining the water without proper equipment. And within minutes, the crew breached the barrier that held back millions of gallons of toxic acid mine drainage and triggered the deluge of toxic sludge that contaminated the Animas River and Colorado River system.⁴³ Westerners paid for this mistake while Environmental Restoration *was paid* for the mistake in the form of additional contracts.⁴⁴

The Gold King Mine disaster reminded the nation of the nearly 120,000 other abandoned mines in Colorado and over 500,000 other abandoned mines in the West in need of remediation.⁴⁵ After all, this was not the first time toxic waste was spilled from the several mines dotting the Animus River.⁴⁶ Patty Limerick, founder of the Center of the American West, pinpointed why mine remediation should be on the forefront of every Westerner's mind:

37. TECH EVALUATION, *supra* note 33, at 36.

38. *Infra* Part II.

39. TECH EVALUATION, *supra* note 33, at 44.

40. *Id.*

41. Complaint at 27, *New Mexico v. EPA*, No. 1:16-cv-00465, 2016 WL 2994912 (D. N.M. May 23, 2016).

42. *Id.*

43. *Id.*

44. *See* 2014 Task Order, *supra* note 36.

45. *Infra* Part II.

46. Brian Clark Howard, *5 Other Mines at Risk of Spilling Toxic Waste*, NAT'L GEOGRAPHIC (Aug. 14, 2015), <https://news.nationalgeographic.com/2015/08/150814-hardrock-mines-toxic-waste-pollution-colorado-mine-environment-gold-king-spill/> [https://perma.cc/5YT9-RR8W].

The mining booms of the nineteenth and early twentieth centuries left behind a mixed heritage: families supported by wages, wealth acquired by some, a crucial contribution to our national prosperity and high standard of living, a folklore of color and adventure, and thousands of old mines that discharge highly toxic water pollution. The necessity of reckoning with the burdensome aspect of our mining history is now much on the minds of mining communities, managers of the public lands, environmental regulators, mining industry leaders, and environmental advocates.

If it holds the attention of some Westerners, the great majority of residents of this region do not notice or recognize this legacy, and that indifference makes its own contribution to the intractableness of the problem.⁴⁷

Famous abandoned mines, including the Navajo Uranium Mines in Utah, Berkley Pit in Montana, and Iron Mountain in California, are currently being addressed, but there are still thousands of others that will continue to pose growing concerns.⁴⁸ These abandoned mines must be assessed, and many will require cleanup with the help of Superfund and EPA contractors. It is important that all parties responsible for the handling of hazardous waste are held liable in the event of a blowout. Therefore, the EPA should choose to learn from the Gold King Mine disaster and address the gaping hole that “over-indemnifies” contractors in the CERCLA liability scheme.

II. THE REGULATORY FRAMEWORK

When private parties fail to clean up toxic sites, CERCLA authorizes the President to order the EPA to initiate cleanup efforts.⁴⁹ The EPA evaluates the site, hires a contractor, and appoints an OSC.⁵⁰ The OSC and contractor then proceed with cleanup.⁵¹ In the event that damage occurs while carrying out the EPA’s response plan, the contractor is indemnified if it

47. LIMERICK ET AL., *supra* note 7, at 1.

48. Howard, *supra* note 46.

49. 42 U.S.C. § 9604(a) (2012).

50. EPA, OSC WARRANT OFFICER TRAINING: OSC TOOLBOX GUIDE 4-1 (Apr. 2015), <https://www.epa.gov/sites/production/files/2015-08/documents/toolbox.pdf> [<https://perma.cc/8YQW-EMAG>] [hereinafter EPA TOOLBOX].

51. *Id.*

proves it was following the instruction of the OSC and was acting under the National Contingency Plan (NCP)⁵²—herein lies the issue. This Part outlines CERCLA’s framework, the mechanism by which sites are listed for Superfund designation, and discusses the indemnification provision which is at the heart of the issue this Comment addresses.

A. *Legacy of Love Canal and the Nation’s Response to Hazardous Waste*

The infamous Love Canal⁵³ and the New Jersey chemical fire⁵⁴ disasters fueled the promulgation and eventual passage of CERCLA,⁵⁵ which was accompanied by the 1980 Superfund

52. 42 U.S.C.A. § 9607(d) (2012).

53. The disaster at Love Canal is regarded as one of the worst environmental disasters in United States history. *EPA Superfund Program: Love Canal, Niagara Falls, NY*, EPA, <https://cumulis.epa.gov/supercpad/cursites/csitinfo.cfm?id=0201290> (last updated Feb. 7, 2017) [<https://perma.cc/WG6Y-XFDF>]. The Love Canal was excavated to accommodate a small hydropower project in Niagara Falls, NY, but was abandoned before the project was completed. *Id.* Between 1942 and 1953, Hooker Chemicals & Plastics Corporation used the abandoned canal to dispose of over 21,000 tons of hazardous chemicals. *Id.* Once the canal (now a toxic waste site) was buried under a layer of clay, the title to the land was sold for one dollar to the Niagara Falls Board of Education. *Id.* The area grew into a residential neighborhood. *Id.* Nearly twenty years after Hooker ceased dumping, a sludge of over eighty chemicals, including several known carcinogens, percolated into basements, and residents saw a rise in cancer and other serious health concerns. *Id.* In response, President Carter declared two federal environmental emergencies at the site and hundreds of families were evacuated from their homes between 1978 and 1980. *Id.*

54. The Chemical Control Corporation (CCC) managed a waste storage facility in Elizabeth, New Jersey, from 1970 to 1978, and it was cited for discharge and waste storage violations. *Superfund Site: Chemical Control, Elizabeth, NJ*, EPA, <https://cumulis.epa.gov/supercpad/cursites/csitinfo.cfm?id=0200037&msspp=med> (last updated Mar. 19, 2017) [<https://perma.cc/SH72-Q4AG>]. The state intervened to clean up what had grown into a bulk of radioactive and infectious wastes and other highly explosive liquids. *Id.* In the midst of their cleanup, the chemicals erupted in flames. *Id.* The fire raged for ten hours and forced New Jersey officials to order the closing of schools and urge residents to remain in their homes. *Id.*

55. CERCLA did not pass without a tooth-and-nail fight between lawmakers. CONG. REC. S1480, 96th Cong., 2d Sess. (1980). A slew of bills was introduced in the years following Love Canal, after the EPA estimated that thousands of hazardous waste sites nationwide posed a serious risk to public health. *Id.* These bills sought to grant the EPA authority to reclaim abandoned hazardous waste sites and to bankroll reclamation efforts with an enormous trust—enter, Superfund. *Id.* Though the entire country was shaken by Love Canal and the EPA’s statistics on hazardous waste sites, the proposed legislation was kicked around Congress for months before a compromise bill was proposed by a

financing mechanism.⁵⁶ CERCLA created the Superfund, which provides the funds to permit the EPA to rapidly respond and remediate in the event of a toxic release or threat of release.⁵⁷ In addition to creating a response fund, CERCLA set forth reporting requirements regarding the closure and abandonment of hazardous waste sites;⁵⁸ provided the framework to assert liability over parties responsible for site contamination;⁵⁹ and established a procedure for funding cleanups when responsible parties cannot be found.⁶⁰ Furthermore, CERCLA established the NPL, which ranks all Superfund-eligible sites by severity of contamination. From the list, the EPA chooses which sites to address first and which to reassess at a later date.⁶¹

When a regional EPA officer, the state, or a citizen suspects that a site might qualify for Superfund cleanup, the individual may file a Preliminary Assessment Petition.⁶² Once reported, the site is entered into the Comprehensive Environmental Response, Compensation, and Liability Information System, which is the EPA's list of all hazardous waste sites.⁶³ The Preliminary Assessment is a basic investigation by the state or the EPA to determine whether or

bipartisan cohort of senators. *Id.* The primary hang-up was none other than the liability scheme—that is, whether to impose joint and several liability for cleanup expenses incurred by the EPA on responsible parties; specifically, whether to impose it retroactively. *Id.* The compromise bill, which became known as the Stafford-Randolph Compromise, *Uniroyal Chem. Co. v. Deltech Corp.*, 160 F.3d 238, 247 (5th Cir. 1998), *as modified on reh'g* (Jan. 8, 1999), dashed provisions allocating joint and several liability to responsible parties for personal injury, property, or income loss. CONG. REC. S1480, 96th Cong., 2d Sess. (1980).

56. *Superfund History*, EPA, <https://www.epa.gov/superfund/superfund-history> (last updated Oct. 28, 2016) [<https://perma.cc/6SBM-JU39>].

57. CERCLA originally levied a special tax on the chemical and petroleum industries to contribute to the better part of a \$1.8 billion fund, but Superfund is now funded through appropriations from the General Fund. *See generally* JONATHAN LEE RAMSEUR, MARK RESCH & JAMES E. MCCARTHY, CONG. RESEARCH SERV., RL31410, SUPERFUND TAXES OR GENERAL REVENUES: FUTURE FUNDING ISSUES FOR THE SUPERFUND PROGRAM (2008).

58. 42 U.S.C. § 9602 (2012).

59. 42 U.S.C. § 9607 (2012).

60. 42 U.S.C. § 9611 (2012).

61. 42 U.S.C. § 9605 (2012).

62. EPA, GUIDANCE FOR PERFORMING PRELIMINARY ASSESSMENTS UNDER CERCLA 2 (1991), <https://semspub.epa.gov/work/HQ/189160.pdf> [<https://perma.cc/L4ZW-K9X4>].

63. *Id.*

not the site poses a threat to human health.⁶⁴ If the investigator determines that the site does pose a risk to human health, a site inspection is conducted to collect samples of hazardous waste and identify whether the risk warrants an emergency response.⁶⁵ Each site where a site inspection is conducted is given a score by the Hazardous Ranking System, which determines whether the site will be placed on the NPL or stored in the system for a potential reassessment in the future.⁶⁶ If the site is placed on the NPL, it is also designated for Superfund cleanup.⁶⁷

Once a site is designated for Superfund cleanup, the OSC, under the authority of the EPA, creates a Statement of Work/Performance Work Statement outlining the work necessary and the planned approach.⁶⁸ The Statement of Work is attached to the overall Task Order given to the contractor, and conveys the objectives of the project and the work required.⁶⁹ Under the Task Order, the OSC directs the response action contractor.⁷⁰ The OSC coordinates all cleanup efforts at the scene of release or threatened release and communicates with potentially responsible parties (PRPs), contractors, and other governmental agencies involved in the cleanup.⁷¹ Since the OSC coordinates, it is logical to hold the OSC—the EPA—responsible for actions taken at a site; however, it may not always be appropriate to hold the government responsible when private contractors misstep during cleanup operations.

B. A Statute in Transition: Decreased Liability for Contractors Post-SARA

The over-indemnification of private contractors arose because the original CERCLA essentially prescribed the need for private contractors⁷² but did little to incentivize contractors

64. *Id.*

65. *Id.*

66. *Id.* at 4.

67. *Id.*

68. EPA TOOLBOX, *supra* note 50, at 4-4.

69. *Id.*

70. *Id.* at 4-1.

71. 40 C.F.R. § 300.120(e) (2017).

72. Though there is no explicit call for private contractors to perform cleanup of hazardous waste sites, CERCLA provides only a statutory framework and funding mechanism for hazardous waste cleanup. Since the EPA does not have an

to assume the risk of massive toxic cleanup. Additionally, private insurance coverage for these contractors was unreliable and a large source of litigation.⁷³ This Section explores Congress's response to these problems and argues that present-day CERCLA is the result of congressional overcorrection of the original 1980 CERCLA with adverse consequences to the public.

After the passage of CERCLA, contractors drafted indemnification agreements within their contracts, but raised three major concerns about such agreements: (1) the EPA did not have express statutory authority to indemnify contractors; (2) the source of the claim payouts was not strictly identified, so it was possible that the Anti-Deficiency Act could bar payment;⁷⁴ and (3) only contractors who worked directly for the EPA could be indemnified, so those contracting with other agencies, states, or PRPs could not be indemnified.⁷⁵ Furthermore, contractors in these early years of CERCLA (1980–1986) struggled to secure adequate insurance to protect them from potential damages arising from site remediation and claimed that they would withdraw from contracts if they were forced to bear the full risks without insurance.⁷⁶

Congress recognized the importance of cleanup contractors in the reclamation of several polluted sites; thus, it incorporated indemnification into the Superfund Amendments and Reauthorization Act (SARA) in 1986.⁷⁷ In doing so, Congress asserted that it was unfair to impose strict liability on response action contractors who, “despite the exercise of due

in-house cleanup division and the creation of one was not called for in the statute, the job fell to private contractors. *See generally* 42 U.S.C. §§ 9601–9675 (2012).

73. Companies that handle hazardous waste generally carry Comprehensive General Liability (CGL) policies, but many insurers refused to pay CERCLA cleanup costs. Stephen Mountainspring, *Insurance Coverage of CERCLA Response Costs: The Limits of Damages in Comprehensive General Liability Policies*, 16 *ECOLOGY L. Q.* 755, 755 (1989).

74. The Anti-Deficiency Act restricts the expenditure or obligation of money that was not appropriated by Congress. 31 U.S.C. § 134 (1870) (repealed with revised provisions contained in 31 U.S.C. § 1341 (2012)). The Comptroller General has ruled that most open-ended federal indemnification clauses violate the provisions of the Act. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/RCED-89-160, *SUPERFUND CONTRACTORS ARE BEING TOO LIBERALLY INDEMNIFIED BY THE GOVERNMENT* 14 n.4 (Sept. 1989) [hereinafter GAO].

75. GAO, *supra* note 74, at 14.

76. JOHN F. SEYMOUR, *INDEMNIFICATION OF CLEANUP CONTRACTORS AT FEDERAL FACILITIES* 6 (1993).

77. Pub. L. No. 99-499, 100 Stat. 1613 (1986).

care and satisfactory performance of contract specifications, could, by virtue of their involvement with hazardous waste sites, be included in the definitions of owner, generator, or transporter and therefore could be subject to [strict] liability.”⁷⁸ Post-SARA, CERCLA now specifically excuses response action contractors through section 9616, which declares that any response action contractor working to mitigate damage from a release or threatened release is not liable for damages resulting from the release.⁷⁹ In instances of alleged negligence, contractors may be subject to liability;⁸⁰ however, section 9619(c) provides that the president may choose to “hold harmless and indemnify” a response action contractor for negligence if the contractor can demonstrate that insurance would not cover such liability.⁸¹

The EPA’s fear that strict liability will deter contractors is warranted, but the implications of broad indemnity should be carefully considered when dealing with profit-motivated entities; therefore, the EPA should attempt to strike a balance. While strict liability without indemnity deters contractor bids, a regime of full indemnity provides minimal incentive to perform to the highest standards and practice the utmost care. Response action contractors are required to carry insurance, which has improved since the poor coverage of the 1980s that SARA intended to address,⁸² and the contractors’ livelihoods are likely not at stake if operations are negligently executed. As it stands, the federal framework does not support careful consideration by the contractor when they are at the direction of the EPA OSC in charge.⁸³ Even more, the federal framework for response action contractor liability is toothless if the EPA routinely claims responsibility for contractor misconduct under the OSC.⁸⁴ This is problematic because the Superfund is

78. H.R. Rep. No. 99-253, at 92 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 2835.

79. 42 U.S.C. § 9619(a)(1) (2012).

80. § 9619(a)(2).

81. § 9619(c)(1).

82. Geoffrey L. Haver, *From Superfund to Super Coverage: 25 Years of CPL*, PROP. CASUALTY 360° (Feb. 1, 2013), <http://www.propertycasualty360.com/2013/02/01/from-superfund-to-super-coverage-25-years-of-cpl> [<https://perma.cc/CV4S-2HM5>].

83. *See* § 9619; *see also* 42 U.S.C. §9607 (2012) (stating that a contractor shall not be held liable when working under the direction of the OSC).

84. *See infra* Part III.

funded by the General Fund; thus, taxpayers end up footing the bill for mistakes by careless contractors. While imposition of strict liability against a response action contractor would likely create a major deterrent for environmental cleanup contractors who want to enter into agreements with the EPA, full indemnity from liability for negligence fosters the potential for carelessness. The matter is further complicated if, in practice, the agency does not impute liability to their contractors in any instance.

III. GOVERNMENT OUTSOURCING: EXCHANGING ACCOUNTABILITY FOR THE SAKE OF EFFICIENCY

Contractors undoubtedly play a vital role in accomplishing government objectives. The EPA is not the first, and certainly not the last, government agency to rely upon an independent contractor to perform key functions of the state. To put things into perspective, federal government agencies spent a combined \$439,639,328 on contracts in 2015, and the EPA did not even fall into the top twenty highest spending agencies.⁸⁵ This Part describes the viewpoints of various scholars on the issues of government privatization of essential functions. It also uses the American prison system as an example of a well-known attempt at increased efficiency that has ultimately led to abysmal effects on the public good, much like CERCLA response action contractor indemnity.

Criticism of government inefficiency and ineffectiveness has cultivated the privatization of public responsibilities—instead of overhauling bureaucracy, the government rerouted functions through private business in an attempt to heighten efficiency.⁸⁶ In fact, the number of contracted employees now exceeds that of federal civilian employees.⁸⁷ Contractor action is not impinged by the necessity for transparency and is often shielded by laws that impose lesser liability, thereby reducing the obligation of accountability to the public.⁸⁸ Furthermore,

85. NAT'L CONTRACT MGMT. ASSOC. & DELTEK, ANNUAL REVIEW OF GOVERNMENT CONTRACTING 2, 4 (2016), http://www.ncmahq.org/docs/default-source/default-document-library/pdfs/exec16---book---annual-review-of-government-contracting_lowres [https://perma.cc/59D3-3KVY].

86. Jon D. Michaels, *Running Government Like a Business . . . Then and Now*, 128 HARV. L. REV. 1152, 1170–71 (2015).

87. *Id.* at 1171 n.86.

88. JODY FREEMAN & MARTHA MINOW, GOVERNMENT BY CONTRACT 3 (2009).

one scholar suggests that governmental agency heads are able to exercise greater control over private employees than their public servant counterparts—because private employees are rarely protected from at-will termination, and contractors intend to retain their lucrative government contracts by pleasing agency directors.⁸⁹ Though this lack of job security encourages contracted entities to work diligently to meet expectations and avoid negligent conduct, it also supports a workforce that takes directives from agency heads without protest.⁹⁰ This mentality may lead to a dangerous environment of unchecked administrative power, with a greater margin of error for oversights.⁹¹ Although operating government like a private business has great populist appeal, the reality of the administrative state is incompatible with such a model. Economic efficiency cannot be the only measure of healthy government function since our system is accountable to every citizen and simply cannot risk failure.⁹²

Of course, there is always room for improved efficiency, but oftentimes perceived inefficiencies in government actions are actually inherent and necessary in public governance.⁹³ Private actors are subject to external competition, while government operation embraces both politics and economics from within, and it is this internal tension that fosters accountability and checks state power.⁹⁴ The United States is necessarily accountable to its citizens,⁹⁵ and bypassing administrative procedures through contracting decreases transparency and opportunity for public engagement. This increases the risk that serious problems evade inspection until it is too late to fix them.⁹⁶ The issue with private actor accountability is illustrated through CERCLA RAC indemnification in the cleanup of Superfund sites.

A. Incentivization by Indemnification

Early on, the EPA recognized the practicality of hiring

89. Michaels, *supra* note 86 at 1172–73.

90. *Id.* at 1173.

91. *See id.* at 1175.

92. *See id.* at 1176 n.105.

93. *See id.* at 1177.

94. *See id.*

95. *See* U.S. CONST. pmb1.

96. *See* FREEMAN & MINOW, *supra* note 88.

private contractors who offer vast expertise in the care and cleanup of hazardous waste. As a result, the EPA has employed private contractors since the establishment of the Superfund.⁹⁷ One such contractor, Environmental Restoration, has been awarded \$381 million in federal contracts since 2007 and boasts involvement in many of the most high-profile environmental disaster cleanups of the past decade, including the cleanup of the Gold King Mine disaster.⁹⁸ As discussed earlier, under CERCLA's indemnity provision,⁹⁹ the government exempts response action contractors from strict liability imposed by section 107 of CERCLA and allows the President to contractually hold harmless from negligence any response action contractor who is carrying out response efforts if the contractor's required insurance does not cover such liability.¹⁰⁰ In other words, the government effectively takes ownership of the Superfund site and the contractor can seek contribution for money paid in cleanup efforts.¹⁰¹

CERCLA further provides that "no person shall be liable . . . for costs or damages as a result of actions taken or omitted in the course of rendering care . . . in accordance with the National Contingency Plan ('NCP') or at the direction of the on-scene coordinator appointed under such plan."¹⁰² Since response action contractors work under the direction of the OSC,¹⁰³ in theory, a contractor may escape liability entirely unless the actions taken rise to the level of negligence.¹⁰⁴ Some experts argue that state strict liability claims, which section 9619 does not preclude, leave contractors vulnerable to massive liability.¹⁰⁵ The contractor cannot escape suits involving state

97. OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, EPA, PUBLICATION 9200.5-008J, SUPERFUND CONTRACTS (1990).

98. Harder & Berzon, *supra* note 5.

99. In passing the Superfund Amendment and Reauthorization Act of 1986 (SARA), Congress authorized the government to indemnify Superfund contractors against liability caused by negligence. Pub. L. No. 99-499, 100 Stat. 1613 (1986). Congress passed the amendment to ensure that contractors were not discouraged from taking on Superfund efforts. GAO, *supra* note 74. Thus, § 9619 of CERCLA grants Response Action Contractors (RACs) broad indemnification from liability, so long as certain requirements prescribed by the statute are met. *Id.*

100. 42 U.S.C. § 9619 (2012).

101. John F. Seymour, *Liability of Government Contractors for Environmental Damage*, 21 PUB. CONT. L.J. 491, 521 (1992).

102. 42 U.S.C. § 9607(d)(1) (2012).

103. *Id.*

104. *Id.*; see also § 9619(a).

105. Seymour, *supra* note 101, at 541.

common law violations, or state statutory violations; however, these laws offer little deterrence to contractors because courts routinely allow an overbroad application of the “government contractor defense.”¹⁰⁶ This lack of true responsibility for full costs may lead to careless operations management. Furthermore, since the OSC is at the helm of operations, the contractor need not consider the consequences of actions ordered by the EPA OSC because the government assumes the risk. Therefore, even if the contractor knows that an action ordered by the OSC might be negligent practice, there is little incentive to suggest an alternative protocol because the OSC (the EPA) bears the liability. Professor Michaels, in his article *Running Government Like a Business . . . Then and Now*, notes that this detail truly distinguishes the public sector from private actors because at-will private contractors are less likely to speak up against an agency head who is abusing his or her discretion or acting contrary to public interest.¹⁰⁷ In the Gold King Mine situation, Environmental Restoration was given specific instructions by the OSC to cease operations due to complications, but nevertheless took orders to initiate excavation into the adit from the interim OSC.¹⁰⁸ In fact, in a June 2017 report released by the EPA Office of Inspector General, the EPA claimed full responsibility for the Gold King Mine release.¹⁰⁹

For all intents and purposes, it is unnecessary for us to determine whether Environmental Restoration acted negligently to recognize that the contractor did not follow the set task order and did not follow the procedure that had been used in previous mine remediation.¹¹⁰ If Environmental Restoration was strictly liable as an owner or operator under CERCLA,¹¹¹ the contractor likely would not have disregarded the original direction of the OSC and the task order by

106. Nina Mendelson, *Six Simple Steps to Increase Contractor Accountability*, in *GOVERNMENT BY CONTRACT* 241, 247–48 (Jody Freeman & Martha Minnow eds., 2009).

107. Michaels, *supra* note 86, at 1173.

108. Complaint, *supra* note 41.

109. OFFICE OF INSPECTOR GEN., EPA, GOLD KING MINE RELEASE: INSPECTOR GENERAL RESPONSE TO CONGRESSIONAL REQUESTS, 11–13 (2017), https://www.epa.gov/sites/production/files/2017-06/documents/_epaig_20170612-17-p-0250.pdf [<https://perma.cc/DX5X-XFYD>] [hereinafter 2017 REPORT].

110. Complaint, *supra* note 41, at 48.

111. 42 U.S.C. § 9607(a) (2012).

excavating without the recommended equipment. Without the statutory assurance of broad sweeping indemnity, the contractor would undoubtedly have considered the risks associated with improper excavation for the sake of the corporation. In fact, even without the statutory shield from liability, contractors are essentially protected by what appears to be an implied indemnification by the EPA, best illustrated by the agency's recent forgiveness of Environmental Restoration.¹¹²

Outsourcing of government functions to actors who are motivated by profit—rather than the public good—will likely result in profit-based decision-making or, at the least, complacency. Running government like a business, or even through business, may not suit environmental matters, but this is not to say that contractors should not be utilized. Greater accountability to the public must be worked into government contracts if we want to incentivize higher standards of care.¹¹³ When contractors are only accountable to the government agency that directs them, the incentive is not only to drive down costs, but also to dutifully follow every direction of the agency.¹¹⁴ By conforming to the opinions and suggested practices of the agency, the contractor secures its position as the “go-to contractor” for similar services in the future.¹¹⁵ In the instance of the Gold King Mine disaster, and most other EPA cleanups,¹¹⁶ Environmental Restoration has clearly established itself as the “go-to contractor.” Even though Environmental Restoration triggered the breach that led to the release, they were nonetheless hired for the cleanup efforts following the incident.¹¹⁷ A new contract was awarded despite the contractor's misconduct in not following the established work plan and disregarding the original OSC's instruction.¹¹⁸

Cleanup of the environment is not the only government function to be auctioned off to private interests. Social

112. 2017 Report, *supra* note 109.

113. *Infra* Section III.B.

114. Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717, 749 (2010).

115. *Id.* at 748–49.

116. Harder & Berzon, *supra* note 5.

117. Order for Supplies or Services from EPA, to Environmental Restoration (Aug. 6, 2015), <https://www.epa.gov/sites/production/files/2015-12/documents/08-1719977.pdf> [<https://perma.cc/2UZA-KS7Y>].

118. See 2014 Task Order, *supra* note 36.

accountability is exchanged for cost reductions and “efficiency” all the time—most infamously in the American prison system.

B. Prisoners of Private Interests: Imprisonment for Profit

Greater economic efficiency rests at the heart of every argument in favor of privatization through government contracting.¹¹⁹ In contracting for increased efficiency, the public often sacrifices accountability and transparency. To illustrate this concept, this Section explores a more familiar sector where the government has privatized essential functions: the American prison system. Like the EPA, the Federal Bureau of Prisons saw an opportunity to decrease federal spending and, in the process, forewent the quality of human care. The examination of the privatization of prisons helps bring to light the often-overlooked underbelly of government contracts.

Privatization of the American prison system presents a prime example of the sacrifice of accountability for efficiency’s sake.¹²⁰ The mass privatization of prisons through government contracting in recent years has led to a “prison industrial complex,”¹²¹ fueled by for-profit entities’ interest in the financial benefits of higher incarceration rates.¹²² Since prison operations contractors are paid per inmate per day, contractors are naturally incentivized to cut costs and increase the number of prisoners.¹²³ A recent pitch by Corrections Corp of America (now CoreCivic) to forty-eight states highlights the chasm between private and public interests in the prison industry.¹²⁴ CoreCivic has offered states generous cost savings in exchange for minimum prison capacities of 1,000 and a guaranteed 90 percent occupancy rate for the next twenty years.¹²⁵

119. Michaels, *supra* note 114, at 718.

120. Sharon Dolovich, *How Privatization Thinks: The Case of Prisons*, in GOVERNMENT BY CONTRACT 128, 129 (Jody Freeman & Martha Minnow eds., 2009).

121. John Whitehead, *Jailing Americans for Profit: The Rise of the Prison Industrial Complex*, HUFFINGTON POST (June 10, 2012), http://www.huffingtonpost.com/john-w-whitehead/prison-privatization_b_1414467.html [<https://perma.cc/P948-QY5Q>].

122. Dolovich, *supra* note 120, at 131.

123. *Id.* at 130.

124. Whitehead, *supra* note 121.

125. *Id.*

To be clear, there is no evidence showing that Environmental Restoration, or any other EPA contractor, is offering discount services to the U.S. government in exchange for increased contracts. However, as discussed in Section III.A, Environmental Restoration was awarded the cleanup contract for the Gold King Mine blowout that they were, in part, responsible for catalyzing. In both instances, the government realizes reductions in cost, but as the adage goes: you get what you pay for.

1. Cost-Benefit Does Not Consider Social Costs

For-profit prisons present a troubling cost-benefit equation—the cost being humanity, and the benefit being financial gain in the private sector.¹²⁶ Courts have routinely imputed no constitutional liability on contracted prison operators and correctional officers;¹²⁷ therefore, prisoners experience diminished ability to recover in the face of constitutional rights violations by private guards.¹²⁸ Once incarcerated, inmates are at the mercy of the prison system. In the case of a private system, the state has washed its hands of the social responsibility associated with management and left the lives of prisoners in the hands of profit-motivated corporations. Herein lies the disconnect between public responsibility and private interest. Theoretically, when the state is responsible for all costs, both economic and social, associated with the treatment of a prisoner, there is an incentive to reduce the rate of recidivism and avoid conduct that, if exposed, could lead to political backlash.¹²⁹ When private corporations contract to oversee prisoners, there is a disincentive to actually reform an offender and reduce the rate

126. See Dolovich, *supra* note 120, at 141.

127. *Minneeci v. Pollard*, 565 U.S. 118, 131 (2012); see also *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001) (finding no private right of action under a *Bivens* claim for deprivation of constitutional rights by a government contractor); *Holly v. Scott*, 434 F.3d 287, 291 (4th Cir. 2006) (finding that a constitutional tort cannot be brought against a private actor when state tort claims may be brought, even when the actor is contracted by the federal government); *Peoples v. CCA Detention Ctrs.*, 422 F.3d 1090, 1101–02 (10th Cir. 2005) (same).

128. See Mendelson, *supra* note 106, at 250–51 (discussing the Supreme Court's decision not to extend *Bivens* liability for private contractors).

129. See Dolovich, *supra* note 120, at 144–45.

of recidivism because more prisoners equate to more profit.¹³⁰ This phenomenon has been noted by the Attorney General's office, in a memo to the Federal Bureau of Prisons:

Private prisons served an important role during a difficult period, but time has shown that they compare poorly to our own Bureau facilities. They simply do not provide the same level of correctional services, programs, and resources; they do not save substantially on costs; and as noted in a recent report by the Department's Office of Inspector General, they do not maintain the same level of safety and security. The rehabilitative services that the Bureau provides, such as educational programs and job training, have proved difficult to replicate and outsource—and these services are essential to reducing recidivism and improving public safety.¹³¹

In fact, under the Obama Administration, the U.S. Attorney General's Office had instructed the Bureau of Prisons not to renew existing contracts in an effort to phase out private prisons.¹³² Those instructions have since been revoked by President Trump's Justice Department,¹³³ but that does not negate the fact that the government *has* recognized that the outsourcing of essential functions can be less effective than once thought.

2. A Kansas City Shuffle: Policy Change through Privatization

In Professor Michael's *Privatization's Pretensions*, he suggests that contractors who can manipulate the system may offer agencies a "workaround" that allows for substantive policy change within the system without the political or legal battle that would likely result if the agency attempted to change policy through formal procedures.¹³⁴ This incentivizes governments to outsource the prison system in order to get

130. *See id.* at 145.

131. Memorandum from Sally Yates, Deputy Attorney Gen. to the Acting Dir. for the Fed. Bureau of Prisons (Aug. 18, 2016) [hereinafter Yates Memo].

132. *Id.*

133. Editorial, *Under Mr. Trump, Private Prisons Thrive Again*, N.Y. TIMES (Feb. 24, 2017), <https://www.nytimes.com/2017/02/24/opinion/under-mr-trump-private-prisons-thrive-again.html> [<https://perma.cc/WN5E-4NLL>].

134. Michaels, *supra* note 114, at 764.

around political battles and cut costs.¹³⁵ Though the privatization of prisons is not inherently evil, profit-seeking corporations have essentially monetized human lives and, similar to the issues in Superfund contractor liability, the system underscores the market's failure to take social costs into account when measuring efficiency.

Similarly, if the EPA itself were to execute Superfund cleanup, perhaps it would be more sensitive to social costs associated with every aspect of the cleanup. Private contractors for the EPA have benefitted from the statutory shield provided by CERCLA since SARA in 1986.¹³⁶ And they have benefitted even more from the EPA's implicit policy of holding Response Action Contractors (RACs) harmless under any circumstance. CERCLA indemnifies RACs and implicit EPA policies hold them harmless under the shroud of CERCLA's indemnification. As long as RACs are operating under the OSC's orders and refraining from grossly negligent conduct, there is no incentive to act with the highest standard of care at every level.¹³⁷ When the EPA essentially assumes all liability, contractors like Environmental Restoration do not have any reason to push back against the OSC's orders, even if they are inadvisable.

IV. EFFICIENCY MEETS EFFICACY: WHERE'S THE SOLUTION IN CERCLA RAC LIABILITY?

The common thread that burdens both CERCLA and the prison system is an issue of private actor accountability to the general public. Privatization of government functions may increase efficiency if we measure efficiency only by the amount of money saved against various other work inputs. However, actions that affect the public interest require that the public's best interests actually be taken into account. The only way to instill greater transparency and accountability into government contracts is through a revision of our regulatory framework. The question is: How do we maintain an efficient system while ensuring that all actors are held accountable? This Part discusses four potential solutions, but it boils down to a question of what the public is willing to spend to ensure a

135. *Id.* at 765.

136. Superfund Amendments and Reorganization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

137. 42 U.S.C. § 9619 (2012).

healthy environment. If my synopsis of the problem is accepted, we are ultimately left with two options: either bring all operations in-house, or break away from the hold harmless trend and negotiate higher contracts with RACs in exchange for their increased duty of care.

A. *Government Overhaul?*

If the issue stems from the privatization of government functions, the simple solution is to move Superfund cleanup operations in-house.¹³⁸ At least one scholar seems to propose such a solution. In an opinion piece for the *New York Times*, Paul R. Verkuil suggests that the United States invest in the bureaucracy rather than continue to outsource government functions.¹³⁹ Verkuil supports his call for a professional bureaucracy by noting that, often times, government contracts effectively fill one government position with two people; hence, efficiency actually decreases.¹⁴⁰ In discussing the privatization of much of the administrative state, Michaels suggests that the government chooses to privatize rather than work to improve internal function:

This privatization of public responsibilities satisfies today's fervent calls to run government like a business and also serves as a bit of a cheat. Rather than actually transform the way government itself works, privatization provides alternative platforms. If government itself cannot be

138. Several Superfund cleanup operations, mostly plan design and management, are already in-house. OFFICE OF INSPECTOR GEN., EPA, RESPONSE ACTION CONTRACTS: STRUCTURE AND ADMINISTRATION NEED IMPROVEMENT (2004), <https://www.epa.gov/sites/production/files/2015-12/documents/20041206-2005-p-00001.pdf> [<https://perma.cc/Z2BX-8AXL>]. Section IV.A proposes to move what is currently outsourced in-house.

139. Paul R. Verkuil, *The Case for Bureaucracy*, N.Y. TIMES (Oct. 3, 2016), <https://www.nytimes.com/2016/10/03/opinion/the-case-for-bureaucracy.html> [<http://perma.cc/LXS9-P8RY>].

140. *Id.*

Consider, for example, that the Air Force increasingly uses contractors as drone pilots. They are permitted to line up targets but are told not to press the firing mechanism because it is an inherent government function. Needless to say, in practice this is a difficult line to draw and enforce. But in theory it requires a government employee to complete the task, making a one-person job into a two-person job.

Id.

substantially overhauled to run like a business (because of, say, the stickiness of salarization, civil-service tenure, and public participatory rights), it can shift playing fields—and run its operations *through* businesses.¹⁴¹

Though a substantial overhaul of government function is impractical, the theory is intriguing. In the context of Superfund cleanup, this would require the EPA to create an in-house division, which would employ experts in the care of hazardous materials. Setting aside feasibility for a moment, an in-house division dedicated to Superfund cleanup would avoid the accountability issues discussed earlier. Salaried employees could increase accountability because, as Michaels suggests, those who do not fear losing their job are more likely to challenge direction when they feel it is misguided.¹⁴² Though society tends to view government bureaucrats as inefficient and private actors as more efficient, Michaels suggests that, in reality, this isn't the case. In fact:

Contractors and other private actors deputized by the government generally aren't protected against at-will termination. They and their firms also need to have their work assignments periodically renewed. Thus they have quite strong incentives to play nicely, as it were, with agency heads, in ways civil servants simply do not. In short, private actors are vulnerable actors, much more likely to carry out overly partisan or unsound directives without complaint than are career civil servants empowered and acculturated to challenge such directives.¹⁴³

Under Michaels's theory, in the instance of Gold King, a salaried EPA employee would have been more likely to challenge the interim OSC's orders to dig.

However, this theory presumes that a salaried employee does not fear other workplace repercussions, aside from termination. The need for federal whistleblower protection statutes demonstrates the hesitancy employees may feel in challenging their supervisor's orders.¹⁴⁴ Moreover, equipment

141. Michaels, *supra* note 86, at 1171.

142. *Id.* at 1172.

143. *Id.* at 1172–73.

144. See, e.g., Whistleblower Protection Act of 1989, Pub. L. No. 101–12, 103

costs would likely be monumental, and the division would require thousands of field workers to address the various environmental concerns across the regions. The employment of such a vast number of *salaried* workers would be extremely costly and inefficient because the number of employees necessary would vary depending on the number of environmental disasters designated for cleanup. The costs to such a division would likely be insurmountable; therefore, it is highly arguable that Superfund cleanup is best left to private contractors (at least during this administration).¹⁴⁵

B. Greater Hesitancy in Holding Contractors Harmless

Overhaul of the EPA structure is unrealistic under the current administration's priorities.¹⁴⁶ A more financially prudent solution to consider is increased hesitancy in granting broad indemnity to government contractors. The EPA took several steps to limit indemnity after the General Accounting Office issued a 1993 report to Congress, titled: "SUPERFUND: Contractors Are Being Too Liberally Indemnified by the Government."¹⁴⁷ After multiple rounds of notice and comment rulemaking, the EPA set limits on dollar amounts of indemnification and authorized the use of indemnification only when diligent efforts to obtain adequate insurance can be shown.¹⁴⁸ Despite these efforts, issues with contractor accountability still exist. And, the EPA perpetuates these issues through the implied indemnification by immediately claiming responsibility for actions of response action

Stat. 16 (1989).

145. Emily Atkin, *Trump Wants to Cut the EPA's Superfund by 25 Percent*, HIGH COUNTRY NEWS (May 23, 2017), <http://www.hcn.org/articles/trumps-budget-wants-to-cut-the-epas-superfund-budget-by-25-percent> [https://perma.cc/6UH9-PF3F].

146. President Trump has expressed his intention to reduce federal spending and freeze federal hiring, and his EPA transition team leader, Myron Ebell, suggested the elimination of 5,000 jobs in the EPA. Joe Davidson, *Trump Transition Leader's Goal Is Two-Thirds Cut in EPA Employees*, WASH. POST (Jan. 30, 2017) <https://www.washingtonpost.com/news/powerpost/wp/2017/01/30/trump-transition-leaders-goal-is-two-thirds-cut-in-epa-employees/> [https://perma.cc/FPY8-MA8Y].

147. Superfund Response Action Contractor Indemnification, 58 Fed. Reg. 5972-02 (Jan. 25, 1993).

148. *Id.* The EPA also adopted several other measures to restrict indemnity. Those measures are outside of the scope of this Comment, but can be found in the same 1993 guidelines. *Id.*

contractors who report to the OSC.

Instead of declaring that all response action contractors will be held harmless for negligence while operating under the NCP, the statute could require that the agency decide whether to hold a contractor harmless on a case-by-case basis—even if an indemnification clause was negotiated in the contract. Unfortunately, this type of uncertainty in the law would undoubtedly be a political obstacle because it would lead to an increase in litigation and a decrease in contractors willing to take on riskier cleanup projects.

Though the issues of privatization are largely similar in both private prisons and privatized environmental cleanup, the solutions are not. The solution to increased accountability for private prison contractors is clearer. In Nina Mendelson's *Six Simple Steps to Increase Contractor Accountability*, she suggests that the contracting agency require prison contractors to open their records regarding compliance with the contract—specifically, the procedure required of prison guards.¹⁴⁹ This would increase contractor accountability to the governing agency. Furthermore, reversal of the *Correctional Services v. Malesko*¹⁵⁰ decision to require that contracted prison guards be held liable for constitutional violations—just as their government counterparts are—would also likely increase accountability.¹⁵¹

In the case of Superfund contracting, greater transparency may not increase accountability, but it would not hurt. If the EPA required Environmental Restoration to compare their actual cost in incorrectly excavating the Gold King Mine adit to the estimated cost of proceeding with the action plan prescribed by the NCP,¹⁵² it may prove that the contractor was in part motivated by the decreased cost of deviating from the NCP—or not. The point is, without the ability to peer into the contractor's records, there is no way of knowing whether the contractor cut corners due to profit motivations.

C. Increased Statutory Liability

Instead of focusing on the failures inherent in the

149. Mendelson, *supra* note 106, at 254.

150. 534 U.S. 61 (2001).

151. Mendelson, *supra* note 106, at 255.

152. See *supra* Section I.B.

privatization of government functions, the EPA could choose to confront the over-indemnification head on. Though revocation of the indemnification provision entirely would likely force contractors out of the business because of high risk,¹⁵³ increasing the standards in granting indemnification (both contractual and implied) could decrease the burden on taxpayers when cleanup goes awry. This could be done either by increasing the standard of care required of contractors or—a more novel approach—shifting the burden from the plaintiffs to the contractor-defendants to prove that their conduct was not negligent. First, let us consider an increased standard of care.

1. Statutory Solution Proposal No. 1: Greater Standard of Care

The current statute requires the EPA to hold contractors liable only if their conduct rises to the level of negligence.¹⁵⁴ Since environmental disasters can greatly affect human lives, it is not unreasonable to demand that contractors take the utmost care in remediating hazardous waste sites, like the Gold King Mine. Rather than holding contractors liable only for negligent conduct, the EPA could require that contractors be held liable, and never indemnified, for conduct that deviates from standard procedure without justification. In the instance of the Gold King Mine, puncturing a hole in the adit at the OSC's orders may have been negligent; however, given that the EPA was willing to claim responsibility, Environmental Restoration's standard of care was never addressed.¹⁵⁵ Increased concern for the standard of care taken by government contractors could potentially prevent the federal government, and taxpayers, from paying the price for private contractor apathy. The argument in favor of this approach is supported by simple economics. When deviation from standard and prudent practices could potentially result in monetary losses for the company, through either costly legal defense or loss of potential future EPA contracts, there is greater incentive to act with care to avoid loss. The notion that cutting corners could result in lost opportunity costs may lead to more

153. See Pub. L. No. 99-499, 100 Stat. 1613 (1986) (explaining the need for indemnification due to the high risk of hazardous site cleanup).

154. 42 U.S.C. § 9616(a) (2012).

155. 2017 REPORT, *supra* note 109.

responsible decision-making. In the case of the Gold King Mine disaster, Environmental Restoration did not lose any future opportunities; as discussed earlier, they were simply awarded with the contract to clean up their cleanup.¹⁵⁶

On the other hand, this could revert contractor bids back to pre-SARA scarcity because contractors may be less willing to assume the risk associated with hazardous waste sites.¹⁵⁷ However, any concern about unbridled liability is unfounded. Insurance providers have come a long way since the infancy of CERCLA and Superfund cleanup, so insurance coverage may provide a more stable safety net than it once did.¹⁵⁸ The government's willingness to entrust the private sector with vital functions that have the potential to affect human lives without entrusting the private sector to provide adequate insurance coverage for corporations is paradoxical. Moreover, covering for negligent actors—even underinsured negligent actors—at the expense of taxpayers contravenes the intent of CERCLA.¹⁵⁹

2. Statutory Solution Proposal No. 2: Burden Shifting

Currently, CERCLA provides that a response action contractor is liable for conduct that is negligent or grossly negligent; however, the President is authorized to indemnify any response action contractor who did not act in a manner considered to be grossly negligent.¹⁶⁰ Therefore, in an action against a response action contractor, the plaintiff must allege that the public was injured because the response action contractor negligently or grossly negligently breached the duty of care.¹⁶¹ Instead of requiring that the plaintiff prove that the response action contractor was negligent or grossly negligent to ensure no indemnity, Congress could shift the burden to the response action contractor-defendant to establish a *prima facie* case that they were *not* negligent or grossly negligent. This approach may be more politically acceptable and would likely

156. See 2014 Task Order, *supra* note 36.

157. See *supra* Section II.B.

158. Haver, *supra* note 82.

159. See *supra* Part II.

160. 42 U.S.C. § 9619(c)(1) (2012).

161. See *id.* “Nothing in this section shall affect the plaintiff's burden of establishing liability under this subchapter.” 42 U.S.C. § 9619(b)(2) (2012).

not cost the government, and thus the taxpayers, nearly as much due to the shift in evidence production.

This model would require the response action contractor to prove one of four things: (1) there was not a legal duty; (2) the contractor did not breach the legal duty of care; 3) there was no actual injury; or (4) the contractor did not cause the injury.¹⁶² By shifting the burden of proof, the plaintiff would only be required to disprove one of the four elements in order to establish that the contractor was negligent or grossly negligent. The drawback to this approach, of course, is the requirement of some form of dispute resolution and what could result in mere retrospective solutions such as compensation rather than prevention of environmental degradation in the first place. However, CERCLA is already notorious for a vast amount of litigation,¹⁶³ so this would be nothing new in the world of environmental law.

CONCLUSION

Business as usual is ineffective and dangerous. When government agencies decide whether to outsource certain functions, the calculations should account for more than efficiency and effectiveness. Government serves in the interest of the public, and the private sector repeatedly fails to take social costs into consideration. Reform is possible without overhauling the bureaucracy, but it will require statutory and regulatory amendments—along with major policy adjustments within the agency—in order to increase accountability of government contractors. As suggested above, the most effective amendments would likely need to come in the form of increased liability or decreased indemnity, neither of which would be popular among the RAC community. In determining the most prudent approach, Congress will need to weigh the political palatability of all potential solutions, but ultimately push for that which serves the public interest to the highest degree.

162. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY §§ 1–25 (AM. LAW. INST. 2000).

163. ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION 413 (Wolters Kluwer Law & Business, 7th ed. 2013).