

Environmental Liability

ARMY PROVIDES EXTENSIVE LIABILITY PROTECTION IN AGREEMENT WITH VIRGINIA

The Army and Virginia have signed a licensing agreement that provides the state extensive protection from any liability associated with contamination on an installation recently aligned. The agreement protects the Virginia Army National Guard, which is directed by the governor, from incurring liability for past and future practices of the U.S. Army at Fort Pickett Military Reservation.

The liability protection could set a precedent for other state-Army agreements, an Army National Guard source says.

The license differs from past mechanisms "in that a lot of effort was put into it to limit liability for past practices and future practices" of federal or other state guard units using the property, a National Guard source says. The new agreement, however, does not assign the U.S. Army, which owns the property, any more responsibility than it would typically assume in such cleanups, according to the source. The source says the federal government effectively pays most of these cleanup costs anyway, since state guards are largely supported by federal monies. What the language in the new agreement does is put "in writing the way [cleanup financing] has worked," the source explains.

The state was largely concerned with any Superfund liability it might inherit as a result of taking over operations at the installation, which was realigned under a base closure law, according to this source. As a result, designated "Areas of Concern" — where contamination exists — were temporarily carved out of the property on which the Virginia Guard is assuming operations. The Virginia Guard will also have operating jurisdiction over these areas once their cleanups are completed. The Army in the agreement commits to complete characterization of the environmental conditions of areas of concern by the year 2005.

Army Secretary Togo West Jr. and Gen. Carroll Thackston, the Adjutant General of Virginia, signed the agreement Sept. 30. Fort Pickett, located in Blackstone, VA, is one of five Army bases undergoing a similar realigning structure. While Fort Chaffee in Arkansas did not use the same type of agreement when it transferred operations Oct. 1, other bases still facing licensing decisions include Fort Indiantown Gap in Pennsylvania, Fort McClellan in Alabama and Fort Hunter Liggett in California.

The National Guard source says that other states must determine whether they want to adopt similar language in their licensing agreements. A significant component of such a decision may be the extent of knowledge about the environmental condition of a property, according to the source. The more a state knows about a property, the less anxious that state is likely to be in assuming control, the source adds. Virginia was particularly "sensitive" about liability because of a previous experience in which it took ownership of a Navy property and incurred environmental cleanup costs, this source says.

Cleanup liability was the main concern of the state as it assumed an operator status. Superfund law applies joint and several liability to operators, as well as owners, of contaminated property. The "Army was always going to be liable" under the joint and several standard, the National Guard source says. But at issue, the source says, was "to what degree could we protect the state from sharing in that liability" for contamination caused prior to Oct. 1.

Prior to the installation's realignment, active and reserve Army troops trained at Fort Pickett; and reserve units will continue to train there.

The agreement, in part, says that the secretary of the Army "acknowledges that one purpose of this Agreement is to ensure that [Virginia] does not assume any of the United State's potential liability or responsibility for existing contamination" nor defend any claims against the United States for contamination created before Oct. 1, 1997. The agreement also contains a rebuttable presumption, in which for the first five years, it is assumed that any newly found contamination existed prior to Oct. 1, 1997.