All's a Fair Share in CERCLA and War: *Guam v. United States* and Military Responsibility for Superfund Cleanups

INTRODUCTION

In Alabama, harmful volatile organic compounds and metals from an Army depot contaminate the soil and groundwater of an already environmentally burdened, majority-Black community.[1] A former Army storage facility in Oregon, once a powder keg of explosive weapons, leaves chemical-laden wastewater percolating through the soil and groundwater of traditional hunting and gathering lands of the Confederated Tribes of the Umatilla Reservation.[2] And in Guam, a "280-foot mountain of trash" that residents say contains DDT and Agent Orange continues to leak hazardous waste into the Lonfit River and, from there, the Pacific Ocean.[3]

Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in 1980 to address these and other hazardous waste sites by establishing a cleanup trust fund—the Superfund—and authorizing the Environmental Protection Agency (EPA) to monitor and undertake cleanup activities.[4] In *Guam v. United States*, the Supreme Court resolved a circuit split on how entities that clean up Superfund sites regulated under CERCLA can pursue costs from other parties responsible for the hazardous waste.[5] *Guam* marks an important victory for communities affected by hazardous

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1. *Anniston Army Depot (Southeast Industrial Area), Anniston, AL*, EPA, https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.Healthenv&id=0400443 (last visited Feb. 16, 2022); *see also* Harriet Washington, *Monsanto Poisoned This Alabama Town – And People Are Still Sick*, BUZZFEED NEWS (July 26, 2019, 10:14 AM), https://www.buzzfeednews.com/article/harrietwashington/monsanto-anniston-harriet-washington-environmental-racism.

2. *Umatilla Army Depot (Lagoons), Hermiston, OR*, EPA, https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.cleanup&id=1000546 (last visited Feb. 16, 2022); John Notarianni, *A New Life Awaits for the Umatilla Chemical Weapons Depot*, OPB (Mar. 4, 2019, 12:00 AM), https://www.opb.org/news/article/oregon-umatilla-chemical-weapons-depot/.

3. Guam v. United States, 950 F.3d 104, 109 (D.C. Cir. 2020).

4. *Superfund History*, EPA (July 14, 2021), https://www.epa.gov/superfund/superfund-history#7.

5. *See* Guam v. United States, 141 S. Ct. 1608, 1612 (2021) (outlining that the Court was deciding whether "a contribution claim arises only if a settlement resolves liability under CERCLA, and not under some other law such as the Clean Water Act"); Guam v. United States, 950 F.3d 104, 114 (2020) (noting the split between the Second Circuit and the Third, Seventh, and Ninth Circuits on whether non-CERCLA settlements like those under the Clean Water Act trigger section 113(f)(3)(B)).

waste sites. It enables them to hold polluters accountable for cleanup costs and short-circuits legal maneuvering that previously allowed the United States military to escape its share of financial responsibility.

I. LEGAL BACKGROUND

CERCLA and its amendments provide the framework for managing and cleaning up Superfund sites designated by EPA.[6] CERCLA's objectives are to "clean up uncontrolled or abandoned hazardous-waste sites" and to enable EPA to "seek out those parties responsible for any release and assure their cooperation in the cleanup."[7] Potentially responsible parties (PRPs) under CERCLA include a range of actors, like companies, state and territorial governments (which CERCLA collectively refers to as "states"),[8] and federal agencies.[9] The statute does not let government PRPs off the hook: federal agencies, including military branches, are "subject to, and [must] comply with, [CERCLA] in the same manner and to the same extent,[] as any nongovernmental entity."[10]

The statute provides two mutually exclusive provisions that allow a PRP conducting cleanup to recoup costs from other PRPs: section 107(a), called the cost-recovery provision, and section 113(f)(3)(B), which, along with the rest of section 113(f), outlines what is called "contribution."[11] Section 107(a), the more generous of the two provisions,[12] allows a party conducting a cleanup to recover from another PRP all expenses of a response action incurred consistent with CERCLA's National Contingency Plan.[13] In other words, section 107(a) allows for joint and several liability for Superfund cleanup costs, meaning a PRP that conducts a cleanup can seek the full cleanup cost from any other PRP regardless

6. *Summary of the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund)*, EPA (Sept. 28, 2021), https://www.epa.gov/laws-regulations/summary-comprehensive-environmental-response-compensation-and-liability-act.

7. *Id*.

8. 42 U.S.C. § 9601(27).

9. 40 C.F.R. § 304.12(l), (m); *see also* 42 U.S.C. § 9601(21).

10. 42 U.S.C. § 9620.

11. *See* KATE R. BOWERS, CONG. RSCH. SERV., LSB10609, SUPREME COURT CLARIFIES CERCLA PROVISIONS FOR RECOUPING CLEANUP COSTS 1 (2021); 42 U.S.C. §§ 9607(a), 9613(f)(3)(B); *Guam*, 950 F.3d at 111 (noting that a party is limited to recouping its costs through § 113(f)(3)(B)'s contribution mechanism, to the exclusion of recouping through § 107(a)'s cost-recovery mechanism, when a settlement agreement triggers § 113(f)(3)(B)).

12. Brief of Amici Curiae States and Territories of the Commonwealth of the N. Mar. I., Alaska, Ark., D.C., Del., Haw., Idaho, Ill., Ind., Iowa, La., Mass., Mich., Neb., Nev., N.J., N.M., N.D., Ohio, Or., R.I., S.D., Utah, V., W. Va., and Wyo. at 3, Guam v. United States, 141 S. Ct. 1608, 1609 (2021) (No. 20-382).

13. 42 U.S.C. § 9607(a)(4)(B). The National Contingency Plan is the "federal government's blueprint for responding to both oil spills and hazardous substance releases." *National Oil and Hazardous Substances Pollution Contingency Plan (NCP) Overview*, EPA (Mar. 30, 2021), https://www.epa.gov/emergency-response/national-oil-and-hazardous-substances-pollution-contingency-plan-ncp-overview.

of how much that other PRP contributed to the hazardous waste.[14] Section 107(a) has a statute of limitations of six years from the initiation of cleanup.[15]

Section 113(f), on the other hand, follows the common-law concept of contribution.[16] According to Black's Law Dictionary, contribution is the "right that gives one of several persons who are liable on a common debt the ability to recover proportionately from each of the others when that one person discharges the debt for the benefit of all."[17] As a result, a court faced with a contribution action for the common debt of cleanup costs equitably allocates costs among PRPs.[18] Put differently, section 113(f)(3)(B) recognizes only several, but not joint, liability. Accordingly, a PRP conducting the cleanup must seek costs individually from every PRP that ever added hazardous waste to the site in proportion to the contamination that PRP created.[19] The provision thus can limit a party's ability to fully recoup its cleanup costs, especially if other PRPs are financially unable to pay for their portion of the hazardous waste.[20] Section 113(f)(3)(B)'s contribution mechanism starts when the PRP conducting cleanup enters into a settlement agreement with the United States or a state and expires three years after the settlement.[21]

A party must recoup costs via section 113(f)(3)(B)'s contribution mechanism when a settlement triggers the provision.[22] In *Guam*, the Court decided that contribution actions under section 113(f)(3)(B) are triggered only by CERCLA-specific settlements between the responsible party and the government, with the result that PRPs that enter non-CERCLA settlements may avail themselves of cost recovery under the more generous section 107(a).[23]

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14. *CERCLA Sections 107/113 Implications and Related Settlement Considerations*, FINDLAW (Jan. 17, 2018), https://corporate.findlaw.com/law-library/cercla-sections-107-113-implications-and-related-settlement.html; *see* Guam v. United States, 950 F.3d 104, 107 (D.C. Cir. 2020) (explaining that "any one PRP may be held responsible for the entire cost of a cleanup").

15. 42 U.S.C. § 9613(g)(2)(B).

16. *See* 42 U.S.C. § 9613(f).

17. *Contribution*, BLACK'S L. DICTIONARY (11th ed. 2019).

18. 42 U.S.C. § 9613(f)(1); *see also* In re Reading Co., 115 F.3d 1111, 1120 (3d Cir. 1997) (defining the relevant equitable factors to include "[t]he act of any one or several of a number of co-debtors, co-sureties, etc., in reimbursing one of their number who has paid the whole debt or suffered the whole liability, *each to the extent of his proportionate share*," quoting *Contribution*, BLACK'S L. DICTIONARY (5th ed.1979) (emphasis added)).

19. *See* Kenneth K. Kilbert, *Neither Joint nor Several Orphan Shares and Private CERCLA Actions*, 41 ENVT'L L. 1045, 1050 (describing that the plaintiff in a contribution action "cannot be made whole without suing all of the tortfeasors" and "proving each defendant's share of liability").

20. *See id.* at 1047, 1050 (explaining that "the risk of insolvency or unavailability of other tortfeasors—the orphan share risk—is on the plaintiff" in a contribution action and defining orphan shares as cleanup costs "attributable to . . . insolvent, dead, or defunct parties").

21. 42 U.S.C. § 9613(g)(3)(B).

22. Guam v. United States, 950 F.3d 104, 111 (D.C. Cir. 2020).

23. Guam v. United States, 141 S. Ct. 1608, 1612 (2021); Alexandra Kleeman & James Graves, *U.S. Supreme Court Clarifies Superfund Law and Provides Cautionary Tale*, 37 No. 4 WESTLAW J. CORP. OFFICERS & DIRS. LIAB. 20 (2021).

II. CASE BACKGROUND

At issue in *Guam* was the Territory of Guam's ability to recoup cleanup costs for the Ordot Landfill.[24] The dump's history follows the history of U.S. military colonialism:[25] The United States acquired Guam in 1898 during the Spanish-American War and has used the island to the Navy's military advantage ever since.[26] The Navy created the Ordot Landfill in the 1940s to dispose of military waste.[27] Until the dump was closed in 2011, both the Navy and Guam's municipal government added to the landfill, located in what was a valley, until it became "at least a 280-foot mountain of trash."[28] During the Korean and Vietnam Wars, the Navy allegedly used the landfill to get rid of munitions and toxic chemicals like DDT and Agent Orange.[29]

EPA initially evaluated Ordot as a Superfund site, placing it on CERCLA's National Priorities List (NPL) in 1983.[30] The agency changed course in 1986 to pursue enforcement against Guam under the Clean Water Act (CWA).[31] EPA and Guam reached a settlement regarding the territory's CWA liability in 2004.[32] The agreement required Guam to pay a penalty for its failure to comply with earlier enforcement orders, to close the landfill, and to construct a replacement landfill.[33]

Faced with $160,000,000 in remediation costs, Guam sued the United States in 2017 to recoup the Navy's share under section 107(a) and, in the alternative, section 113(f)(3)(B).[34] The United States filed a motion to dismiss for failure to state a claim, arguing that the CWA settlement triggered section 113(f)(3)(B) and that Guam's contribution action was therefore time-barred due to the three-year statute of limitations.[35] The district court disagreed, deciding that the case could go forward because the 2004 settlement was not under CERCLA, did not conclusively settle Guam's liability, and did not trigger section 113(f)(3)(B), leaving open cost recovery under section 107(a).[36]

In an interlocutory appeal by the United States, the D.C. Circuit reversed, finding that the 2004 settlement triggered section 113(f)(3)(B) and that, therefore, Guam could not pursue cost recovery and its contribution action was

24. 141 S. Ct. at 1611–12.

25. 950 F.3d at 108; *see also* Sasha Davis, *The US Military Base Network and Contemporary Colonialism Power Projection, Resistance and the Quest for Operational Unilateralism*, 30 POL. GEOGRAPHY 215, 221 (2011).

26. Petition for a Writ of Certiorari at 6, Guam v. United States, 141 S. Ct. 1608 (2021) (No. 20-382).

27. *Id.* at 7.

28. Brief for the Petitioner at 8, *Guam*, 141 S. Ct. 1608 (No. 20-382).

29. *Id.*

30. Guam v. United States, 341 F. Supp. 3d 74, 78 (D.D.C. 2018).

31. *Id.* at 78–79.

32. 141 S. Ct. at 1611.

33. 341 F. Supp. 3d at 79.

34. *Id.* at 80.

35. *Id.* at 77.

36. *Id.*

time barred.[37] The appellate court, while recognizing the result as "harsh" from Guam's perspective,[38] agreed with the United States and a majority of other circuits that the settlement resolved Guam's liability for some of a response action, but that section 113(f)(3)(B) required no more.[39]

Guam petitioned for a writ of certiorari on two questions: whether a non-CERCLA settlement can trigger section 113(f)(3)(B) and whether a settlement must conclusively establish the settling party's liability to trigger the contribution provision.[40] The Supreme Court reversed, holding that a settlement must be specific to CERCLA in order to trigger contribution and abstaining from addressing the second question.[41] Justice Thomas, writing for a unanimous Court in a mere five pages, explained that section 113(f)(3)(B) is clearly linked to the broader CERCLA framework, as evidenced by the section's language and the context of section 113's other contribution provisions.[42] The opinion also articulated that treating non-CERCLA settlements as if they resolved a PRP's CERCLA liability was counterintuitive, supporting section 113(f)(3)(B) being triggered only by CERCLA settlements.[43]

III. ANALYSIS

Despite the opinion's brevity, *Guam* has significant implications for the allocation of payment for Superfund cleanups. Outside of the specific context of Ordot Landfill, the holding prevents unpaid cleanup costs from becoming the responsibility of state governments that, as the unwilling payers of last resort, will be on the hook for unclaimed expenses. The holding is especially important for the many Superfund sites where the U.S. military is a PRP because it closes a legal loophole that allowed the government to insulate the military from the financial consequences of its hazardous waste.

A. Guam Protects States and Territories with Superfund Sites

The decision in *Guam* protects CERCLA's "spirit of cooperative federalism," which encourages PRPs, states, and the federal government to collaborate to clean up Superfund sites.[44] Cooperative federalism is valuable in the context of Superfund cleanups. As the Supreme Court opined in *Atlantic*

37. Guam v. United States, 950 F.3d 104, 107 (D.C. Cir. 2020).

38. *Id.* at 118.

39. *Id.* at 116.

40. Petition for a Writ of Certiorari, *supra* note 26, at ii.

41. 141 S. Ct. at 1612; *see also* Kleeman & Graves, *supra* note 23 (mentioning that the Court did not reach the second question).

42. 141 S. Ct. at 1613–14.

43. *Id.* at 1614.

44. Atl. Richfield Co. v. Christian, 140 S. Ct. 1335, 1356 (2020); *see also id.* at 1363 (Gorsuch, J., concurring in part and dissenting in part) ("Everything in CERCLA suggests that it seeks to supplement, not supplant, traditional state law remedies and promote, not prohibit, efforts to restore contaminated land.").

Richfield Co. v. Christian in the term preceding *Guam*, "[i]t is not 'paternalistic central planning' but instead the 'spirit of cooperative federalism [that] run[s] throughout CERCLA and its regulations.'"[45] For example, CERCLA mandates that a cleanup comply with applicable federal *and* state regulations as dictated by the characteristics of the specific site.[46] The statutory text also requires the federal government to incorporate state involvement in cleanup planning and defer to state-initiated cleanups.[47]

Guam empowers states to realize CERCLA's cooperative federalism by broadening the availability of cost recovery relative to contribution, which leaves fewer uncompensated cleanup costs to state governments. Because sections 107(a) and 113(f)(3)(B) are mutually exclusive, changes to their scopes is a zero-sum game: broadening the applicability of one restricts the availability of the other.[48] Allowing non-CERCLA settlements to trigger section 113(f)(3)(B)'s contribution mechanism and three-year statute of limitations as the United States proposed could create a "trap for the unwary," as Justice Kavanaugh termed it during oral argument.[49] After three years, the entity responsible for site cleanup would be left unable to seek money from other PRPs, as section 107(a) would be unavailable and section 113(f)(3)(B) would be time-barred.[50] Twenty-six states and territories from around the country and across the political spectrum, writing as amici in *Guam*, expressed their concern that state governments and other settling parties would be left to pay for cleanups if the Court adopted the United States' argument.[51] Assuaging those concerns, *Guam* maintains CERCLA's respect for states' role in cleanups by preventing costs of federally initiated cleanups from landing with states.

Guam's holding additionally means that parties are more likely to settle liability of contaminated areas.[52] If non-CERCLA settlements were to trigger section 113(f)(3)(B), states could wind up with greater cleanup costs, undermining the respect for states inherent in CERCLA's cooperative federalism. States often settle cases with parties responsible for pollution under their own environmental statutes as well as federal statutes like the CWA and CERCLA.[53] In settling, responsible parties save themselves and the government the time and expense of litigation, facilitating speedier cleanups financed by those responsible for hazardous waste.[54] Under the United States' theory,

45. *Id*. at 1356 (internal citation omitted).

46. Ronald G. Aronovsky, *A Preemption Paradox Preserving the Role of State Law in Private Cleanup Cost Disputes*, 16 N.Y.U. ENV'T L.J. 225, 275 n.236 (2008).

47. 42 U.S.C. §§ 9621(f)(1), 9605(h).

48. Brief of Amici Curiae States and Territories, *supra* note 12, at 10.

49. Transcript of Oral Argument at 53, Guam v. United States, 141 S. Ct. 1608 (2021) (No. 20-382).

50. *See* Brief of Amici Curiae States and Territories, *supra* note 12, at 11.

51. *Id.* at 12.

52. *See id.* at 11.

53. *Id*. at 10.

54. *Id*. at 11 (quoting W.R. Grace & Co.-Conn. v. Zotos Int'l, Inc., 559 F.3d 85, 94 (2d Cir. 2009)).

however, parties would be disincentivized from settling because a settlement would "suddenly trigger[] an exclusive three-year timer to discover the full extent of the problem, identify all other responsible parties, and bring suits against them—or else forfeit any possible CERCLA recovery down the road."[55] Because the Court rejected the United States' argument, PRPs are more likely to settle and conduct cleanup, resulting in less expense left to states and keeping CERCLA's balance between state and federal authority.

B. Guam Protects Communities Environmentally Impacted by Military Activity

Guam's ramifications are particularly important for states with communities impacted by environmentally harmful military activity. The United States holds a dual role as both enforcer of federal environmental statutes and, in the context of its armed forces, often a PRP in CERCLA cases. As a result, the federal government has considerable power and conflicting interests in dictating how pollution is cleaned up and who pays for the costs associated with cleanups. *Guam* prevents the federal government from exploiting this dual role by using legal strategy to escape financial responsibility for the military's environmental damage.

In reversing the D.C. Circuit's opinion, the Court closed a loophole that would have allowed the Navy to avoid paying for any cleanup at the Ordot Landfill.[56] EPA, as the enforcer in the United States' dual role, took administrative action against Guam pursuant to a provision of the CWA under which the United States cannot be liable.[57] As a result, under the CWA, Guam could not recover cleanup costs from the Navy.[58]

Prior to the settlement, EPA repeatedly told the territory that "CERCLA remedial action [was] unnecessary."[59] In retrospect, Guam attributed EPA's avoidance of CERCLA in the settlement to the United States having "every incentive *not* to inform Guam of its view that the decree started the shorter, three-year clock on seeking contribution."[60] With the United States immune under the CWA and Guam unwarily failing to take advantage of its single opportunity to recoup costs, the United States attempted to "have its cake and eat it too" by

55. Reply Brief for Petitioner at 22, Guam v. United States, 141 S. Ct. 1608 (2021) (No. 20-382).

56. *See* Guam v. United States, 950 F.3d 104, 118 (D.C. Cir. 2020 (noting that the "practical effect" of the D.C. Circuit's decision was "that Guam cannot now seek recoupment from the United States for [the Ordot Landfill] contamination because its cause of action for contribution expired in 2007.").

57. Petition for a Writ of Certiorari, *supra* note 26, at 8 ("While the United States is subject to liability under CERCLA (see 42 U.S.C. § 9620), it is not subject to liability under the applicable CWA provision, 33 U.S.C. § 1319. *See* United States Dep't of Energy v. Ohio, 503 U.S. 607, 624 (1992).").

58. *Id*.

59. *Id*. at 8–9 (citing EPA, SUPERFUND RECORD OF DECISION: ORDOT LANDFILL 12–14 (Sept. 1988) and EPA, FIVE YEAR REVIEW OF THE NO ACTION DECISION AT THE ORDOT LANDFILL SUPERFUND SITE IN GUAM 3–5 (Sept. 1993)).

60. *Id*. at 22.

insulating itself from responsibility for the Ordot Landfill.[61] In so doing, the Department of Defense (DOD) fell short of its mission to ensure the security of the country—which arguably includes its environmental security—by refusing to clean up its mess through legal maneuvering.[62] The Court tacitly precluded this circumvention of cleanup costs at military sites by establishing that only CERCLA-specific settlements start the clock on section 113(f)(3)(B) contribution actions.

Guam likely applies to many other jurisdictions where the United States military has contributed to hazardous waste. The federal facilities on the NPL are overwhelmingly the responsibility of the military.[63] Of the 157 federal facilities on the NPL, 129 have a branch of DOD listed as the primary agency.[64] This number does not account for federal facilities where EPA has taken enforcement action under an environmental statute other than CERCLA, like it did under the CWA for the Ordot Landfill.[65] The number also does not include sites that could be subject to CERCLA enforcement but either have not been evaluated or are insufficiently urgent for listing on the NPL.[66] The Formerly Used Defense Sites Program in the U.S. Army Corps of Engineers cleans up the military's CERCLA sites.[67] The Corps reported in 2019 that 1,736 of its 5,440 identified sites had not yet been cleaned up pursuant to CERCLA.[68] The Government Accountability Office in 2010 reported that DOD had more than 50,000 sites requiring cleanup in addition to its NPL sites.[69] Not all of these sites necessarily have civilian entities in the same position as Guam that, under the D.C. Circuit's decision,

61. Transcript of Oral Argument, *supra* note 49, at 56–57.

62. *See About*, U.S. DEP'T OF DEF., https://www.defense.gov/about/ (last visited Feb. 17, 2022); Jim Garamone, *Scientists, Policy Experts Assess Environment's Impact on Stability, Defense Strategy*, DOD NEWS (Aug. 10, 2020), https://www.defense.gov/News/Feature-Stories/Story/Article/2307629/scientists-policy-experts-assess-environments-impact-on-stability-defense-strat/ (describing DOD's Resource Competition, Environmental Security and Stability group and how environmental factors have affected military success).

63. *See Cleanups at Federal Facilities National Priorities List Sites*, EPA (July 22, 2022), https://www.epa.gov/fedfac/national-priorities-list-sites.

64. *Id*. (counting entries with the Defense Logistics Agency, Department of Defense, National Guard, US Air Force, US Army, US Coast Guard, and US Navy as agencies and excluding entries with NPL Status of "DELETED").

65. *See, e.g.*, *Civil Cases and Settlements*, EPA (Feb. 15, 2022), https://cfpub.epa.gov/enforcement/cases/ (listing settlements under federal air, water, and waste and chemical statutes involving military branches as well as other government entities and private parties).

66. *See* EPA, EPA-540-R-11-021, THIS IS SUPERFUND: A COMMUNITY GUIDE TO EPA'S SUPERFUND PROGRAM 4, 6–7 (2011) (explaining that the public helps EPA "discover" Superfund sites, after which EPA conducts a preliminary assessment to determine whether a site should be on the NPL); U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-633T, HAZARDOUS WASTE CLEANUP: OBSERVATIONS ON STATES' ROLE, LIABILITIES AT DOD AND HARDROCK MINING SITES, AND LITIGATION ISSUES 3 (2013) (noting that of the over 40,000 sites proposed in the past 30 years, only a few thousand have made it onto the NPL).

67. *Formerly Used Defense Sites Program*, U.S. ARMY CORPS OF ENG'RS, https://www.usace.army.mil/missions/environmental/formerly-used-defense-sites/ (last visited Jan. 11, 2022).

68. *Id.*

69. U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-633T, *supra* note 66, at GAO Highlights.

could have been responsible for cleanup costs without recourse. Nonetheless, the holding in *Guam* provides assurance to potentially thousands of communities that the federal government will not use its dual role to escape financial responsibility for military pollution.

The decision in *Guam* is also important because DOD has a pattern of not following CERCLA requirements aimed at holding PRPs accountable for orderly cleanups.[70] In the past, DOD has taken more than a decade to enter into statutorily mandated interagency agreements with EPA to coordinate NPL site cleanups,[71] conducted cleanup evaluations without EPA's input,[72] and rejected the Government Accountability Office's recommendation that it institute standardized procedures for requesting public health assessments at NPL and non-NPL sites.[73] The Court's decision provides a tool to compel DOD to pay for its role to communities involved in cleaning up pollution caused in part by the military.

Environmental justice communities are often impacted by military activity and thus stand to gain from *Guam*'s holding.[74] Figure 1 depicts FUDS sites with active cleanups in California in relation to census blocks in the 90th percentile nationally of EPA's EJScreen indexes for air toxics cancer risk, air toxics respiratory hazard, and major direct dischargers to water. EJScreen is EPA's environmental justice screening tool that combines environmental and demographic indicators to identify areas with potential environmental justice issues.[75]

70. *See id.* at 10–13.

71. *Id*. at 10.

72. *Id*. at 11.

73. *Id*. at 12–13.

74. *See, e.g.*, Washington, *supra* note 1; Rick Bragg & Glynn Wilson, *Burning of Chemical Arms Puts Fear in Wind*, N.Y. TIMES (Sept. 15, 2002) (describing that the Army incinerated chemical weapons, including nerve agents, at an depot in Anniston, Alabama, a majority-Black city that has suffered from PCB pollution from Monsanto for decades, with limited disaster preparedness).

75. *Purposes and Uses of EJScreen*, EPA (Feb. 18, 2022), https://www.epa.gov/ejscreen/purposes-and-uses-ejscreen.

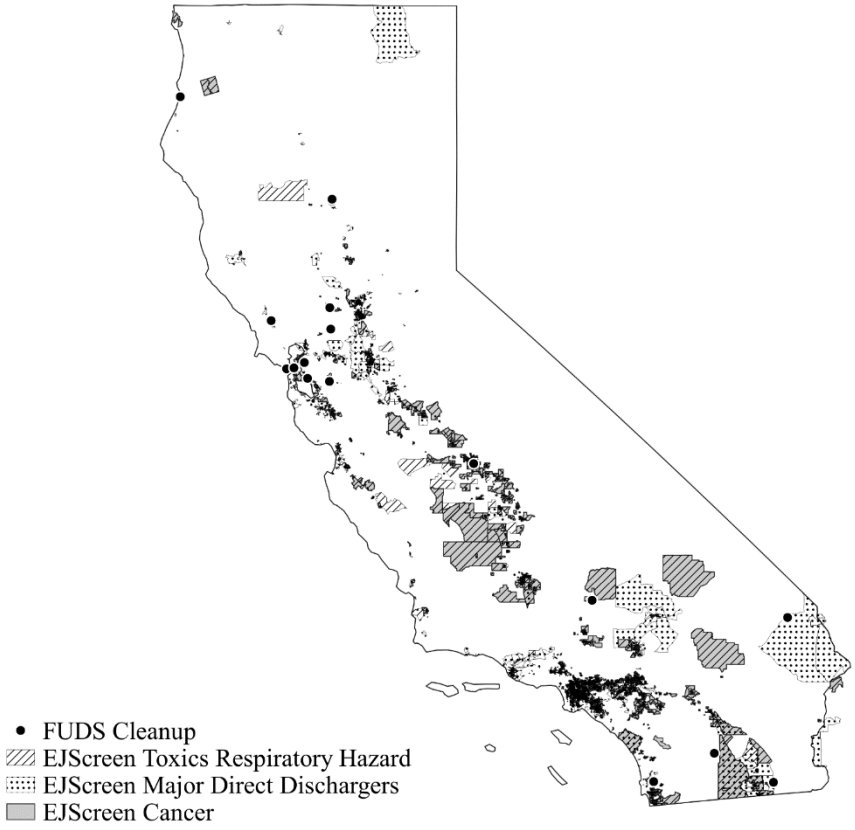

Fig. 1 *FUDS sites with active cleanups in California overlaid on areas in census blocks with the highest 10 percent of EJScreen scores nationwide for air toxics cancer risk, air toxics respiratory hazard, and major direct dischargers to water.*[76]

Guam may provide some respite to these and other communities that face layered environmental hazards by protecting them from shouldering the financial burden of military site cleanup on top of those sites' health burdens. States may now sue the federal government to recoup costs they spend in cleaning up these sites if they have entered into a settlement under a state or federal statute other than CERCLA, even more than three years after the settlement.

76. Map by the author using data from *Formerly Used Defense Sites (FUDS), All Data, Reported to Congress in FY2019*, U.S. ARMY CORPS OF ENG'RS GEOSPATIAL (Nov. 30, 2021), https://geospatial-usace.opendata.arcgis.com/maps/3f8354667d5b4b1b8ad7a6e00c3cf3b1/about; *Index of /EJSCREEN/2020*, EPA (July 1, 2021), https://gaftp.epa.gov/EJSCREEN/2020/.

CONCLUSION

The Supreme Court in *Guam* clarified a minor but important detail of CERCLA to ensure that states and territories, especially those impacted by U.S. military activity, that enter into settlements under environmental laws have clear-cut options to recover cleanup costs. *Guam*'s holding maintains CERCLA's cooperative federalism and respect for states' role in hazardous waste cleanup by making it less likely that states and territories will be left as the last-resort source of funding. By closing a legal loophole, the holding also protects communities impacted by military activity and prevents the federal government from evading its financial cleanup duties.

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