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COST RECOVERY BY PRIVATE PARTIES UNDER CERCLA: PLANNING A RESPONSE ACTION FOR MAXIMUM RECOVERY*

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I. BACKGROUND: AN ACTION WHOSE TIME HAS COME

A. *The Issue*

During the waning hours of the Carter Administration, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)[1] in response to public outcry regarding

1. Pub. L. No. 96-510, 94 Stat. 2767 (codified at 42 U.S.C. §§ 9601-9657 (1982)), *as amended by* the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (codified at 42 U.S.C. §§ 9601-9675 (1988)).

The United States District Court for the Western District of Missouri commented on the manner in which Congress passed CERCLA, stating: "CERCLA is . . . a hastily drawn piece of compromise legislation, marred by vague terminology and deleted provisions. . . . [N]umerous important features were deleted during the closing hours of the Congressional session." United States v. Northeastern Pharmaceutical and Chem. Co., 579 F. Supp. 823, 838 n.15 (W.D. Mo. 1984), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

toxic and hazardous waste disposal.[2] The primary purpose of CERCLA was to facilitate government cleanup of hazardous substances[3] and to mitigate damage to the public health and welfare, and to the environment.[4] To help serve this purpose, CERCLA established the Hazardous Substance Response Trust Fund (Superfund)[5] to provide money for both immediate government responses and long-term cleanups "where a liable party does not clean up, cannot be found, or cannot pay the cost of cleanup and compensation."[6] Even though Congress originally created a $1.6 billion Superfund program and in 1986 increased the amount to $8.5 billion,[7] the estimated cost of waste site cleanups far exceeds the money available from the Superfund.[8]

Because funds are limited and the total number of contaminated sites in the United States is so large, CERCLA has enjoyed only limited

2. *See* H.R. REP. No. 1016, 96th Cong., 2d Sess., pt. 1, at 17-18 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6119-20; WILLIAM H. FRANK & TIMOTHY B. ATKESON, SUPERFUND: LITIGATION AND CLEANUP 1 (BNA Special Report) (1985) (recounting that at Love Canal in 1978, then-President Carter declared a state of emergency that was followed by the discovery of thousands of other dumpsites, "alarming the public and mobilizing the Administration and the Congress"); *see also* Elizabeth T. Luster, *The Comprehensive Environmental Response, Compensation and Liability Act of 1980: Is Joint and Several Liability the Answer to Superfund?*, 18 NEW ENG. L. REV. 109, 114-15 (1982) (pointing out that only ten per cent of the 77.1 billion pounds of hazardous waste generated annually in the United States is disposed of in a safe manner; the remaining waste is dumped in an environmentally unwise manner).

3. FRANK & ATKESON, *supra* note 2, at 2 ("[CERCLA] was designed to bring order to what was perceived in Congress and in the legal profession as redundant and inadequate federal laws dealing with hazardous substance cleanup and compensation."); *see also* New York v. Shore Realty Corp., 759 F.2d 1032, 1040 (2d Cir. 1985) (reiterating that CERCLA applies primarily to the cleanup of hazardous waste sites and to emergency responses to spills).

A "hazardous substance" is one identified as such under several environmental statutes listed in 42 U.S.C. § 9601(14) (1988), or any substance which the Environmental Protection Agency (EPA) identifies as hazardous because it "may present substantial danger to the public health or welfare or the environment." *Id.* § 9602(a).

4. FRANK & ATKESON, *supra* note 2, at 1 (citing the Committee on Environment and Public Works, S. REP. No. 11, 99th Cong., 1st Sess. 1 (1985)) ("Congress enacted the federal superfund in 1980 to . . . protect public health and the environment from releases of hazardous substances and waste."); *see, e.g.*, Exxon Corp. v. Hunt, 475 U.S. 355, 358-59 (1986).

5. CERCLA § 221, 94 Stat. at 2801 (codified as amended in scattered sections of 26 & 42 U.S.C.).

6. *Id.*

7. *See* SARA § 111(a), 42 U.S.C. § 9611(a).

8. Even at the time of CERCLA's passage, the EPA estimated that the hazardous waste problem would cost over $44 billion to remedy. H.R. REP. No. 1016, *supra* note 2, at 70-71, *reprinted in* 1980 U.S.C.C.A.N. at 6146.

success.[9] One study by the General Accounting Office estimated the potential hazardous waste sites to number between 130,000 and 425,000.[10] The EPA already has a backlog of more than 30,000 potential Superfund sites.[11] In addition, there are many sites that are too small or that pose an insufficient health risk to warrant the use of limited Superfund monies.[12] Even sites not currently involving hazardous substances should be viewed with concern because of the possibility of contamination during prior use.[13]

Additionally, the EPA may only fund remedial actions at sites that have been placed on the National Priorities List (NPL).[14] The EPA had placed only 1,187 sites on the National Priority List as of August 1990[15] and had commenced only about 140 long-term or major cleanups as of November 1989.[16] The large number of contaminated sites in comparison to the number of sites on the NPL indicates that most hazardous waste sites are unlikely to be cleaned up by the EPA because the number of sites in need of cleanup simply exceeds the EPA's resources.[17]

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9. In a 1989 review of the CERCLA program the EPA stated: "[A]fter nine years of experience the most important lesson may be that the Superfund program faces a workload stretching well into the next century, and would do so even if everything had gone right from the very start." OFFICE OF EMERGENCY AND REMEDIAL RESPONSE, U.S. EPA, A MANAGEMENT REVIEW OF THE SUPERFUND PROGRAM 3 (1989).

10. U.S. GEN. ACCT. OFF., SUPERFUND: EXTENT OF NATION'S POTENTIAL HAZARDOUS WASTE PROBLEM STILL UNKNOWN 3 (1987). At the time Congress adopted CERCLA, the EPA estimated that there were between 30,000 and 50,000 hazardous waste sites in the United States, and that 1,200 to 2,000 of these sites posed a serious risk to public health. H.R. REP. No. 1016, *supra* note 2, at 18, *reprinted in* 1980 U.S.C.C.A.N. at 6120.

11. *10 New Superfund Sites Proposed by EPA; Lowest Number in History of Annual NPL Updates*, 20 Env't Rep. (BNA) 112, 112 (May 12, 1989).

12. For a comprehensive discussion of the magnitude of the hazardous waste problem, see Luster, *supra* note 2, at 114-20.

13. *See* William A. Anderson, II & Melinda E. Taylor, *Representing Buyers*, NAT. RESOURCES & ENV'T, Fall 1988, at 3, 6 ("While it may be a slight overstatement to declare that *everything* is a hazardous substance, the exceptions are narrow and few. And it is perhaps only slightly more of an overstatement to say that any site in the United States is a potential CERCLA site.").

14. The National Priorities List (NPL) was established pursuant to CERCLA § 105(a)(8)(B), 42 U.S.C. § 9605(a)(8)(B). It lists the sites that the EPA intends to address by conducting remedial action. 40 C.F.R. pt. 300, app. B (1991).

15. *EPA Adds 106 Sites to Final NPL, Leaving 20 Sites Proposed for List*, 21 Env't Rep. (BNA) 846, 846 (Aug. 31, 1990) (stating that the EPA, on August 28, 1990, made the decision to add 106 sites to the NPL, which included 116 federal facilities). The EPA originally estimated that up to 2,200 sites would be included in the list. FRANK & ATKESON, *supra* note 2, at 13 nn.108-10.

16. *Cf.* 135 CONG. REC. E4104 (daily ed. Nov. 21, 1989) (statement of Rep. Anderson).

17. *Industry and Environmentalists Square Off over Superfund NCP Deferral Policy*, INSIDE EPA WKLY. REP., Mar. 31, 1989, at 7, 8 (pointing out that various industrial groups assert that "there are more sites needing cleanup than resources provide").

The current number of hazardous waste sites cannot be cleaned up with the available government resoures. The EPA has difficulty maintaining a staff with the necessary technical skills to perform or to supervise the work of private contractors. In addition, the Superfund, although large

A similar situation exists at the state level. At least twenty-nine states have enacted legislation modeled after the federal hazardous waste cleanup scheme.[18] As with CERCLA, enforcement of these state statutes is limited by the complexity of the legislation, inadequate funds and too few personnel. Thus, the formidable task of cleaning up hazardous waste sites in the United States seems beyond the ability of the federal and state governments alone.

If hazardous waste sites are to be cleaned up, most of the work will have to be done by private parties who may then use the legal system, including CERCLA, to recoup as many of their expenditures as possible from other legally responsible parties. Private parties will effectively be forced to clean up by state and local governments, potential land purchasers, lending institutions, and land owners and their insurance companies who are concerned with the potential for becoming defendants in private tort actions. Private cost recovery is consistent with Congress' intent that responsible parties provide the bulk of cleanup costs.

B. *An Alternative*

Based on these realities, one alternative to the government-initiated cleanup is a private cleanup[19] followed by a private cost recovery action based on section 107 of CERCLA.[20] The private cost recovery action is becoming an important part of hazardous waste litigation.[21] Private parties faced with the potential costs of cleanup or serious limitations on the use or transfer of their land can seek to make other responsible parties

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in comparison to the budgets of other environmental programs, is not ample to finance the tremendous costs of hazardous waste cleanup in the United States.

18. *See Status of State Laws and Regulations: State Law Update*, 20 Env't Rep. (BNA) 1454, 1458-61 (Dec. 29, 1989) (listing the titles or regulations of several state solid waste management laws and their revisions).

19. *See, e.g.*, James R. Arnold, *Toxic Torts and the Private Recovery of Response Costs Under CERCLA*, NAT. RESOURCES & ENV'T, Spring 1988, at 23, 23-25. At least one state has held, commensurate with CERCLA, that private party actions are contemplated by its state hazardous waste statutory scheme. On January 30, 1991, the New Jersey Supreme Court held that a private right of action is implied under New Jersey's Environmental Cleanup Responsibility Act. Dixon Venture v. Joseph Dixon Crucible Co., 584 A.2d 797, 799 (N.J. 1991).

20. 42 U.S.C. § 9607. Subsections 107(a)(4)(A) and (B) provide generally that potential defendants are liable for certain cleanup costs incurred "by any other person" ("other" meaning other than the United States or any state government or Indian tribe). *Id.* at § 9607(a)(4)(A), (B).

21. *See* Daniel Riesel, *Private Hazardous Substance Litigation*, A.L.I.-A.B.A. COURSE OF STUDY C534, 1991 WL 547 (1990) (proclaiming that the private action under CERCLA § 107 is "emerging as the predominant form of hazardous substance litigation"). The private cause of action also provides an incentive for private parties (some of whom may be subject to liability themselves) to take the initiative in cleaning up contaminated sites as quickly and completely as possible. City of New York v. Exxon Corp., 633 F. Supp. 609, 616-17 (S.D.N.Y. 1986).

pay all or part of the cleanup costs. Thus, parties are bringing an increasing number of suits for recovery of hazardous substance cleanup costs where the government may have no direct involvement in the litigation or in the cleanup efforts.[22]

Private response recovery actions concerning the use of land are changing the framework of a vast array of business transactions. Those who previously failed to consider the environmental repercussions of their business activities now recognize the significance of their potential environmental liability. Banks, holding companies, lenders, insurance companies, and real estate developers (among others) are making changes in long-standing business practices to protect themselves from liability for hazardous waste cleanup.[23] Thus, an understanding of the requisites for a private party action under section 107 action is essential to all practitioners, whether they specialize in environmental law or encounter CERCLA concerns through practice in other fields. Accordingly, this article will describe in detail the use of a CERCLA section 107 action by a private party, including a discussion of the potential plaintiffs and defendants, the remedies, and lastly, the defenses which might be raised to such an action.

II. PLAINTIFFS

A private cost recovery action is available to a "person" who can prove the necessary elements of a claim under subsections 107(a)(1)-(3) and (a)(4)(B).[24] "Person" is broadly defined under CERCLA to encompass not only natural persons, but also corporations, organizations, and government entities.[25]

22. *See, e.g.*, Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989); Channel Master Satellite Sys. v. JFD Elecs. Corp., 748 F. Supp. 373 (E.D.N.C. 1990); General Elec. Co. v. Litton Business Sys., 715 F. Supp. 949 (W.D. Mo. 1989), *aff'd sub nom.* General Elec. Co. v. Litton Indus. Automation Sys., 920 F.2d 1415 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1390 (1991).

23. Barnett M. Lawrence, *Liability of Corporate Officers Under CERCLA: An Ounce of Prevention May Be the Cure*, 20 Envtl. L. Rep. (Envtl. L. Inst.) 10,377, 10,377-78 (Sept. 1990) (stating that "CERCLA's liberal liability scheme has been a fertile ground for litigation seeking to expand the net of liability; banks, insurance companies, real estate developers, and corporate holding companies now regularly evaluate their environmental liability exposure") (editors' summary); *see, e.g.*, Brian G. Burby, *An Overview of Methods for Conducting Property Transaction Site Assessments*, 20 Env't Rep. (BNA) 1451, 1451-52 (Dec. 29, 1989) (asserting the need to conduct environmental assessments in commercial and industrial real estate transactions). For a discussion of the effect of potential environmental liability on lending institutions, see *infra* part III.E.

24. 42 U.S.C. § 9607(a)(1)-(3), (a)(4)(B) (1988).

25. "The term 'person' means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." CERCLA § 101(21), 42 U.S.C. § 9601(21).

Some debate has centered around the text of subsection 107(a)(4)(B) which states that a claim is available to "any *other* person."[26] This language has been used to raise the issue of whether, in order to qualify to bring an action against a potentially responsible party, one must have liability under CERCLA. Most courts have rejected this argument.[27] Any person who can satisfy the elements of a section 107 claim[28] may bring suit, regardless of whether that person is liable under CERCLA.

III. POTENTIAL DEFENDANTS

Section 107(a) lists four categories of potential defendants[29] which may be liable for reimbursement of funds expended to clean up hazardous waste sites:

> (1) the owner and operator of a vessel or a facility,
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances . . . and
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities . . . or sites selected by such person . . . .[30]

Under section 107(a), potential liability can be based on a defendant's legal relationship to a site and is not necessarily derived from any particular act or omission of the CERCLA defendant. Rather, CERCLA's expansive language brings within its scope parties who are neither physically nor morally responsible for the environmental harm to be

26. *See id.* § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B) (emphasis added).

27. *See, e.g.*, General Elec. v. Litton Business Sys., 715 F. Supp. 949, 956 (W.D. Mo. 1989), *aff'd sub nom.* General Elec. Co. v. Litton Indus. Automation Sys., 920 F.2d 1415 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1390 (1991); Polger v. Republic Nat'l Bank, 709 F. Supp. 204, 209 (D. Colo. 1989). *But see* D'Imperio v. United States, 575 F. Supp. 248, 253 (D.N.J. 1983).

28. For a discussion of the elements of a § 107 cost recovery action, see *infra* part IV.

29. Part III is intended to provide only a general overview of potential defendants in a private cost recovery action. A detailed evaluation of such defendants is beyond the scope of this article.

30. 42 U.S.C. § 9607(a).

remedied.[31] Judicial decisions have further expanded the pool of potential defendants.[32] CERCLA terms such potential defendants as Potentially Responsible Parties (PRPs).[33] The following sections briefly discuss the categories of parties subject to a private action based on section 107.

A. *Owners and Operators*

The terms "owner" and "operator" are construed broadly with little regard given to fault or length of ownership. Liability can extend to all current owners and operators even when the disposal or release of hazardous substances occurred prior to their period of ownership.[34] Section 107(a)(2) further extends liability to past owners and operators.[35] However, liability attaches to a past owner only if hazardous substances were disposed during the past owner's period of ownership or if the past owner knew of a release or threatened release and did not disclose such knowledge.[36]

B. *Transporters*

Section 107(a)(4) extends liability to transporters only when they actually selected the subject disposal site.[37] The judiciary has enforced this requirement.[38] Thus, most transporter liability cases center around the factual question of whether or to what extent the transporter was responsible for selecting the disposal facility.[39] Courts generally reason

31. Margot A. Metzner, *Traps for the Unwary: The Expanding Liability Under CERCLA for Past Owners, Current Owners, and "Arrangers,"* 4 Toxics L. Rep. (BNA) 959, 964 (Jan. 24, 1990).

32. *Id.* at 963-64; *see, e.g.*, United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1384 (8th Cir. 1989) (holding that defendant pesticide manufacturers, by virtue of their relationship with pesticide formulator, "arranged for" disposal because generation of hazardous wastes was inherent in formulation process); United States v. Velsicol Chem. Corp., 701 F. Supp. 140, 142-43 (W.D. Tenn. 1987) (holding that the business relationship between defendant pesticide manufacturers and pesticide formulator was sufficient to constitute "arranging for" disposal in light of defendants' knowledge that there would be spills and losses during blending and that wastes would be generated during formulation).

33. CERCLA § 104(a)(1), 42 U.S.C. § 9604(a)(1).

34. New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985).

35. 42 U.S.C. § 9607(a)(2). Further, a defendant may be liable for its pre-CERCLA acts. *See, e.g.*, United States v. Hooker Chems. & Plastics Corp., 680 F. Supp. 546, 557-59 (W.D.N.Y. 1988) (holding defendant Occidental Chemical Corporation liable as past owner of part of Love Canal that it had used for waste disposal).

36. CERCLA §§ 101(35)(c), 107(a)(2), 42 U.S.C. §§ 9601(35)(c), 9607(a)(2); *see* discussion *infra* part V.B. (regarding sellers' contractual attempts to limit CERCLA liability).

37. 42 U.S.C. § 9607(a)(4).

38. However, a transporter who causes a spill of hazardous waste during transportation is liable under CERCLA. Environmental Transp. Sys. v. Ensco, Inc., 763 F. Supp. 384, 392 (C.D. Ill. 1991).

39. *See* Hassayampa Steering Comm. v. Arizona, 32 Env't Rep. Cas. (BNA) 1396, 1400 (D.

that where a transporter had no involvement in site selection, its connection with the waste material is very attenuated, and therefore, liability should not be imposed; liability should be reserved for transporters who take a more active role.[40]

C. *Arrangers*

As with "owner" and "operator," the term "arranged for disposal" has been construed broadly. Recent judicial decisions have declined to require an intent to control disposal as a requisite to section 107(a)(3) liability.[41] Such an intent requirement would run contrary to CERCLA's remedial scheme and frustrate the statute's goals.[42] For example, liability based on arrangement for disposal need not be based on arrangement in the literal sense, but may simply exist where generation of hazardous waste is inherent in a process: such as where a formulator mixes a manufacturer's active ingredients with inert materials to produce a new product. This generation of hazardous waste may be inherent because of the likelihood of spills, or because waste will result from the cleaning of equipment, or from production activities. Thus, merely producing a product that generates hazardous waste can make one a PRP within the meaning of section 107(a)(3).[43]

D. *Corporations, Corporate Officers, and Shareholders*

Consistent with the broad application of CERCLA liability, courts have held corporations, corporate officers, and shareholders liable as CERCLA PRPs.[44] CERCLA's definition of "persons" subject to liability includes corporations.[45] While neither successor nor parent corporations are specifically mentioned in the statute, they have still been held liable as "owners" or "operators" if they were directly involved in the day-to-day operations of the subject corporation.[46] The United States

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Ariz. 1990) (state's administration of manifest system did not preclude transporter from selecting site); *see also* United States v. Western Processing Co., 5 Toxics L. Rep. (BNA) 1235 (W.D. Wash. Jan. 11, 1991) (denying transporters' motions for summary judgment because genuine issues of material fact existed regarding who designated the dump site).

40. *See* cases cited *supra* note 39.

41. United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1379-80 (8th Cir. 1989); *see also* United States v. Velsicol Chem. Corp., 701 F. Supp. 140, 142-43 (W.D. Tenn. 1987).

42. *Aceto*, 872 F.2d at 1380.

43. *See id.* at 1376; *Velsicol*, 701 F. Supp. at 142.

44. For a discussion of corporate veil as a defense to CERCLA liability, see *infra* part V.C.

45. CERCLA § 101(21), 42 U.S.C. § 9601(21).

46. *See* Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 92 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989) (finding successor corporation liable for response costs); United

District Court for the District of Missouri found a successor corporation liable for CERCLA cleanup costs in *United States v. Mexico Feed & Seed Co.*[47] The court found that the successor corporation was liable for hazardous waste cleanup costs that resulted from the acts of its predecessor. The court considered various factors in determining successor liability.[48] Ultimately, the court held the successor corporation liable because the successor retained the same employees and physical facilities, continued the same business, retained the prior company's name, and retained almost all of its operating assets.[49]

Contrary to the usual application of officer immunity, courts have also held corporate officers liable under CERCLA.[50] However, the application of corporate officer liability is very fact-specific, and as such varies from case to case.[51] For example, no court has found a corporate officer to be liable merely because of his status as an officer.[52] Some decisions focus on an officer's ability to control operations while others focus on an officer's actual conduct.[53]

States v. Crown Roll Leaf, Inc., 29 Env't Rep. Cas. (BNA) 2018, 2024 (D.N.J. 1988) (following the Third Circuit's reasoning in *Smith Land*); *see also* United States v. Kayser-Roth Corp., 724 F. Supp. 15 (D.R.I. 1989) (holding that a parent corporation will be liable as an "operator" only if it is actively involved in the activities of the subsidiary, not merely because of ownership or general authority to control), *aff'd*, 910 F.2d 24 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 957 (1991). Applying a more stringent test, the Fifth Circuit would allow the parent to be liable where the corporate veil has been pierced, and the parent had complete domination of finances, policies, and practices of the subsidiary. Joslyn Corp. v. T.L. James & Co., 696 F. Supp. 222 (W.D. La. 1988), *aff'd*, 893 F.2d 80 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1017 (1991). For an extensive discussion of successor liability under CERCLA, see David C. Clarke, Note, *Successor Liability Under CERCLA: A Federal Common Law Approach*, 58 GEO. WASH. L. REV. 1300 (1990).

47. 764 F. Supp. 565 (E.D. Mo. 1991).

48. These factors include whether the successor: (1) retains the same employees; (2) retains the same supervisory personnel; (3) retains the same production facilities in the same location; (4) continues producing the same products; (5) retains the same name; (6) maintains continuity of assets and general business operations; and (7) whether the successor holds itself out to the public as the continuation of the previous corporation.

Id. at 572-73 (quoting United States v. Distler, 741 F. Supp. 637, 642-43 (W.D. Ky. 1990)).

49. *Id.* at 573.

50. *See* United States v. Northeastern Pharmaceutical & Chem. Co. (NEPACCO), 810 F.2d 726, 745-46 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); Kelley v. ARCO Indus., 723 F. Supp. 1214 (W.D. Mich. 1989); United States v. Bliss, 667 F. Supp. 1298 (E.D. Mo. 1987); *see also* Lawrence, *supra* note 23, at 10,377 (stating that the government may choose to pursue corporate officers as part of enforcement strategy).

51. *Kelley*, 723 F. Supp. at 1220 (stating that the test for liability of corporate individuals is heavily fact-specific, requiring evaluation of the total situation).

52. Lawrence, *supra* note 23, at 10,378 (stating that the broadest possible standard of officer liability is that based solely on one's status as corporate officer, but that no court has gone to this extreme).

53. *Id.* at 10,379. Cases in which the court emphasized the authority to control include New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985) (holding sole officer and stockholder of company liable under CERCLA) and Vermont v. Staco, Inc., 684 F. Supp. 822, 831-32 (D. Vt. 1988) (imposing personal liability on executive officers because they participated in general management

In addition, and also contrary to the general rule of shareholder immunity, individual shareholders may be liable for costs of cleanup if they had an active role in corporate decision making.[54] In *United States v. Northernaire Plating Co.*,[55] the court held the sole shareholder (who was also the president of the corporation) liable as an operator under CERCLA because of his responsibility for arranging for the disposal of hazardous substances.[56] In *International Clinical Laboratories, Inc. v. Stevens*,[57] the court also found that a principal shareholder of a corporation (who was also the president) was potentially subject to CERCLA liability.[58] Clearly, not only corporations, but their officers and shareholders remain subject to CERCLA liability.

E. *Secured Creditors*

In an effort to protect secured creditors from CERCLA liability, Congress created a specific exemption for secured creditors.[59] To avoid liability, a creditor must demonstrate that it did not participate in managing the contaminated facility, and that it holds indicia of ownership to

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and control of company), *rescinded in part, vacated in part*, No. CIV. 86-190, 1989 WL 225428 (D. Vt. Apr. 20, 1989). Defendant's actions consisted of "decisions that related to the managing businesses and the marketing businesses and all the overall operations of the company." *Id.* at 831 n.5.

Cases in which the court emphasized personal participation of an officer include *NEPACCO*, 810 F.2d at 743, 745 (stating that authority to control the handling and disposal of hazardous substances is critical, but finding liability because corporate officers actually participated in CERCLA violations and in related corporate decision-making), *cert. denied*, 484 U.S. 848 (1987), United States v. Ward, 618 F. Supp. 884, 894-95 (E.D.N.C. 1985) (holding corporate officer of company liable because he personally arranged for disposal of polychlorinated biphenyls (PCBs)), and United States v. Conservation Chem. Co., 619 F. Supp. 162, 190 (W.D. Mo. 1985) (stating that corporate officers who actively participate in management of disposal facility can be held personally liable and holding liable the officer personally involved in activities leading to contamination, including establishment of layout of site, supervision of site construction, and development of waste treatment processes). *See also* United States v. Bliss, 667 F. Supp. 1298 (E.D. Mo. 1987).

54. *See NEPACCO*, 810 F.2d at 745 (finding major shareholder and officer liable because imposing liability on corporation but not on those who actually make decisions would be inconsistent with congressional intent); Columbia River Serv. Corp. v. Gilman, 751 F. Supp. 1448, 1450 (W.D. Wash. 1990) (finding that shareholders of dissolved company could be sued under CERCLA, although the court had determined that the dissolved corporation could not be sued).

55. 670 F. Supp. 742 (W.D. Mich. 1987), *aff'd sub nom.* United States v. R.W. Meyer, Inc., 889 F.2d 1497 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057 (1990).

56. *Id.* at 747-48.

57. 710 F. Supp. 466 (E.D.N.Y. 1989).

58. *Id.* at 467, 471. For a commentary on shareholder liability under CERCLA, see Rita Cain, *Shareholder Liability Under Superfund: Corporate Veil or Vale of Tears?*, 17 J. LEGIS. 1 (1990).

59. CERCLA § 101(20)(A), 94 Stat. at 2769. For comprehensive discussions of lender liability, see Thomas L. Adams, Jr. & Julia S.J. Tyler, *Haste, Waste and Lender Liability Under CERCLA*, 4 TUL. ENVTL. L.J. 117 (1990); Michael F. Smith, Comment, *Limiting Liability of the Passive Lender Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980*, 26 TULSA L.J. 75 (1990); M. Joel Bolstein & Lois Reznick, *Lender Liability After* Fleet Factors, ENVTL. L. (A.B.A. Standing Comm.), Fall 1990, at 1.

protect a security interest.[60] Courts have delivered various interpretations of the scope of the secured creditor exemption.[61] The resulting uncertainty and confusion regarding its applicability has necessitated remedial legislation and administrative rule-making that precisely defines the parameters of the exemption. But the desired clarity has not been achieved.

Courts have evidenced this uncertainty by imposing CERCLA liability on creditors on two bases: participating in the management and control of a facility, and current ownership for purposes other than protecting a security interest. In *United States v. Mirabile*,[62] the Federal District Court of Maryland held that, in the absence of participation in managing the daily operations of a facility, post-foreclosure ownership would not render a creditor liable.[63] In *United States v. Maryland Bank & Trust Co.*,[64] the court construed the exemption far more stringently than it had in *Mirabile*. Maryland Bank & Trust foreclosed on its security interest, purchased the facility at the foreclosure sale, and retained ownership for four years.[65] The court held the creditor liable because it acquired the property "not to protect its security interest, but to protect its investment."[66] In *United States v. Fleet Factors Corp.*,[67] the Eleventh Circuit concluded that actual participation in managing a facility is not necessary to hold a creditor liable; the dispositive inquiry is whether the

60. CERCLA § 101(20)(A), 42 U.S.C. 9601(20)(A). Section 101(20)(A) states that " 'owner or operator' . . . does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility." *Id.*

61. *Compare* United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 579 (D. Md. 1986) (finding bank liable because it converted its security interest into an investment by acquiring ownership at foreclosure sale—i.e., bank held "indicia of ownership" not to protect a security interest, but as an investment) *with* United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,992, 20,996 (E.D. Pa. Sept. 4, 1985) (concluding bank was exempt since it immediately assigned post-foreclosure ownership to third party without participating in daily management of the site) *and compare In re* Bergsoe Metal Corp., 910 F.2d 668, 672-73 (9th Cir. 1990) (rejecting *Fleet Factors* and holding that secured creditor must have *actually* participated in management of facility to be liable) *with* United States v. Fleet Factors Corp., 901 F.2d 1550, 1557 (11th Cir. 1990) (adjudicating secured creditor liable because its conduct indicated a *capacity* to influence daily operations of facility), *cert. denied*, 111 S. Ct. 752 (1991).

62. 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,992 (E.D. Pa. Sept. 4, 1985).

63. *Id.* at 20,996. Commentators have suggested that *Mirabile* represents the zenith in lender protection. *See* Adams & Tyler, *supra* note 59, at 119 (stating that *Mirabile* would prove to be the high water mark for lender protection if there ever was one).

64. 632 F. Supp. 573 (D. Md. 1986).

65. *Id.* at 579.

66. *Id.*

67. 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 752 (1991).

creditor had the capacity to influence a corporation's treatment of hazardous wastes.[68] The Ninth Circuit contributed to the confusion in *In re Bergsoe Metal Corp.*[69] The *Bergsoe* court declined to follow the *Fleet Factors* analysis and reasoned that the critical question was not whether the creditor had the capacity to influence managerial decisions regarding waste, but whether it did in fact participate in managing the facility.[70]

In response to the resulting confusion and uncertainty that has hindered the activities of many lending institutions and public entities,[71] the EPA proposed a rule which would limit the liability of financial institutions under CERCLA.[72] The rule would apply only to security interests, not to investments in property; address foreclosure and liquidation; establish a bright-line test for determining when participation in managerial activities will result in a loss of exemption protection; and allow a lender to police a loan and foreclose on contaminated property without losing exempt status.[73]

In addition, three pieces of legislation have been introduced in Congress that would protect lenders, fiduciaries, and government agencies from Superfund liability. The bills also aim to resolve the uncertainties of CERCLA lender liability.[74]

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68. *Id.* at 1557-58.

69. 910 F.2d 668 (9th Cir. 1990).

70. *Id.* at 672-73.

71. *See, e.g., National Oil and Hazardous Substances Pollution Contingency Plan; Lender Liability Under CERCLA*, 56 Fed. Reg. 28,798, 28,799 (1991) (to be codified at 40 C.F.R. pt. 300) (proposed June 24, 1991) [hereinafter *Lender Liability*] (stating that uncertainty in the lender liability area has assumed particular importance for the Federal Deposit Insurance Corporation, Resolution Trust Corporation, and other governmental entities that provide lending and credit services); David R. Tripp, *Wichita Strikes Back at the Blob: Municipal Liability Under CERCLA and How One City Solved Ground Water Problems and Rejuvenated Its Declining Tax Base*, 6 Toxics L. Rep. (BNA) 130, 132 (June 26, 1991) (pointing out that a $375 million private development stalled while financing issues and environmental lender liability concerns were evaluated).

72. *Lender Liability, supra* note 71, at 28,808-10. The proposed rule would become part of the National Contingency Plan, thus providing the best administrative basis for a binding rule. James P. O'Brien & Kathleen L. Nooney, *EPA's Lender Liability Rule: A Significant Step for the Lending Community*, 6 Toxics L. Rep. (BNA) 246, 250 (July 24, 1991).

73. *Lender Liability, supra* note 71, at 28,808-09.

74. Bradley S. Tupi & William R. Nicholson, *Legislation to Restore CERCLA's Security Interest Exemption: Which Bill Should Lenders Support?*, 6 Toxics L. Rep. (BNA) 161 (July 3, 1991). The specific pieces of legislation proposed to clarify lender liability include: H.R. 1450, 102d Cong., 1st Sess. (1991) introduced by John LaFalce (D-N.Y.) on March 14, 1991; H.R. 1643, 102d Cong., 1st Sess. (1991) introduced by Wayne Owens (D-Utah) on March 22, 1991; and S. 651, 102d Cong., 1st Sess. (1991) introduced by Jake Garn (R-Utah) on March 13, 1991. *Id.* The Garn bill would limit a lender's liability to the fair market value of the property after clean-up as long as the lender exercised environmental due diligence, *id.* at 161-64 n.11, and essentially adopts the requirements of *In re Bergsoe*. *See supra* note 70 and accompanying text. The LaFalce bill would essentially codify the EPA's proposed draft rule on lender liability under CERCLA. Tupi & Nicholson, *supra* note 74, at 164. In contrast to Senator Garn's bill, the LaFalce bill would not require environmental due

The EPA's proposed rule and the bills Congress is currently considering would provide meaningful protection for financial institutions and public entities that are uncertain of the status of lender liability under CERCLA. Neither the EPA nor Congress proposes a blanket exemption for secured creditors.[75] Both seek to clarify those actions which lenders may undertake without losing CERCLA's secured creditor exemption protection.[76] Thus, secured creditors will remain potential defendants to CERCLA suits.

F. *Government Entities*

CERCLA waives the sovereign immunity of the federal government[77] and provides that a state or local government that has caused or contributed to the release or threatened release of hazardous substances is liable to the same extent as a non-government entity.[78] However, CERCLA exempts state or local governments from liability when they involuntarily acquire ownership of facilities.[79]

A number of recent cases have imposed CERCLA liability on states. In *Pennsylvania v. Union Gas Co.*,[80] the United States Supreme Court recognized that "the language of CERCLA as amended by SARA clearly evinces an intent to hold States liable in damages in federal court."[81] The Michigan Department of Natural Resources was held liable as an operator because the Department, after it assumed control of a

diligence. O'Brien & Nooney, *supra* note 72, at 250 n.116. In addition to amending CERCLA, the LaFalce bill would amend RCRA to provide lender and fiduciary protections. Tupi & Nicholson, *supra* note 74, at 165. The Owens bill would amend the security interest exemption to allow lenders to foreclose without incurring CERCLA liability. *Id.* It would also clarify the innocent landowner defense by specifying the level of inquiry required. *Id.* at 166; see *infra* notes 323-26 and accompanying text for a discussion of the innocent landowner defense. For a commentary on the EPA's draft lender liability proposal, see Sharman Braff, *The Lender as Environmental Policeman: Comment on EPA's Draft Lender Liability Rules*, 5 Toxics L. Rep. (BNA) 1424 (April 10, 1991).

75. *See supra* notes 71-74 and accompanying text.

76. *See supra* notes 71-74 and accompanying text.

77. CERCLA § 120(a), 42 U.S.C. 9620(a) (1988). SARA amended and recodified the original CERCLA § 107(g) waiver. Section 120(a) now waives sovereign immunity for all departments, agencies, and instrumentalities (including the executive, legislative and judicial branches) of government with respect to CERCLA compliance. *Id.*

78. *Id.* § 101(20)(D), 42 U.S.C. § 9601(20)(D); *see* Municipal Settlement Policy, 54 Fed. Reg. 51071-76 (1989) [hereinafter Municipal Settlement Policy] (setting forth the EPA's treatment of municipalities in settlement negotiations and in cost recovery actions and stating that municipalities may be held liable just as any private party who falls within § 107(a)). *See generally* Robert J. Saner II & Peter J. Fontaine, *CERCLA Municipal Settlement Policy: Muddying Our Waters*, 21 Env't Rep. (BNA) 492 (July 13, 1990) (discussing the Municipal Settlement Policy's effect on publicly owned treatment works and public water suppliers).

79. CERCLA § 101(20)(D), 42 U.S.C. § 9601(20)(D).

80. 491 U.S. 1 (1989).

81. *Id.* at 13. *See* Thomas L. Hagerman, *Look Out States . . . Your Environmental Liability*

polluted site, failed to prevent further contamination.[82] However, the mere exercise of a regulatory power, absent more, has been held insufficient to impose operator liability on a state.[83] In *United States v. Stringfellow*,[84] California was held liable on two grounds: as an "operator" and as an "owner."[85] The court predicated both bases of liability on the degree of control that California exercised over the site.[86] Thus, when a state wields sufficient control over a contaminated site, it is a potential defendant in a private party CERCLA action.[87]

The issue of municipal liability for collection and disposal of municipal wastes remains unresolved. In 1989, the EPA promulgated the Municipal Settlement Policy.[88] The policy states that a municipality is not liable as a "generator" at a Superfund site if it only disposed of household wastes collected in the normal course of business.[89] The federal government's position is that municipalities as a class are not exempt from CERCLA liability,[90] and that the Municipal Settlement Policy distinguishes between classes of waste, not classes of generators.[91] From the EPA's perspective, it is not cost-effective to pursue generators whose

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Could Be Bigger Than You Think, 30 NAT. RESOURCES J. 929 (1990) (discussing the *Union Gas* decision).

82. CPC Int'l, Inc. v. Aerojet-General Corp., 731 F. Supp. 783, 786 (W.D. Mich. 1989). MDNR's failure to operate groundwater purge wells drastically increased contamination of local groundwater. *Id.*

83. *See* United States v. New Castle County, 727 F. Supp. 854, 866 (D. Del. 1989) (refusing to impose liability on state as "owner" or "operator" where state participated at site "in its regulatory capacity as protector of the health, safety, and welfare of its citizens" and not because of proprietary interest); *see also* Hassayampa Steering Comm. v. Arizona, 32 Env't Rep. Cas. (BNA) 1401, 1410 (D. Ariz. 1990) (holding Arizona liable as generator because it generated and disposed of hazardous chemicals at site, but refused to hold Arizona liable as an operator because court could not determine whether the state had exceeded regulatory activity).

84. 31 Env't Rep. Cas. (BNA) 1315 (C.D. Cal. 1990).

85. *Id.* at 1319-20.

86. *Id.* To resolve the question of whether or not California was liable as an "operator," the *Stringfellow* court scrutinized eleven factors delineated in Rockwell Int'l Corp. v. IU Int'l Corp., 702 F. Supp. 1384, 1390-91 (N.D. Ill. 1988). *Stringfellow*, 31 Env't Rep. Cas. (BNA) at 1319-20. The court then applied the same factors to hold California liable as an owner. *Id.* at 1320.

87. For a commentary on state CERCLA liability, see generally Thomas L. Hamlin et al., *The Ability to Control Test: Expanding CERCLA Liability Beyond Lenders?*, 5 Toxics L. Rep. (BNA) 833, 838-39 (Nov. 28, 1990).

88. Municipal Settlement Policy, *supra* note 78, at 51,072-73.

89. *Id.*

90. *See* B.F. Goodrich Co. v. Murtha, 32 Env't Rep. Cas. (BNA) 1487, 1493 (D. Conn. 1991) (holding that municipalities, as a class, are not exempt from CERCLA liability), *aff'd*, 958 F.2d 1192 (2d Cir. 1992); Transportation Leasing Co. v. California, 5 Toxics L. Rep. (BNA) 1014 (C.D. Cal. Dec. 4, 1990) (basing its holding on congressional intent and the EPA's interpretation of its regulations, the court concluded that CERCLA does not expressly exempt from liability the disposal of household wastes).

91. United States v. Kramer, 757 F. Supp. 397, 433 (D.N.J. 1991).

contributions at a Superfund site are limited to waste containing relatively small quantities of hazardous household materials.[92]

Presently, CERCLA allows municipalities to be impleaded by defendants who are seeking contribution. Thus, the EPA's settlement policy does not prevent municipalities from being brought into CERCLA actions; it merely alters the procedure by which they become defendants.[93]

The EPA announced new policies on July 17, 1991, to clarify the liability of municipalities who have contributed solid waste to Superfund sites.[94] The EPA stated that it will draft national guidelines for the allocation of costs of municipal solid waste at the sites and will develop a model settlement policy.[95] The policy encourages municipalities to settle early with the EPA, thereby obtaining contribution protection.[96] Industry claims that the policy is an unfair attempt to shift cleanup costs from local governments to corporations.[97] While it acknowledges the policy's pro-municipal bias, the EPA asserts that it is simply providing an alternative for those entities that Congress did not originally intend to include as major contributors.[98]

Consequently, legislation has been introduced in Congress that would extend municipal protection beyond that proposed by the EPA. Once enacted, the legislation would apply retroactively to pending suits.[99] Because of pressure on legislators to vote in favor of exempting

92. Municipal Settlement Policy, *supra* note 78, at 51,073.

93. *Kramer*, 757 F. Supp. at 434. CERCLA's statutory scheme grants the EPA discretion to select which PRPs to sue and relegates to named PRPs the responsibility to implead others in contribution actions. *Id.*

94. *New Policy Protects Municipalities, Exempts Homeowners from CERCLA Liability*, 22 Env't Rep. (BNA) 647 (July 19, 1991).

95. *Id.*

96. *Id.*

97. *EPA Kicks Off Major Effort to Shield Cities From Industry Superfund Lawsuits*, INSIDE E.P.A. WKLY. REP., July 19, 1991, at 1, 1 [hereinafter *EPA's Major Effort*].

98. *Id.* at 7. The EPA desires to "get people out of the Superfund system that the law did not intend to be major contributors to the cleanup," explained the EPA Administrator William Reilly when announcing the initiative in his speech given on July 16, 1991, in Salt Lake City, Utah before the National Association of Counties.

The new policy displays an approach that is somewhat contrary to the EPA's former position taken in the first major municipality suit. In B.F. Goodrich v. Murtha, 32 Env't Rep. Cas. (BNA) 1487 (D. Conn. 1991), the EPA argued in an amicus curiae brief that their decision not to sue a municipality "does not obligate other potential plaintiffs to make the same decision." *EPA's Major Effort*, *supra* note 97, at 7-8.

99. *Bills Exempting Cities from Superfund May Become First Major Law Change*, INSIDE E.P.A. WKLY. REP., July 26, 1991, at 1, 6-7. Senate Environment & Public Works superfund oceans & water protection chairman Frank Lautenberg (D-N.J.) will introduce legislation in the Senate, and Rep. Robert Torricelli (D-N.J.) will introduce legislation in the House. *Id.* at 1.

their cities, it is likely that Congress will pass at least some form of the legislation. However, strong opposition from industry and environmentalists indicates that passage will be far from effortless. Currently, municipalities remain PRPs and are exposed to liability as third party defendants.

G. *Landlords and Tenants*

A landlord, as an owner of property, is strictly liable under section 107(a)(1) for cleanup costs; that the owner was not in possession at the time of contamination nor personally culpable is irrelevant.[100] The Sixth Circuit recently held a landlord liable for one-third of the cost of a CERCLA site cleanup even though the lessee of the property was primarily responsible for the contamination.[101] Even the lessee of a site is liable as an owner for unlawful acts committed during the lessee's occupancy.[102] Additionally, if a lessee has subleased the property, the lessee may be liable as an owner or landlord, and the sublessee may also be liable as an owner.[103]

IV. PRIVATE ACTION PLAINTIFF'S PRIMA FACIE CASE

By the enactment of CERCLA, Congress created an action for a private party to recover its costs of responding to a site contaminated by hazardous waste.[104] More specifically, CERCLA established a right of

100. *See, e.g.*, United States v. Argent Corp., 14 Envtl. L. Rep. (Envtl. L. Inst.) 20,616 (D.N.M. May 4, 1984) (imposing liability on lessor who was not involved in the operations of the enterprise responsible for contaminating the site).

101. United States v. R.W. Meyer, Inc., 932 F.2d 568 (6th Cir. 1991).

102. *See, e.g.*, United States v. South Carolina Recycling and Disposal, Inc., 653 F. Supp. 984, 1003 (D.S.C. 1984) (recognizing that lessees are liable not only because of their participation in activities resulting in contamination, but also because the lessee, as the current occupant, assumes the owner's responsibility for maintaining control over the property), *aff'd in part, vacated in part sub nom.* United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989).

103. *Id.*

104. *See* City of Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135 (E.D. Pa. 1982).

> [I]t is clear from the discussions which preceded the passage of CERCLA that the statute is designed to achieve one key objective—to facilitate the prompt clean up of hazardous dumpsites by providing a means of financing both governmental and private responses and by placing the ultimate financial burden upon those responsible for the danger. The liability provision is an integral part of the statute's method of achieving this goal for it gives a private party the right to recover its response costs from responsible third parties which it may choose to pursue rather than claiming against the fund.

Id. at 1142-43; *see also* Artesian Water Co. v. New Castle Co., 605 F. Supp. 1348, 1356 (Del. 1985) (acknowledging right of private party to maintain action under § 107(a)); Jones v. Inmont, 584 F. Supp. 1425, 1428 (S.D. Ohio 1984) (upholding a private party's right to pursue a cost recovery

action by "any other person"[105] who cleans up a site to recover cleanup costs from the parties responsible for improper hazardous waste disposal on that site.[106] This private action advances one of the purposes of CERCLA: to assess liability for the costs of cleanups to the parties responsible for the pollution.[107]

A private action plaintiff must prove four elements to establish a prima facie case for recovery of its response costs.[108] The plaintiff must prove (1) the site is a "facility";[109] (2) a release or threatened release of a

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action under CERCLA); Pinole Point Properties, Inc. v. Bethlehem Steel Corp., 596 F. Supp. 283, 289 (N.D. Cal. 1984) (holding that § 107 does establish a private cause of action).

105. The statute, in the relevant part, states:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section [potentially responsible parties] shall be liable for . . . any other necessary costs of response *incurred by any other person* consistent with the national contingency plan. . . . The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D).

CERCLA § 107(a), 42 U.S.C. § 9607(a) (emphasis added).

The National Contingency Plan (NCP) consists of regulations adopted by the EPA that govern the cleanup of hazardous waste sites. National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. pt. 300 (1991) [hereinafter NCP]; *see infra* notes 118-25 and accompanying text. The NCP states the rule. "Responsible parties shall be liable for necessary costs of response actions to releases of hazardous substances incurred by any other person consistent with the NCP." NCP, *supra* § 300.700(c)(2).

"[A]ny other person" presumably means that anyone who responds to a hazardous waste release may recover response costs. Keith W. Holman, Wickland Oil Terminals v. Asarco, Inc. *and the 1986 Superfund Amendments: The Tide Turns on CERCLA's Private Right to Recover Hazardous Waste Response Costs*, 17 ENVTL. L. 307, 308 (1987); *see supra* notes 24-28 and accompanying text.

106. CERCLA § 107(a), 42 U.S.C. § 9607(a); Wickland Oil Terminals, Inc. v. Asarco, Inc., 792 F.2d 887, 890 (9th Cir. 1986).

107. *See* CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4).

108. *Id.* § 107(a), 42 U.S.C. § 9607(a); NCP, *supra* note 105, § 300.700 (Subpart H—Participation by Other Persons); *see, e.g.*, United States v. Hooker Chems. & Plastics Corp., 680 F. Supp. 546, 549 (W.D.N.Y. 1988) (plaintiff stated a claim by asserting that "it is a 'person' who owned or operated a 'facility' at which 'hazardous substances' were 'disposed' and from which there was a 'release' or 'threatened release' of a 'hazardous substance' which caused plaintiffs to incur 'response costs,' including 'removal [and] remediation action . . . not inconsistent with the national contingency plan' "). United States v. Northeastern Pharmaceutical & Chem. Co. (NEPACCO), 810 F.2d 726, 747-48 (8th Cir. 1986) (in contrast to government, private parties must show consistency with NCP), *cert. denied*, 484 U.S. 848 (1987).

109. A "facility" is "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located . . . ." CERCLA § 101(9), 42 U.S.C. § 9601(9). A "facility" includes "any building, structure, installation, equipment, pipe or pipeline . . . well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft" or "any site or area where a hazardous substance has . . . come to be located." *Id.*

hazardous substance[110] has occurred;[111] (3) the release or threatened release has caused the plaintiff to incur "necessary costs of response . . . consistent with the [National Contingency Plan (NCP)]";[112] and (4) the defendant is a "covered person" under section 107(a).[113]

Elements one and two of the private plaintiff's prima facie case have been extensively discussed by the courts and various commentators;[114] therefore, these issues will not be discussed in this article. The fourth

110. Section 101(14) of CERCLA defines "hazardous substance" very broadly and incorporates additional, analogous provisions from the Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6992k (1988), and the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §§ 1251-1376 (1988). 42 U.S.C. § 9601(14).

The plaintiff need not demonstrate that a threshold amount of a substance was deposited, only that the amount was sufficient to warrant a response. Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 669 (5th Cir. 1989). The generator-defendants in United States v. Wade, 577 F. Supp. 1326, 1340 (E.D. Pa. 1983) argued unsuccessfully that a broad definition would lead to absurd results. The court rejected the contention that the deposition of a penny on a plot of land could lead to CERCLA liability by virtue of copper being included on the list of toxic pollutants promulgated pursuant to § 307 of the FWPCA. *Id.*

111. The term "release" is broadly defined by CERCLA as "any spilling, leaking, pumping, . . . dumping, or disposing into the environment . . . ." CERCLA § 101(22), 42 U.S.C. § 9601(22).

112. CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B). The Ninth Circuit held that the plaintiff must assert the incurrence of response costs to establish a prima facie case. Ascon Properties, Inc. v. Mobil Oil Co., 866 F.2d 1149, 1154 (9th Cir. 1989) ("A plaintiff must allege at least one type of 'response cost' cognizable under CERCLA that has been incurred to state a prima facie case."); *see* Cadillac Fairview/California, Inc. v. Dow Chem. Co., 840 F.2d 691, 695 (9th Cir. 1988) (stating that measures undertaken by the plaintiff fell within the definition of "costs of response," and implying that the incurrence of CERCLA recognized response costs must be alleged to state a prima facie case).

Moreover, a plaintiff need not incur *all* costs of response before seeking recovery. Section 113(g)(2) authorizes courts to enter declaratory judgments on liability that are binding on subsequent § 107 cost recovery actions. 42 U.S.C. § 9613(g)(2). This provision encourages expeditious cleanups rather than discouraging or delaying private cleanups even though the issue of consistency with the NCP can be raised in subsequent actions to recover costs. *See* 55 Fed. Reg. 8798 (1990) (responding to a commenter, the EPA agreed that the incurrence of all response costs was not a prerequisite to a cost recovery action).

113. The statute includes as "covered persons": (1) owners or operators, (2) prior owners or operators who owned or operated at the time of disposal, (3) those who arranged for treatment or disposal, and (4) transporters. 42 U.S.C. § 9607(a); *see also Ascon Properties, Inc.*, 866 F.2d at 1152-53.

114. Courts have broadly interpreted "facility." One court defined "facility" as "every place where hazardous substances come to be located . . . ." United States v. Conservation Chem. Co., 619 F. Supp. 162, 185 (W.D. Mo. 1985). Residential subdivisions built on soils containing hazardous substances are also considered facilities. Tanglewood E. Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1572-73 (5th Cir. 1988). Stables and even roads have been declared facilities due to the deposition of hazardous substances used to suppress dust. United States v. Bliss, 667 F. Supp. 1298, 1305 (E.D. Mo. 1987); *see also* United States v. Ward, 618 F. Supp. 884, 895 (E.D.N.C. 1985). For discussions of what constitutes a facility, see Kyle E. McSlarrow et al., *A Decade of Superfund Litigation: CERCLA Case Law from 1981-1991*, 21 Envtl. L. Rep. (Envtl. L. Inst.) 10,367, 10,389-90 (July 1991); James L. Rogers, Jr. & Eugene C. McCall, Jr., *The Private Plaintiff's Prima Facie Case Under CERCLA Section 107*, 41 S.C. L. REV. 833, 847-48 (1990).

Courts have determined that dispersion of hazardous substances under many different conditions may constitute a "release." A "release" may encompass the presence of hazardous substances in soil and groundwater. *See* New York v. Shore Realty Corp., 759 F.2d 1032, 1045 (2d Cir. 1985)

element has already been discussed.[115] The third element of a prima facie case, and the focus of this section, requires that a plaintiff have incurred "necessary costs of response consistent with the NCP." The very language raises questions. What are "response" costs? What response actions are consistent with the NCP? What are "necessary" costs? This section attempts to answer these questions and also examines court opinions which address the recoverability of specific types of "response" costs.

The private action plaintiff is in much the same position as the EPA under CERCLA section 107 except in the case of available remedies and regarding the burden of proof. The private plaintiff is limited to the recovery of costs expended, while the EPA may seek prospective injunctions, punitive damages, and natural resource damages. Additionally, a private action plaintiff must plead and prove consistency with the NCP;[116] however, in an action by the EPA, the defendants bear the burden of proving inconsistency with the NCP in order to avoid liability.

In many cases, an owner of contaminated property may be forced to initiate a private cleanup action and recover costs as a private action plaintiff. Potential CERCLA problems may prevent the property owners from being able to use their property as collateral or to otherwise obtain loans, from selling or leasing the property, or from obtaining permits from state or local governments to develop land. Thus, property owners are essentially being forced to clean up regardless of whether government action is imminent. Because of these factors, private parties are increasingly utilizing the private cost recovery provisions of CERCLA.[117]

(defining a "release" to include present and past leaks from storage tanks and pipelines). For discussions of what constitutes a release, see McSlarrow et al., *supra* at 10,389-90; Rogers & McCall, *supra* at 843-46; A. Christian Worrell, III & Joseph B. Jaap, *Private Cost Recovery Under CERCLA for Hazardous Substance Cleanup: A Last Resort*, 18 N. KY. L. REV. 237, 243-45 (1990). "Threatened release" may include storage of hazardous substances in a manner that "may reasonably be anticipated to pose a danger to the environment." Velsicol Chem. Corp. v. Reilly Tar & Chem. Corp., 21 Env't Rep. Cas. (BNA) 2118, 2122 (E.D. Tenn. 1984); *see also* New York v. Shore Realty, 759 F.2d at 1045 ("The corroding and deteriorating tanks, Shore's lack of expertise in handling hazardous waste, and even the failure to license the facility, amount to a threat of release.").

115. *See* discussion *supra* part III.

116. In a federal cost recovery action, the government need only demonstrate a lack of inconsistency with the NCP to recover its costs. Section 107(a)(4) states "any person . . . shall be liable for all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe *not inconsistent with the national contingency plan*." 42 U.S.C. § 9607(a)(4)(A) (emphasis added).

In a private cost recovery action, § 107(a)(4)(B) allows recovery for "any other necessary costs of response incurred by any other person consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B). For a discussion of the private action plaintiff's requirement of showing that response costs were consistent with the NCP, see *infra* part IV.A.

117. *See* Ambrogi v. Gould, Inc., 750 F. Supp. 1233 (M.D. Pa. 1990); General Elec. Co. v.

A. *Consistency with the NCP*

The NCP provides the procedures for responding to releases of oil, "hazardous substances, pollutants, and contaminants."[118] The earlier pre-CERCLA version of the NCP was promulgated by the EPA under authority of section 311 of the Clean Water Act.[119] Section 105 of CERCLA mandated revision of the NCP to establish procedures, criteria, and responsibilities to guide responses to releases of "hazardous substances, pollutants, and contaminants."[120] Although EPA was slow to revise the NCP, it first did so on July 16, 1982.[121] The second revision was promulgated in 1985.[122]

SARA and Executive Order No. 12,580[123] directed the EPA to revise the NCP to reflect amendments to CERCLA since the 1980 original act, implement regulatory changes, clarify existing NCP language, and more accurately reflect the sequence of response actions.[124] In 1990, the EPA revised the NCP according to Congress' mandate to assure both effective and environmentally sound response actions.[125] This article deals primarily with the 1990 NCP—the current version of the NCP as of this writing.

The requirement for consistency with the NCP has caused much confusion among private parties seeking to begin cleanup efforts. The confusion results from CERCLA's failure to define "consistency with the

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Litton Business Sys., 715 F. Supp. 949 (W.D. Mo. 1989), *aff'd sub nom.* General Elec. Co. v. Litton Indus. Automation Sys., 920 F.2d 1415 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1390 (1991); Amland Properties Corp. v. Aluminum Co. of Am., 711 F. Supp. 784 (D.N.J. 1989). *See generally* Daniel M. Steinway, *Private Cost Recovery Actions: What is the Impact of the Consistency Requirements?*, 20 Env't Rep. (BNA) 1947 (April 6, 1990) ("In recent years there has been an explosion of private cost-recovery suits under CERCLA, as more parties . . . have chosen to avoid the lengthy and expensive route of waiting for a government cleanup, litigating or settling, and then seeking to shift or spread liability.").

118. CERCLA § 105, 42 U.S.C. § 9605(a).

119. 33 U.S.C. § 1321(c)(2) (1988). Section 311 establishes liability for the discharge of oil and hazardous substances. *Id.* § 1321(f)-(g).

120. 42 U.S.C. § 9605(a). Under Executive Order No. 12,316, the EPA was delegated the responsibility to amend the NCP. Exec. Order No. 12,316, 3 C.F.R. 168 (1982). The NCP was redesignated as 40 C.F.R. pt. 300 at that time. 47 Fed. Reg. 10,972 (1982).

121. National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. pt. 300 (1983) (current version at 40 C.F.R. pt. 300 (1991)).

122. National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. pt. 300 (1985) (current version at 40 C.F.R. pt. 300 (1991)) [hereinafter 1985 NCP]. Prior to the 1985 revision, the NCP made no mention of private cost recovery actions.

123. Exec. Order No. 12,580, 3 C.F.R. 193 (1988), *reprinted in* 42 U.S.C. § 9615 (1988).

124. 55 Fed. Reg. 8666 (1990).

125. "The NCP provides for efficient, coordinated, and effective response to discharges of oil and releases of hazardous substances . . . ." 40 C.F.R. § 300.3(b) (1991).

NCP" and from courts' inconsistent application of that standard.[126] The high cost of cleanup and CERCLA's lack of specificity concerning what is a recoverable cost have created anxiety in parties trying to meet the legal requirements prerequisite to recovery of response costs. Moreover, the uncertainty encourages people primarily responsible for creating the hazardous waste dump to avoid liability by not participating in response actions and waiting until after a cleanup has been completed. The responsible parties then argue that the cleanup efforts were not consistent with the NCP.

The new NCP clarifies the appropriate standard by which to measure consistency with the NCP. The standard is less harsh in its application, and thereby increases the likelihood of recovery of cleanup costs from recalcitrants. However, a private party who conducts a cleanup should still pay close attention to all of the requirements of the NCP. Accordingly, a number of issues must be addressed in order to ascertain a full understanding of the "consistency" requirement.

1. Procedural Issues

a. Proof of Consistency

One of the disputed issues is whether consistency with the NCP must be part of the prima facie burden of proving liability or whether consistency with the NCP is part of the determination of the amount of actual damages.[127] Obviously, a private action plaintiff would prefer to obtain a court ruling on liability before committing resources to a cleanup.[128] Consistency with the NCP is a fact question, and as a result,

126. *See generally* Paul W. Heiring, Note, *Private Cost Recovery Actions Under CERCLA*, 69 MINN. L. REV. 1135, 1142 (1985).

127. A number of cases have held that consistency with the NCP is part of the prima facie case. County Line Inv. Co. v. Tinney, 30 Env't Rep. Cas. (BNA) 1062, 1063 (N.D. Okla. 1989), *aff'd*, 933 F.2d 1508, 1512 (10th Cir. 1991); Artesian Water Co. v. New Castle County (Artesian Water Co. I), 659 F. Supp. 1269, 1292 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988); *see* Amland Properties Corp. v. Aluminum Co. of Am., 711 F. Supp. 784, 794 (D.N.J. 1989). *Contra* United States v. Northeastern Pharmaceutical and Chem. Co., 579 F. Supp. 823, 850 (W.D. Mo. 1984), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135, 1144 n.16 (E.D. Pa. 1982) (complying with the NCP "appears to be related to the recovery of damages and not to the existence of a valid claim for relief"). This issue has generated much litigation and the courts are divided. Rogers & McCall, *supra* note 114, at 848.

128. Additionally, at least one court enunciated its opinion that early determinations of liability may be made with a later determination of recoverable response costs. Fishel v. Westinghouse Elec. Corp., 640 F. Supp. 442, 447 (M.D. Pa. 1986).

a court should not address this issue on a motion to dismiss when a plaintiff has pleaded consistency.[129] A contrary rule would discourage the private cleanup of contaminated sites. Several recent cases indicate that prior to the development of a full factual record, a court may grant declaratory judgment on the issue of liability to a plaintiff who can show the incurrence of potentially recoverable response costs.[130] Therefore, a debate between the parties over how much of the costs were "necessary" and "consistent with the NCP" does not preclude a grant of declaratory judgment concerning liability; it only delays a determination of the costs that are recoverable until a full factual record can be developed.[131]

A declaratory judgment only on the issue of liability may be denied if the facts required to determine consistency with the NCP are fully developed at the time of the decision. In *Amland Properties Corp. v. Aluminum Co. of America*,[132] the court held that a determination of consistency with the NCP was appropriate upon a motion for summary judgment because a complete record of the response costs was available at the time of the decision.[133] The court distinguished other cases[134] on the basis of incomplete factual records available to the court at the time of those decisions.[135] Under the *Amland Properties* rationale, a declaratory judgment on only liability will be appropriate when the cleanup costs are not fully expended—a requirement easily met by a private plaintiff interested in determining liability before substantial funds are committed to a cleanup.

The goal of CERCLA to encourage voluntary cleanup supports

129. *See Amland Properties Corp.*, 711 F. Supp. at 794; *Artesian Water Co. I*, 659 F. Supp. at 1292; *Stepan Chem.*, 544 F. Supp. at 1144 n.16.

130. T & E Indus. v. Safety Light Corp., 680 F. Supp. 696, 709 (D.N.J. 1988); Sunnen Prods. Co. v. Chemtech Indus., 658 F. Supp. 276, 278 (E.D. Mo. 1987). For a discussion of the procedural aspects of NCP compliance, see Steinway, *supra* note 117, at 1949.

131. *See T & E Indus.*, 680 F. Supp. at 709; *see also* Southland Corp. v. Ashland Oil, Inc., 696 F. Supp. 994, 1000 (D.N.J. 1988) ("[W]hile the need for a factual determination on specific costs would preclude summary judgment on the issue of damages at this stage, this is not the result when the request is for a declaration of liability."); United States v. Medley, 17 Envtl. L. Rep. (Envtl. L. Inst.) 20,297, 20,298 (D.S.C. Nov. 4, 1986) ("[C]onsistency or inconsistency with the NCP is not a necessary element of the United States' motion for partial summary judgment on liability . . . and relates only to the recoverability of various cost items . . . .").

132. 711 F. Supp. 784 (D.N.J. 1989).

133. Id. at 794; *see also* McSlarrow, *supra* note 114, at 10,398. "When a sufficient factual record has been developed, the question of consistency becomes both ripe for decision and necessary before a court can award response costs." *Id.*

134. *Southland Corp.*, 696 F. Supp. at 1000; *T & E Indus.*, 680 F. Supp. at 709; *Sunnen Prods. Co.*, 658 F. Supp. at 276.

135. *Amland Properties*, 711 F. Supp. at 794 n.9. "The complete factual record in this case renders inapposite *Sunnen* in which consistency of costs could not be ascertained until the record was further developed." *Id.* (citation omitted).

early determinations of liability. "Requiring that a plaintiff show, as part of its prima facie case, that it incurred the kind of costs recoverable under CERCLA is considerably different and less onerous than requiring that it show that those costs were incurred consistent with the detailed procedural and substantive provisions of the NCP."[136] Indeed, determining liability before all the costs of cleanup are incurred encourages PRPs to settle and provides a greater incentive for private parties to clean up a release of hazardous substances. A contrary rule requiring consistency to be shown prior to a judgment on liability would dissuade business entities from expending cleanup costs because they would have no assurance of recovering some or all of their financial burden. Yet, with the current rationale, PRPs are still protected from paying the costs of irresponsible or poorly planned response actions as consistency must be proven prior to the recovery of cleanup costs.

b. NPL Status

Considerable debate has occurred over whether a facility must be listed on the National Priorities List (NPL)[137] prior to initiation of a private cleanup in order for the private party to recover its costs. The 1985 NCP did not provide any requirement that a site be on the NPL,[138] nor does the 1990 NCP list such a requirement.[139] Further, the case law is consistent that NPL listing is not a prerequisite for private cost recovery actions.[140] The requirement of NPL listing for government cleanups serves the purpose of proper allocation of scarce Superfund monies. However, NPL status as a prerequisite for private cost recovery actions would not promote conservation of the Superfund.[141]

136. Steinway, *supra* note 117, at 1948.

137. The President is required to list, as part of the NCP, the known or threatened releases throughout the United States and to revise the list annually. CERCLA § 105(a)(8)(B), 42 U.S.C. § 9605(a)(8)(B). The NPL is based on criteria emphasizing the relative risk to public health or welfare. *Id.* § 105(a)(8)(A), 42 U.S.C. § 9605(a)(8)(A).

138. Note that § 300.71 of the 1985 NCP dealing with "other party responses" contains no provision limiting private cost recovery to cleanup of NPL sites. 1985 NCP, *supra* note 122, § 300.71.

139. NCP, *supra* note 105, pt. 300.

140. [W]e hold that NPL listing is not a general requirement under the NCP .... Moreover, limiting the scope of NPL listing as a requirement for response action is consistent with the purpose of CERCLA. The NPL is a relatively short list when compared with the huge number of hazardous waste facilities Congress sought to clean up.

N.Y. v. Shore Realty Corp., 759 F.2d 1032, 1046-47 (2d Cir. 1985). "[C]onsistency with the National Contingency Plan, not pre-authorization or appearance on the National Priorities List, is all that is required under section 107(a)(4)(B)." Pinole Point Properties v. Bethlehem Steel Corp., 596 F. Supp. 283, 290 (N.D. Cal. 1984).

141. *Pinole Point Properties*, 596 F. Supp. at 290. "A limitation under section 107(a)(4)(B) to

c. *Government Approval*

After conflicting court decisions[142] and later clarifying regulations, it is finally clear that government approval of a response action is clearly not a prerequisite to recovery by a private action plaintiff. Several courts interpreted the 1982 NCP as requiring government approval of cleanup plans to be consistent with the NCP.[143] The EPA resolved this issue in its 1985 NCP revisions by stating that government approval, involvement or coordination with a government agency is not necessary for a private response action to be consistent with the NCP.[144] Because the 1990 NCP made no change in relation to government approval, private parties continue to need no approval of their response plans to recover their costs.[145]

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recovery of expenses at NPL sites would make sense only if it served to conserve Superfund money. This logic simply does not apply to private parties seeking recovery, not from the Fund, but directly from responsible parties." Jeffrey M. Gaba, *Recovering Hazardous Waste Cleanup Costs: The Private Cause of Action Under CERCLA*, 13 ECOLOGY L.Q. 181, 201 (1986).

142. After promulgation of the 1982 NCP, widespread confusion existed among courts and commentators over whether, under the guidelines of the NCP, recovery of costs by a private plaintiff was contingent on governmental authorization of the cleanup effort. *See, e.g.*, Wickland Oil Terminals, Inc. v. Asarco, Inc., 792 F.2d 887, 891-92 (9th Cir. 1986) (holding that prior governmental authorization is not a prerequisite to a claim under § 107(a)).

143. Bulk Distrib. Ctrs., Inc. v. Monsanto Co., 589 F. Supp. 1437, 1447-48 (S.D. Fla. 1984); Cadillac Fairview/California, Inc. v. Dow Chem. Co., 21 Env't Rep. Cas. (BNA) 1584, 1586-87 (C.D. Cal. 1984), *rev'd*, 840 F.2d 691, 695 (9th Cir. 1988). In reversing, the Ninth Circuit in *Cadillac Fairview* stated: "[T]here is no indication in the statute that prior approval or action by a state or local government is either necessary or desirable." *Cadillac Fairview*, 840 F.2d at 695.

144. 1985 NCP, *supra* note 122, § 300.71 ("[G]overnment approval of response actions is not required."). Courts have interpreted the 1985 NCP as not requiring government approval. Richland-Lexington Airport Dist. v. Atlas Properties, Inc., 901 F.2d 1206, 1208-09 (4th Cir. 1990) ("[G]overnmental approval is not a prerequisite to private recovery for cleanup costs under 42 U.S.C. §§ 9607(a)(2), (3), and (4)(B) of CERCLA.").

> Neither CERCLA nor the national contingency plan describes a procedure whereby a private party could coordinate its response efforts with those of a local or state government or seek the approval of state or local governmental entities before commencing a response action. Indeed, there is no indication in the statute that prior approval or action by a state or local government is either necessary or desirable.

Cadillac Fairview, 840 F.2d at 695. Prior governmental approval is only required when reimbursement of response costs is sought from the government; no prior government approval is required for recovery of response costs from a private party. Lykins v. Westinghouse Elec. Corp., 27 Env't Rep. Cas. (BNA) 1590, 1594 (E.D. Ky. 1988).

145. NCP, *supra* note 105, § 300.700. Preauthorization of a response action is required of those parties who plan to seek reimbursement from the Superfund under CERCLA § 111(a)(2). *Id.* § 300.700(d)(2). Preauthorization, in this context, is the EPA's prior approval to submit a claim against the Fund. *Id.* § 300.700(d)(3). To obtain reimbursement from the Fund, costs must be reasonable and necessary, and the EPA must certify the necessity and consistency of costs with the preauthorization decision document. *Id.* § 300.700(d)(7), (8). The recovery of costs from the Superfund is not addressed further in this article.

d. Retroactivity of the 1990 NCP

The 1990 NCP will be applied retroactively to cleanups in progress at the time of its effective date.[146] The EPA stated that "grandfathering" ongoing cleanups would be inappropriate because it would preclude application of the 1990 rule to cleanups which may continue for years into the future. The burden of retroactive application of the 1990 NCP on private parties is offset by the substantial compliance standard of the new NCP that relaxes the consistency burden on a private party.[147] Moreover, notice has been given for over a year that the CERCLA requirements would be elements of a cleanup. In addition, private parties that began their cleanup under the strict compliance standard of the 1985 NCP should have no problem meeting the relaxed 1990 requirements.

Litigation by defendants may result over both the relaxed standard and the retroactive provision of the 1990 NCP. Courts have previously held that cleanups should be evaluated in relation to the NCP that was effective when response costs were incurred, but courts have also upheld the EPA's previous, more stringent, strict compliance standard.[148]

e. Notice of Suit

Notice to the government prior to the filing of a private cost recovery action is not necessary; however, a private party must give concurrent notice to the government.[149] Moreover, section 113(*l*) of CERCLA requires the plaintiff who files a cost recovery action in federal court to provide a copy of the complaint to the United States Attorney General and the Administrator of the EPA.[150]

2. The Standard of Compliance

Prior to promulgation of the 1990 NCP, courts were divided over the standard of compliance that was appropriate in evaluating private responses under the 1985 NCP. Many courts interpreted "consistency with the NCP" as mandating "strict" compliance with its procedural and

146. The effective date of the 1990 NCP was April 9, 1990. 55 Fed. Reg. 8666 (1990).

147. *See* discussion *infra* part IV.A.2.

148. Artesian Water Co. v. New Castle County (Artesian Water Co. I), 659 F. Supp. 1269, 1294 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988). "There is little doubt that the EPA's policy on retroactivity will be challenged in litigation." Rex Callaway, *Private Party Cost Recovery Actions Under CERCLA*, 5 NAT'L. ENVTL. ENF. J. 3, 9 (1991).

149. 55 Fed. Reg. 8798 (1990) (explaining § 300.700 of the NCP, *supra* note 105).

150. 42 U.S.C. § 9613(*l*).

substantive provisions.[151] On the other hand, several courts were not convinced that private cleanups should be evaluated under exacting standards and instead adopted a "substantial compliance" standard.[152] These decisions, together with the SARA mandate for revision of the NCP, set the stage for reconsideration of the standard of compliance during promulgation of the 1990 NCP.

The 1990 NCP effectively resolved the split by establishing "substantial compliance" as the measure of the consistency of a cleanup with the NCP. Consistency with the NCP will now be determined in relation to section 300.700(c)(3) of the 1990 NCP which states:

> For purposes of cost recovery under section 107(a)(4)(B) of CERCLA: (i) A private party response action will be considered "consistent with the NCP," if the action, when evaluated as a whole, is in substantial compliance with the applicable requirements in paragraphs (e)(5) and (6) of this section, and results in a CERCLA-quality cleanup . . . .[153]

The "substantial compliance" standard is a significant change from the requirements of the 1985 NCP[154] and from the EPA's original notice enunciated in the proposed rule.[155] Under the prior strict compliance standard, cleanups were subject to an evaluation so stringent that PRPs were able to easily challenge the effectiveness of environmentally protective cleanups to avoid sharing the financial burden.[156] The new standard provides a more realistic mechanism for review while encouraging the goals of voluntary private cleanups and effective environmental remediation.

The EPA recognized that the final determination of consistency will

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151. *See* Amland Properties Corp. v. Aluminum Co. of Am., 711 F. Supp. 784, 796 (D.N.J. 1989) (denying that "substantial compliance" with the NCP was sufficient).

152. The site evaluation does not have to comply strictly with the NCP, but must be consistent with its requirements. General Elec. Co. v. Litton Indus. Automation Sys., 920 F.2d 1415, 1420 (8th Cir. 1990) (holding that consistency with the national contingency plan does not necessitate strict compliance with its provisions), *cert. denied*, 111 S. Ct. 1390 (1991); NL Indus. v. Kaplan, 792 F.2d 896, 898-99 (9th Cir. 1986); *see also* Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887, 891 (9th Cir. 1986) (Although the court did not decide whether strict compliance was necessary, it stated in dicta that "section 107(a) does not require strict compliance with the national contingency plan; rather, response costs incurred by a private party may be 'consistent with the national contingency plan' so long as the response measures promote the broader purposes of the plan.").

153. NCP, *supra* note 105, § 300.700(c)(3).

154. "The 1985 and the proposed NCP had required provision-by-provision comparisons between the elements of private actions and specific requirements of the NCP." Lawrence E. Starfield, *The 1990 National Contingency Plan—More Detail and More Structure, But Still a Balancing Act*, 20 Envtl. L. Rep. (Envtl. L. Inst.) 10,222, 10,248 (Feb. 2, 1990).

155. In the proposed rule, the EPA indicated that consistency with the NCP could only be established by compliance with a list of requirements. 53 Fed. Reg. 51,462 (1988).

156. Starfield, *supra* note 154, at 10,248.

be made on a case-by-case basis; however, sections 105(a) and (b) of CERCLA authorize the EPA to establish potentially applicable procedures and requirements.[157] Thus, the new rule establishes that consistency with the NCP should be measured by whether the private party cleanup has achieved "substantial compliance" with a list of potentially applicable requirements intended as "guidance to private parties [and] that may be pertinent to a particular site."[158] Section 300.700(c)(5) of the NCP enumerates the potentially applicable requirements.[159] During the selection of a remedial response, the methods of remedying releases listed in Appendix D of the NCP may also be appropriate for consideration by private parties.[160] The NCP does not require absolute compliance with each provision; however, each is potentially applicable. "A private party can, of course, eliminate any risk or uncertainty by meeting the full set of requirements identified by the EPA as potentially relevant to private actions."[161]

Consistency requirements also mandate that private parties allow an opportunity for public comment concerning the selection of a response action in accordance with the public participation provisions of the NCP or substantially equivalent state and local requirements.[162] Failure to

157. 55 Fed. Reg. 8794 (1990) (explaining § 300.700(c) of the NCP, *supra* note 105).

158. 55 Fed. Reg. 8858 (1990) (discussing § 300.700(c)(5)-(7) of the NCP, *supra* note 105).

159. The NCP requirements include:

> (i) § 300.150 (on worker health and safety); (ii) § 300.160 (on documentation and cost recovery); (iii) § 300.400(c)(1), (4), (5) and (7) (on determining the need for a Fund-financed action); (e) (on permit requirements) except that the permit waiver does not apply to private party response actions; and (g) (on identification of ARARs) except that applicable requirements of federal or state law may not be waived by a private party; (iv) § 300.405(b), (c) and (d) (on reports of releases to the NRC); (v) § 300.410 (on removal site evaluation) except paragraphs (e)(5) and (6); (vi) § 300.415 (on removal actions) except paragraphs (a)(2), (b)(2)(vii), (b)(5), and (f); and including § 300.415(i) with regard to meeting ARARs where practicable except that *private party removal actions must always comply with the requirements of applicable law*; (vii) § 300.420 (on remedial site evaluation); (viii) § 300.430 (on RI/FS and selection of remedy) except paragraph (f)(1)(ii)(C)(6) and that applicable *requirements of federal or state law may not be waived by a private party*; and (ix) § 300.435 (on RD/DA and operation and maintenance).

NCP, *supra* note 105, §§ 300.150-.435 (emphasis added).

160. NCP, *supra* note 105, § 300.700(c)(7).

161. 55 Fed. Reg. 8794 (1990) (discussing § 300.700(c)(5)-(7) in the NCP, *supra* note 105). The NCP also provides that "[a]ny response action carried out in compliance with the terms of an order issued by the EPA pursuant to section 106 of CERCLA, or a consent decree entered into pursuant to section 122, will be considered 'consistent with the NCP.'" *Id.* § 300.700(c)(3)(ii).

162. Provisions regarding public participation are potentially applicable to private party response actions, except administrative records and information containing repository requirements stated therein:

> (i) Section 300.155 (on public information and community relations);
> (ii) Section 300.415(m) (on community relations during removal actions);
> (iii) Section 300.430(c) (on community relations during RI/FS) except paragraph (c)(5);

provide a public comment period on a proposed remedial action may preclude recovery of costs.[163]

The EPA stated in the final rule that the new standard advances the goals of not requiring rigid adherence to a detailed set of procedures while assuring that a private action is only available for environmentally sound cleanups.[164] Following the CERCLA mandate of effective cleanup of hazardous substances, the EPA specifically stated that the "substantial compliance" standard "should not be an invitation to perform low quality cleanups."[165] The consistency requirement and the substantive provisions of the NCP present a significant incentive to perform a high quality response action because the penalty for an inadequate response is the denial of all or a portion of the expenses incurred. The more lenient standard encourages private parties to conduct voluntary cleanups and discourages defendants from seizing upon a rigid list of definitive criteria in the search for minor discrepancies that may be used to preclude cost recovery for private party cleanups.[166] To further encourage private cleanups and enhance legitimate cost recovery efforts, the EPA established the principle that "immaterial or insubstantial deviations from the provisions" of the NCP should not preclude a finding of consistency with the NCP.[167] In determining whether a private party's

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(iv) Section 300.430(f)(2), (3), and (6) (on community relations during selection of remedy); and

(v) Section 300.435(c) (on community relations during RD/RA and operation and maintenance).

NCP, *supra* note 105, § 300.700(c)(6)(i)-(v).

163. *See* County Line Inv. Co. v. Tinney, 933 F.2d 1508, 1514-15 (10th Cir. 1991) (failing to provide for public comment precluded recovery); *see also* Channel Master Satellite, Sys. v. JFD Elecs. Corp., 748 F. Supp. 373, 389-90 (E.D.N.C. 1990) (failing to provide for public comment was inconsistent with NCP and therefore barred recovery).

164. 55 Fed. Reg. 8793 (1990) (explaining § 300.700(c) in the NCP, *supra* note 105).

165. NCP, *supra* note 105, § 300.700(c)(3). Moreover, even if a site cleanup is conducted consistent with the NCP, PRPs may be liable for costs associated with future releases of hazardous substances at the same site. "Implementation of response measures by potentially responsible parties or by any other person does not release those parties from liability under section 107(a) of CERCLA, except as provided in a settlement under section 122 of CERCLA or a federal court judgment." NCP, *supra* note 105, § 300.700(g). Thus, PRPs have an incentive to make their own evaluation of the cleanup. *See* 42 U.S.C. §§ 9604(a)(1), 9605(e), 9621(c), 9622(f) (1988); 55 Fed. Reg. 8793 (1990) (discussing the EPA's application of § 300.430 of the NCP, *supra* note 105).

166. NCP, *supra* note 105, § 300.700(c). The EPA recognized that establishing a rigid list of requirements may be used to defeat cost recovery actions for meritorious cleanup actions based on mere technical failures such as failure to provide a public hearing when the public was afforded an opportunity to comment. *Id.* Moreover, the EPA took note that private parties are generally inexperienced in conducting cleanups, and if failure to comply with all of the provisions was based on lack of experience, recovery should not be denied. *Id. See also* Starfield, *supra* note 154, at 10,248 ("[M]any voluntary cleanups are being contested based on allegations that cleanups failed to meet the letter of the NCP, even if the spirit of the regulation was satisfied.").

167. NCP, *supra* note 105, § 300.700(c)(4).

cleanup was in substantial compliance, courts should note that section 300.700(c)(4) "expressly require[s] lenience"[168] in the application of the 1990 NCP.[169]

3. Remedial Versus Removal Costs

A private action plaintiff must identify the type of cleanup that will be undertaken because the requirements of CERCLA and the NCP differ depending upon whether the cleanup is classified as a "remedial" or "removal" action. Essentially, CERCLA divides responses into two categories, "removal" and "remedial" actions, with different legal requirements for each.[170] CERCLA defines "removal" actions as:

> the cleanup or removal of released hazardous substances from the environment, such actions as may be necessar[ily] taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release .... The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals ....[171]

"Remedial" action is defined to include:

> those actions consistent with [a] permanent remedy taken instead of or in addition to removal actions ..., to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes ... neutralization, cleanup of released hazardous substances or contaminated materials ....[172]

Basically, removal actions are instituted in response to immediate threats

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168. Ambrogi v. Gould, Inc., 750 F. Supp. 1233, 1254 n.27 (M.D. Pa. 1990).

169. "Actions under § 300.700(c)(1) will not be considered 'inconsistent with the NCP,' and actions taken under § 300.700(c)(2) will not be considered not 'consistent with the NCP,' based on immaterial or insubstantial deviations from the provisions of 40 CFR part 300." NCP, *supra* note 105, § 300.700(c)(4).

170. "The division of CERCLA responses into the two categories of removal and remedial actions ... figures prominently in judicial analysis of consistency with the NCP." Channel Master Satellite, Sys. v. JFD Elecs. Corp., 748 F. Supp. 373, 385 (E.D.N.C. 1990); *see also* Amland Properties Corp. v. Aluminum Co. of Am., 711 F. Supp. 784, 795 (D.N.J. 1989) ("The distinction between these two actions is of no small importance, for whereas removal actions need only comply with the relatively simple NCP requirements set forth at 40 C.F.R. § 300.65 ... remedial actions must comport with the 'more detailed procedural and substantive provisions of the NCP.' ").

171. CERCLA § 101(23), 42 U.S.C. § 9601(23).

172. *Id.* § 101(24), 42 U.S.C. § 9601(24).

to public welfare or to the environment,[173] and remedial actions are activities intended to restore long-term environmental quality.[174] Historically, the NCP cleanup requirements differed depending upon the characterization of the response as removal or remedial. The 1985 NCP expressly delineated mandatory and applicable provisions based on the type of response.[175]

Although the significance of classifying the response is not as clearly delineated in the 1990 NCP, the distinction remains an important concern for private action plaintiffs. The 1990 NCP provides a list of provisions potentially applicable to "response actions" regardless of whether the response is classified as removal or remedial. However, the 1990 NCP continues to distinguish to some extent between actions appropriate for removal and those appropriate for remedial actions.[176] For example, remedial actions must meet applicable or relevant and appropriate requirements (ARARs),[177] whereas removal actions must attain ARARs "to the extent practicable considering the exigencies of the situation."[178] Thus, the distinction between removal and remedial actions remains a primary concern for the potential private action plaintiff. A court will evaluate the appropriateness of a cleanup based on the provisions applicable to the type of cleanup conducted.

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173. City of New York v. Exxon Corp., 633 F. Supp. 609, 614 (S.D.N.Y. 1986) (" 'removal' actions are primarily those intended for the short-term abatement of toxic waste hazards").

174. *Id.* (" 'remedial' actions are typically those intended to restore long-term environmental quality").

175. The 1985 NCP listed certain cleanup actions that were consistent with the NCP:

> (i) Where the action is a removal action, acts in circumstances warranting removal and implements removal action consistent with § 300.65.
>
> (ii) Where the action is a remedial action:
>
> (A) Provides for appropriate site investigation and analysis of remedial alternatives as required under § 300.68;
>
> (B) Complies with the provisions of paragraphs (e) through (i) of § 300.68;
>
> (C) Selects a cost-effective response;
>
> (D) Provides an opportunity for appropriate public comment concerning the selection of a remedial action consistent with paragraph (d) of § 300.67 unless compliance with the legally applicable or relevant and appropriate State and local requirements identified under paragraph (4) of this section provides a substantially equivalent opportunity for public involvement in the choice of remedy.

1985 NCP, *supra* note 122, § 300.71(a)(2).

176. *See* NCP, *supra* note 105, § 300.700(c)(5). Note that § 300.700(c)(5) provides a list of potentially applicable requirements some of which are delineated based on categorization as removal or remedial actions. *Id.*

177. CERCLA § 121, 42 U.S.C. § 9621.

178. NCP, *supra* note 105, § 300.415(i). This distinction may become less relevant for removal actions which are not conducted in great haste and involve more complex procedures.

4. CERCLA-Quality Cleanup

Section 300.700(c)(3)(i) requires that response actions must be in substantial compliance with the NCP *and* result in a "CERCLA-quality" cleanup.[179] The term "CERCLA-quality cleanup" has not appeared in previous versions of the NCP and is defined only in the 1990 Preamble. To meet this standard, the plaintiff must (1) meet the three remedy selection requirements of section 121(b)(1) of CERCLA; (2) attain ARARs according to section 121(d)(4); and (3) provide for meaningful public participation as prescribed in section 117.[180] The three remedy selection provisions require that "the remedial action must be 'protective of human health and the environment,' utilize 'permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable,' and be 'cost-effective . . . .' "[181]

The EPA stated that the requirements of a CERCLA quality cleanup were not new additions resulting from the proposed rule, but rather that private parties had previously been required to comply strictly with a more detailed list of provisions of the NCP, which included these requirements. However, it is not clear whether cost-effectiveness was previously a requirement of only remedial actions or both remedial and removal actions.

Defendants in private cost recovery actions often assert as a uniform defense that the cleanup conducted by a private party without prior government authorization was not cost-effective.[182] Under the 1985 NCP, the courts were in general agreement that cost-effectiveness was not an absolute prerequisite to recovery of all response costs in a private party

179. NCP, *supra* note 105, § 300.700(c)(3)(i). This element serves to compensate for the more lenient "substantial compliance" standard, thus precluding private cost recoveries for cleanups that may not be environmentally sound. 55 Fed. Reg. 8792-93 (1990). One commentator wrote that "the new standard reflects the Agency's view that it is also important to encourage only environmentally sound cleanups, not any cleanup. The requirement for 'CERCLA-quality cleanups' was intended to achieve this goal." Starfield, *supra* note 154, at 10,248. Additionally, the author noted, "The Agency concluded that such hyper-technical challenges were not in the best interest of environmental protection." *Id.*

180. 55 Fed. Reg. 8793 (1990) (explaining the significance of § 300.700(c) of the NCP, *supra* note 105). The EPA recognized that public participation is not required by CERCLA § 121, but considered it necessary to any proper cleanup. *Id.*

181. *Id.* (defining a "CERCLA quality cleanup" according to the NCP, *supra* note 105, § 300.700(c), and CERCLA § 121, 42 U.S.C. § 9621).

182. *See* Channel Master Satellite, Sys. v. JFD Elec. Corp., 748 F. Supp. 373, 384 (E.D.N.C. 1990).

action.[183] Because removal actions are generally conducted to abate imminent dangers, they were not required to be cost-effective.[184] However, remedial actions were required to be cost-effective.[185]

The 1990 NCP presents an interesting dilemma: Is the distinction between the applicability of the cost-effectiveness requirement to removal and remedial actions still valid? It appears from the foregoing analysis that consistency with the NCP does not mandate a determination of cost-effectiveness for a removal action, but that it does call for such a determination for remedial actions.

5. Cost Effectiveness

The EPA's silence on whether cost-effectiveness is a prerequisite to the recovery of costs incurred in a removal action should not be construed as an endorsement by the EPA of that requirement. The EPA defines "CERCLA-quality" cleanup to include a mandate that "the action must satisfy . . . [the standards of] section 121(b)(1)—i.e., the *remedial action* must be . . . 'cost-effective . . . .' "[186] Given the significant deference afforded to the EPA by reviewing courts,[187] the EPA (or perhaps the courts) could extend the requirement of cost-effectiveness to removal actions. However, this appears to be an unintended ambiguity. First, both the Preamble[188] and section 121(b)(1) of CERCLA refer to "remedial" actions.[189] Second, the "CERCLA-quality" requirement was

183. *Id.* at 387. Although the court in *Channel Master Satellite* did not decide the case based on the cost-effectiveness requirement, the court stated that "although NCP requirements 'should not be applied in a Procrustean manner,' compliance [with the NCP] 'is [not] reducible to an inquiry into whether the clean-up was cost-efficient and environmentally sound.' " *Id.* at 383 (quoting BCW Assoc. v. Occidental Chem. Corp., No. Civ. A. 86-5947, 1988 WL 102641, at *23 n.3 (E.D. Pa. Sept. 29, 1988).

184. *See* 1985 NCP, *supra* note 122, §§ 300.65, 300.71(a)(2)(i) (current version at 40 C.F.R. §§ 300.415, 300.700(c)) These sections do not require cost-effectiveness.

185. 1985 NCP, *supra* note 122, § 300.71(a)(2)(ii)(C) (current version at 40 C.F.R § 300.430(f)(1)(ii)(D)).

186. 55 Fed. Reg. 8793 (1990) (emphasis added) (interpreting proposed § 300.700(c) of the NCP, *supra* note 105). In the case of remedial actions, the EPA has defined a cost-effective remedy as "one which, among the alternatives examined, is least costly but technologically feasible, reliable and [that] adequately protects public health and the environment." U.S. ENVIRONMENTAL PROTECTION AGENCY, COST RECOVERY ACTIONS UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (CERCLA), GUIDANCE MEMO, OSWER No. 9832.1 (1986).

187. A reviewing court owes considerable deference to agency interpretations of statutes that an agency administers. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 844-45 (1984).

188. 55 Fed. Reg. 8793 (1990).

189. 42 U.S.C. § 9621(b)(1).

added while promulgating a more lenient standard of consistency to provide for environmentally sound cleanups which can be achieved even if an action is less than cost-effective.

Two sections of the NCP present support for the claim that cost-effectiveness is not a prerequisite for removal actions to be consistent with the NCP. First, cost-effectiveness is not mentioned among the NCP provisions which are potentially applicable to removal actions.[190] On the other hand, cost-effectiveness is an explicit requirement of a remedial action under subsection 300.430(f)(ii)(D) of the 1990 NCP.[191] Second, the "CERCLA-quality" requirement also includes a mandate to meet ARARs; yet, the NCP explicitly distinguishes between removal and remedial actions with reference to ARARs. While remedial actions must meet ARARs, removal actions need only meet ARARs "to the extent practicable considering the exigencies of the situation . . . ."[192]

The general purpose of a removal action also supports the argument that cost-effectiveness should not be a requirement of a removal action. Removal actions are generally conducted in an expedient manner, to provide immediate containment of hazardous substances, and protect public health. Circumstances may not allow time for detailed analysis and planning. A requirement of cost-effectiveness for removal actions would impede protection of public health in the face of an immediate need.

Since the overriding goal of CERCLA is to have waste sites cleaned up, it makes little sense to allow those who do not participate in the cleanup to nitpick the efficacy of the remedy selected. While a court should review the cost-effectiveness of a response, the burden should be on the defendant to show the response was unreasonable under the circumstances that existed when the decision was made. The resulting ambiguities and inconsistencies exposed in this discussion indicate that removal actions are not subject to a cost-effectiveness analysis, but remedial actions must be subjected to such an analysis.

In summary, the EPA stated that it has issued a more lenient standard while still "identifying several requirements that must be met to achieve substantial compliance."[193] In this way, the EPA effectively provided relief from the requirement of strict adherence to a rigid list of provisions, yet still ensured that a private right of action is only available

190. NCP, *supra* note 105, §§ 300.310 (removal site evaluation), 300.415 (removal actions).
191. "Each remedial action selected shall be cost effective . . . ." *Id.* § 300.430(f)(ii)(D).
192. *Id.* § 300.415(i).
193. 55 Fed. Reg. 8793 (1990).

to those parties who conduct environmentally sound cleanups.[194]

B. *What Are "Necessary Costs"?*

Section 107(a)(4)(B) of CERCLA mandates that a private party may only recover the "necessary costs of response."[195] Because neither CERCLA nor the NCP defines "necessary costs," courts necessarily use a case-by-case method to determine which of the response costs incurred by a private party are "necessary costs of response."[196] Case law thus presents some guidance on the question of what private response costs are "necessary."

Although a clear and full understanding of the term "necessary costs" is elusive, the Eighth Circuit defines "necessary" to include the costs of any cleanup requirements mandated by the NCP and any expenditures made while complying with state standards and mandates. In *General Electric Co. v. Litton Industrial Automation Systems*,[197] Litton argued that General Electric's response costs were not "necessary," but were incurred to enhance the value of the property. However, the NCP requires private party responses to comply with all applicable, relevant and appropriate federal, state, and local requirements. The court determined that General Electric's cleanup effort was merely designed to attain state-imposed environmental standards that were not achieved until completion of the cleanup. Because General Electric's level of cleanup was mandated by the NCP and state law, the costs incurred were considered "necessary" to comply with the NCP.[198]

As one article explains,[199] the "term 'necessary' has not received much judicial attention, and courts concentrate instead on whether the costs were incurred as part of an allowable removal or remedial action."[200] Courts have not developed a restrictive definition of "necessary," but instead have generally defined "necessary" as "logically unavoidable but at the same time . . . uncompelled by the USEPA."[201]

194. *Id.* at 8794.

195. 42 U.S.C. § 9607(a)(4)(B).

196. *See* Heiring, *supra* note 126, at 1150; *see also* Brewer v. Ravan, 680 F. Supp. 1176, 1179 (M.D. Tenn. 1988) (noting difficulty which arises in applying § 107(a) because CERCLA does not define necessary costs of response).

197. 920 F.2d 1415 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1390 (1991).

198. *Id.* at 1421.

199. McSlarrow, *supra* note 114, at 10,367.

200. *Id.*

201. Allied Corp. v. Acme Solvents Reclaiming, Inc., 691 F. Supp. 1100, 1107 (N.D. Ill. 1988).

Most courts agree that costs incurred to comply with mandatory government cleanup requirements fall within the general meaning of "necessary response costs."[202]

At the other end of the spectrum, a private action plaintiff who fails to document the reasons for cleanup expenditures falls short of meeting the "necessary" burden.[203] A mere list of expenses, without any reasonable basis to demonstrate the necessity of the costs, does not fulfill the burden. Although the standard for compliance has been relaxed, in order to recover cleanup costs, a plaintiff must have the ability to at least provide some reasonable justification for each cost.[204] A private party should review the costs it seeks to recover with a common sense consideration of their appropriateness.[205]

No difficulties should arise when the NCP or federal, state, or local laws clearly mandate a particular activity, or when a plaintiff simply does not document costs. These situations lead to definitive results, the former warranting an award of costs and the latter precluding recovery. The expenditures of concern involve costs for cleanup activities which are beneficial in the cleanup process, but which may not have been necessary to meet a specific government standard. Courts will continue to rule on the appropriateness of these costs on a case-by-case basis using their sense of equity and the guidance provided in the 1990 NCP.

Persons conducting a cleanup would be well-advised to follow carefully the requirements of the NCP and to document fully and justify each expenditure. Engineers and scientists should be consulted in order to

202. NL Indus. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986) (holding that the costs of response required by local and state governments were "necessary" under § 107(a)(2)(B)).

203. Ambrogi v. Gould, Inc., 750 F. Supp. 1233, 1257 (M.D. Pa. 1991).

204. One court held that:

> [t]he mere conclusory affidavits of Plaintiffs showing that they have incurred alternative water costs do not prove that those costs are 'necessary.' In determining the necessity of the costs, the Court will also have to consider what alternatives were available to Plaintiffs to provide alternative water, even if it is decided that alternative water of some kind was a necessary cost.

Hopkins v. Elano Corp., 30 Env't Rep. Cas. (BNA) 1782, 1785 (S.D. Ohio 1989) (denying summary judgment because genuine issues of material fact remained concerning the necessity of response costs).

205. A unique example of unjustified costs was uncovered during the deposition of a hazardous waste site project manager. The project manager was questioned about certain phone bills, which included the costs of calls made to "900" numbers. Not surprisingly, the state's attorney (the plaintiff) was willing to stipulate that calls made to numbers advertised as "Intimate sexual pleasure of Emmanuelle X," "Hypatia Lee—Sizzling, sultry sex star of the silver screen," and "Forbidden fantasies of Alexis C—a seductive nymph" were probably not consistent with the NCP. Deposition of Gary Hoffmaster (Vol. II) at 200-07, Kelly v. E.I DuPont De Nemours and Co. (E.D. Mich. Dec. 20, 1990) (No. 90CV72028DT) (quoted portions on file with the *Tulsa Law Journal*).

properly execute an effective cleanup which meets the standards set forth by the NCP. Moreover, persons conducting cleanups should seek assistance from both the EPA and the state environmental department.

C. *Recoverable Costs*

Although Congress and the EPA have given some guidance on the costs that are recoverable in a private action, parties often must resort to the courts for a determination of what constitutes recoverable costs.[206] Congress provided two sources of limited guidance on recoverable costs. First, the statutory definitions of "removal" and "remedial" actions list actions for which private parties may recover the corresponding costs if the actions are "necessary" and "incurred consistent with the NCP." Second, Congress instructed the EPA to promulgate the NCP which contains more specific guidance. Generally, the EPA considers recoverable costs to include: activities necessary to determine the nature and extent of danger to the public health or the environment; activities necessary to plan for and conduct response actions; and the costs of litigation.[207] As a result of the inadequate guidance and because of the factual variation in the cases, a determination of recoverable costs must still be made for each site. Thus, a review of the case law is helpful. This section will explore the realm of costs for which courts have granted or denied recovery.

Note at the outset that a private action plaintiff may recover prejudgment interest on awards of cleanup costs. Section 107(a) provides for recovery of interest on the amount of response costs recoverable at the same rate as specified for interest on the Superfund.[208] Note also that the trial court in *General Electric* awarded prejudgment interest as a recoverable response cost.[209]

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206. *See, e.g.*, Tanglewood E. Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1575 (5th Cir. 1988) (finding that the approval of a government agency is not a prerequisite to the recovery of response costs); Piccolini v. Simon's Wrecking, 686 F. Supp. 1063, 1068 (M.D. Pa. 1988) (finding that "response costs" should be construed liberally); T & E Indus. v. Safety Light Corp., 680 F. Supp. 696, 705 (D.N.J. 1988) (allowing a private party to recover costs of a type which a governmental agency could have recovered).

207. In responding to a commentator's request that it clarify the scope of costs recoverable under the NCP, the EPA stated that this information should be more properly provided in EPA guidance documents. 55 Fed. Reg. 8681 (1990) (summarizing comments made about proposed § 300.160 of the NCP, *supra* note 105). The EPA also responded that it was developing a regulation to "provide for recovery of direct and indirect costs under CERCLA." *Id.* Note, however, that § 300.160(d) now includes the costs of any health assessments or health effect studies within the scope of costs for which PRPs are responsible. NCP, *supra* note 105, § 300.160.

208. 42 U.S.C. § 9607(a).

209. General Elec. Co. v. Litton Business Sys., 715 F. Supp. 949, 959 (W.D. Mo. 1989), *aff'd*

1. Initial Costs

The first costs of a cleanup generally involve determining the nature and extent of a hazardous substance problem. These may include the costs of investigations, monitoring, surveying, testing and other information-gathering activities, as well as costs of erecting fencing and utilizing security measures to prevent people from being exposed to dangerous conditions. Some releases or threats thereof present sufficient danger to warrant immediate measures to protect the public. Such a facility must first be secured and any imminent or actual releases must be contained. Fencing and security provisions are examples of immediate responses used to reduce the danger to the public. For the most part, courts have allowed recovery of costs associated with containing the hazardous substance to protect the public.[210]

Following containment, a prudent person will conduct an investigation that should show which hazardous substances have been released, the extent of contamination, the extent of any danger, and other information needed to develop a proper cleanup plan. Some courts, in ruling on recoverability, have attempted to place substantial limitations on the timing of investigative costs in relation to the cleanup.[211] These considerations aside, costs associated with investigating a release or threat of a release of a hazardous substance are recoverable as response costs.[212]

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sub nom. General Elec. Co. v. Litton Indus. Automation Sys., 920 F.2d 1415 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1390 (1991); *see also* Key Tronic Corp. v. United States, 766 F. Supp. 865, 868-69 (E.D. Wash. 1991) ("CERCLA clearly states that in cost recovery actions under § 107 the plaintiff may recover prejudgment interest.").

210. Cadillac Fairview/California, Inc. v. Dow Chem. Co., 840 F.2d 691, 695 (9th Cir. 1988) (allowing recovery of security expenditures); *see* Amland Properties Corp. v. Aluminum Co. of Am., 711 F. Supp. 784, 795 (D.N.J. 1989) (stating that erecting a fence and establishing a 24-hour guard were "removal actions," but denying recovery because those actions were taken prior to any knowledge of the release of hazardous substances).

211. Bulk Distrib. Ctrs., Inc. v. Monsanto Co., 589 F. Supp. 1437, 1451-52 (S.D. Fla. 1984) (allowing recovery of investigatory costs only if and when the actual cleanup has begun); United States v. Price, 577 F. Supp. 1103, 1110 (D.N.J. 1983) (holding that costs of investigation are recoverable only if specified in the complaint and only after actual cleanup has begun). Note that both of these decisions pre-date SARA. *Contra* Artesian Water Co. v. New Castle County (Artesian Water Co. II), 851 F.2d 643, 651 (3d Cir. 1988) (affirming denial of economic damages except for monitoring costs).

212. Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 672 (5th Cir. 1989) (affirming award of response costs on grounds that release of hazardous substances had occurred); Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887, 892 (9th Cir. 1986) (construing CERCLA § 107(a)(2)(B) to permit recovery of on-site testing and investigative costs); Brewer v. Ravan, 680 F. Supp. 1176, 1179 (M.D. Tenn. 1988) (allowing recovery of on-site testing and investigative costs under § 107(a)); Velsicol Chem. Corp. v. Reilly Tar & Chem. Corp., 21 Env't Rep. Cas. (BNA) 2118, 2122 (E.D. Tenn. 1984) (allowing recovery of investigative costs as response costs under CERCLA).

Section 107(a) provides for "recovery of 'costs of response,' which includes the costs of 'such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances.' "[213] Accordingly, courts have allowed recovery of investigation costs under section 107(a).[214] Moreover, these costs are recoverable even absent actual contamination and even prior to initiation of any other response action.[215] Thus, a variety of expenditures are recoverable under section 107(a)(4)(B) when incurred to assess a release and to develop an appropriate remedy.[216]

2. On-Site Cleanup Costs

This section briefly examines the recoverable cleanup costs that may be incurred at the site. The following items represent only a few of the actual cleanup activities a private party may conduct.

Actual on-site cleanup activities include a broad spectrum of possible removal and remedial actions.[217] The guidance provided in the statute is only illustrative because appropriate cleanup methods are

213. *Wickland Oil Terminals*, 792 F.2d at 892. "Removal" includes the costs necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances. *See* CERCLA § 101(23), 42 U.S.C. § 9601(23) (definition of "removal"). At least two commentators have posited that the broad remedial thrust of CERCLA provides a basis for denying any distinction between actual cleanup costs and investigative costs. Rogers & McCall, *supra* note 114, at 849.

214. *Wickland Oil Terminals*, 792 F.2d at 892 (construing "cost of response" to include testing expenses); Artesian Water Co. v. New Castle County (Artesian Water Co. I), 659 F. Supp. 1269, 1285 (D. Del. 1987) ("[O]nly the expenses of monitoring and evaluation are response costs within the meaning of CERCLA."), *aff'd*, 851 F.2d 643 (3d Cir. 1988); *Brewer*, 680 F. Supp. at 1179 (including on-site soil testing and water monitoring within scope of response costs); International Clinical Lab., Inc. v. Stevens, 710 F. Supp. 466, 472 (E.D.N.Y. 1989) (citing CERCLA § 101(23), the court concluded that costs necessary to " 'monitor, assess and evaluate the release or threat of release of hazardous substances' " appear to be recoverable).

215. Expenditures for investigatory procedures instituted in response to a release which indicate that no contamination of a water supply took place may still be recoverable. *Artesian Water Co. II*, 851 F.2d at 651.

216. One court has gone so far as to state that the detailed NCP provisions governing other response actions do not apply to preliminary site evaluations. Amland Properties Corp. v. Aluminum Co. of Am., 711 F. Supp. 784, 795 (D.N.J. 1989) (citing *Artesian Water Co. I*, 659 F. Supp. at 1294).

217. "Removal" actions include security and site control precautions, drainage controls, stabilization techniques, migration reduction techniques, use of chemicals, excavation, consolidation or removal of highly contaminated soils, removal of drums and other containers, containment, treatment, disposal and incineration of hazardous wastes, and provisions of alternative water supplies. NCP, *supra* note 105, § 300.415. For the statutory definition, see CERCLA § 101(23), 42 U.S.C. § 9601(23). "Remedy" is also defined by the statute:

> The terms "remedy" or "remedial action" . . . include[ ], but [are] not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances or contaminated materials, recycling or reuse, diversion, destruction, segregation of

numerous and depend upon site conditions such as terrain, soil permeability, and proximity to surface and groundwater as well as the type and identity of the hazardous substances released and the manner of their release. Removing hazardous wastes from the site, by whatever means, is the traditional notion of a cleanup action. Costs associated with this type of removal are recoverable. For example, the excavation of soil and buried drums of hazardous substances was considered a removal action in *General Electric Co. v. Litton Industrial Automation Systems.*[218] Because the removal was consistent with the 1985 NCP, the costs were recoverable.[219] Additionally, courts have allowed parties to recover the costs of conforming the response action to comply with the Resource Conservation and Recovery Act (RCRA).[220]

Courts have allowed costs incurred by a party to protect persons endangered by the release of hazardous substances. For example, costs incurred in evacuating and housing persons threatened by a release have been held recoverable.[221] Further, in *Lutz v. Chromatex, Inc.*,[222] the district court held that the terms "remove" or "removal" and "remedy" or "remedial" also include the provision of alternative water supplies.[223] In *Artesian Water Co. v. New Castle County (Artesian Water Co. I)*,[224] the court found that the costs of providing alternative water supplies are recoverable, but only if the existing water supply is contaminated or threatened by the release of hazardous substances.[225]

> reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the costs of permanent relocation of residents [in certain circumstances] . . . offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.

CERCLA § 101(24), 42 U.S.C. § 9601(24).

218. 920 F.2d 1415, 1419 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1390 (1991).

219. *Id.* at 1420; *see also* New York v. Shore Realty Corp., 759 F.2d 1032, 1043 (2d Cir. 1985) (holding supervision costs involved in removing drums are also recoverable).

220. 42 U.S.C. §§ 6901-6992k (1988); *see* Chemical Waste Management, Inc. v. Armstrong World Indus., 669 F. Supp. 1285, 1289-91 (E.D. Pa. 1987) (stating that inspection, monitoring, and closing costs required by RCRA and conducted consistent with the NCP may be recoverable); *see also* Mardan Corp. v. C.G.C. Music, Ltd., 600 F. Supp. 1049, 1054 (D. Ariz. 1984), *aff'd*, 804 F.2d 1454 (9th Cir. 1986) ("RCRA compliance costs may also be considered 'response costs' under CERCLA.").

221. *See* Lutz v. Chromatex, Inc., 718 F. Supp. 413, 420 (M.D. Pa. 1989) (denying motion for dismissal because these activities are recoverable under CERCLA § 107 and are included in CERCLA § 101(23)).

222. 718 F. Supp. 413 (M.D. Pa. 1989).

223. *Id.* at 419.

224. 659 F. Supp. 1269 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988).

225. *Id.* at 1287.

3. Indirect Costs

Recently, consideration has been given to the recovery of indirect costs such as rent, utilities, supplies, clerical staff, executive personnel, and other overhead expenses incurred in conducting a cleanup.[226] Generally, the EPA is entitled to recover indirect costs in a federal government cost recovery action.[227] In *United States v. R.W. Meyer, Inc.*,[228] the Sixth Circuit stated that "indirect costs are part and parcel of all costs of the removal action . . . ."[229]

Private parties conducting a cleanup may also recover indirect costs. No reason exists to characterize indirect costs as response costs exclusively for purposes of government actions. Although few courts have addressed this issue in the context of a private action,[230] indirect costs are in fact expenditures incurred as a result, at least in part, of the necessity to conduct a cleanup. In *T & E Industries v. Safety Light Corp.*,[231] a federal district court held that the value of the time a company president devoted to monitoring, assessing, and evaluating a cleanup may be recoverable.[232] Other courts have reached similar results.[233]

All "transaction costs,"[234] a category of indirect costs, should be allowed as response costs. "Transaction costs" include the costs of engineers, attorneys, and consultants as well as administrative and management costs required to properly clean up a site or to recover cleanup

226. *See, e.g.*, Callaway, *supra* note 148, at 6.

227. United States v. Ottati & Goss, Inc., 900 F.2d 429, 444 (1st Cir. 1990) ("[O]rdinarily courts should allow recovery of these indirect costs."). However, the *Ottati & Goss* court was concerned with the EPA's conduct, and therefore, remanded the decision to the district court to consider denial of these costs as a sanction. *Id.*

228. 889 F.2d 1497 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057 (1990).

229. *Id.* at 1503.

230. Callaway, *supra* note 148, at 6.

231. 680 F. Supp. 696 (D.N.J. 1988).

232. *Id.* at 706-07. For a short discussion of the recoverability of supervisory costs see Jane E. Lein & Kevin M. Ward, *Private Party Response Cost Recovery Under CERCLA*, 21 Envtl. L. Rep. (Envtl. L. Inst.) 10,322, 10,330 (June 1991).

233. Lykins v. Westinghouse Elec. Corp., 715 F. Supp. 1357 (E.D. Ky. 1989) (holding supervisory costs to be recoverable); *see also* Key Tronic Corp. v. United States, 766 F. Supp. 865, 872 (E.D. Wash. 1991) (holding the executive and outside investigator's fees incurred in the PRP search recoverable).

234. Hedeman, Cannon, and Friedland defined CERCLA "transaction costs" as the "millions of dollars in administrative, legal, engineering, consulting, and other management costs borne by EPA, private industry, and local governments that do not directly result in cleaning up a waste site, but are nonetheless inevitable in establishing liability for cleaning up a site." William N. Hedeman et al., *Superfund Transaction Costs: A Critical Perspective on the Superfund Liability Scheme*, 21 Envtl. L. Rep. (Envtl. L. Inst.) 10,413, 10,415 (July 1991). Not all transactional costs will fit neatly into one of the other categories of recoverable costs, but nonetheless, should be allowed because the plaintiff expends these monies in an effort to correct a difficult social problem.

costs. Administrative and management costs, although sometimes difficult to measure, should be included when tallying indirect costs. Private as well as government recovery of indirect costs should be considered a reasonable and recoverable response cost.

4. Future Costs

Future costs can include expenses of monitoring air, water, and health problems associated with the release as well as cleanup costs associated with a future release at a site where insufficient remediation has taken place. Because of the uncertainty of future costs, private action plaintiffs often seek a declaratory judgment on the issue of the liability of future expenses. Expenses that may be incurred in the future are generally disputed more than are the actual costs of cleanup previously incurred.

One of the most contested potential response expenditures is the cost of medical monitoring. The courts are split on the question of whether to consider these costs recoverable.[235] Although the issue is not resolved, the general trend is to deny the costs of medical monitoring. *Coburn v. Sun Chemical Corp.*[236] exemplifies the rationale of denying recovery of monitoring costs. After reviewing the language of CERCLA, its legislative history, and case law, the *Coburn* court determined, based on the following analysis, that "costs of medical screening and/or future medical monitoring are clearly not 'necessary costs of response' under [section] 107 of CERCLA."[237] The statutory definitions of "removal" and "remedial" actions do not contain any language related to medical

235. Cases holding costs of medical monitoring recoverable include: Brewer v. Ravan, 680 F. Supp. 1176, 1179 (M.D. Tenn. 1988) ("[M]edical testing and screening conducted *to assess the effect of the release . . . on public health or to identify potential public health problems presented by the release* . . . present a cognizable claim under section 9607(a). . . . Public health related medical tests and screening clearly . . . constitute 'removal' under section 9601(23)."); Williams v. Allied Automotive, 704 F. Supp. 782, 784 (N.D. Ohio 1988) ("In the absence of any controlling authority on the issue, this Court is of the opinion that costs of future medical monitoring are not categorically unrecoverable as response costs . . . ."); Velsicol Chem. Corp. v. Reilly Tar & Chem. Corp., 21 Env't Rep. Cas. (BNA) 2118, 2121 (E.D. Tenn. 1984) (finding that costs of identifying and allaying an environmental problem are recoverable).

Cases reaching the opposite conclusion include: Cook v. Rockwell Int'l Corp., 755 F. Supp. 1468, 1474 (D. Colo. 1991) (finding that costs of medical testing to monitor health effects are not recoverable under § 107); Ambrogi v. Gould, Inc., 750 F. Supp. 1233, 1246 (M.D. Pa. 1990) (" '[M]edical surveillance, health effect studies, and health assessments' are *not* recoverable response costs under CERCLA."); States v. BFG Electroplating and Mfg. Co., 31 Env't Rep. Cas. (BNA) 1350, 1353 (W.D. Pa. 1990) (determining that both past and future medical monitoring costs are not cognizable under § 107); *see also* Woodman v. United States, 764 F. Supp. 1467, 1469 (M.D. Fla. 1991) ("[F]uture medical monitoring expenses are not CERCLA response costs.").

236. 28 Env't Rep. Cas. (BNA) 1665 (E.D. Pa. 1988).

237. *Id.* at 1671.

expenses. These terms refer to the cleanup of toxic substances, not medical monitoring. Moreover, the medical care provisions of CERCLA are not included in section 107 but are included in section 104(i).[238] Congress could have provided for a private right of action for medical testing and care had it wanted to. Instead, CERCLA's legislative history indicates that Congress considered such provisions and decided to "delete[ ] the Federal cause of action for medical expenses or property or income loss."[239] This analysis has been adopted by a number of courts.[240]

In SARA, Congress created the Agency for Toxic Substances and Disease Registry (ATSDR) to provide medical testing and care for individuals exposed to hazardous substances. The testing includes "tissue sampling, chromosomal testing, epidemiological studies, or any other assistance appropriate under the circumstances . . . ."[241] The benefits of the ATSDR are designed to compensate for the inability to recover medical surveillance expenses under CERCLA.

For purposes of recovering future cleanup costs, plaintiffs will undoubtedly seek a declaratory judgment holding the defendant responsible for the future "response costs."[242] To establish a right to declaratory relief, the plaintiff must fulfill the same basic elements of the cost recovery action.[243] Once a party has obtained a declaratory judgment, it may proceed with confidence that the accountable party will be legally responsible for sharing the financial burden.

5. Damages

Generally, a private cause of action for damages under CERCLA is not available.[244] The denial of recovery for damages is supported by the distinction between the meaning of the terms "damages" and "costs."

238. 42 U.S.C. § 9604(i). Section 104(i) handles extraordinary future costs related to the cleanup, including medical expenses, while § 107 addresses the immediate reimbursement costs of controlling the damage or response costs.

239. 126 CONG. REC. 30,932 (1980) (comments of Sen. Randolph). Senator Stafford also commented, "We eliminated the Federal cause of action, including medical causation and statute of limitations." *Id.* at 30,935.

240. Ambrogi v. Gould, Inc., 750 F. Supp. 1233 (M.D. Pa. 1990); States v. BFG Electroplating and Mfg. Co., 31 Env't Rep. Cas. (BNA) 1350, 1353 (W.D. Pa. 1990); Lutz v. Chromatex, Inc., 718 F. Supp. 413 (M.D. Pa. 1989).

241. 42 U.S.C. § 9604(i)(4) (1988); *see* Chaplin v. Exxon Co., 25 Env't Rep. Cas. (BNA) 2009, 2012 (S.D. Tex. 1986).

242. Southland Corp. v. Ashland Oil, Inc., 696 F. Supp. 994, 999 (D.N.J. 1988) (citing T & E Indus. v. Safety Light Corp., 680 F. Supp. 696, 708 (D.N.J. 1988)); *see* discussion *supra* part IV.A.1.

243. Rockwell Int'l Corp. v. IU Int'l Corp., 702 F. Supp. 1384, 1388 (N.D. Ill. 1988).

244. Piccolini v. Simon's Wrecking, 686 F. Supp. 1063, 1068 (M.D. Pa. 1988).

"Damages" and "response costs" have different meanings under CERCLA. "Damages" means compensation for injury or loss of natural resources.[245] Only the federal or state government or an Indian tribe acting as trustee may sue for natural resource damages.[246] In contrast, private "response costs" include "removal" or "remedial" actions taken in response to a release of hazardous substances. Section 107 only provides for the recovery of "necessary response costs" incurred in response to a release or threatened release of hazardous substances or as part of an actual cleanup.[247]

A number of courts have held that economic damages are not recoverable under section 107(a)(4)(B). Examples of the damages sought by plaintiffs and denied by the courts under section 107 include diminution in property value,[248] lost profits,[249] consequential damages,[250] loss of the use of water wells,[251] loss of the beneficial use of gardens and property,[252] and damages incurred as a result of fraud.[253] In *Artesian Water Co. v. New Castle County (Artesian Water Co. I)*,[254] the United States District Court for Delaware stated that Congress manifested an intent not to allow compensation for economic loss or personal injury under CERCLA.[255] The holding of *Artesian Water Co. I* is supported by statements

245. CERCLA § 101(6), 42 U.S.C. § 9601(6).

246. *Id.* § 107(a)(4)(C), (f)(1), 42 U.S.C. § 9607(a)(4)(C), (f)(1); Regan v. Cherry Corp., 706 F. Supp. 145, 151 (D.R.I. 1989) (citing United States v. Mottolo, 605 F. Supp. 898, 904 (D.N.H. 1985)).

247. Adams v. Republic Steel Corp., 621 F. Supp. 370, 376 (W.D. Tenn. 1985).

248. *Piccolini*, 686 F. Supp. at 1068 ("[D]amages for diminution in property value and lost income are not recoverable under CERCLA."); Wehner v. Syntex Corp., 681 F. Supp. 651, 653 (N.D. Cal. 1987) (finding the reduced market value of a home is not recoverable under CERCLA).

249. Mola Dev. Corp. v. United States, 22 Env't Rep. Cas. (BNA) 1443, 1446 (C.D. Cal. 1985) ("[L]ost profits are not recoverable under CERCLA.").

250. Artesian Water Co. v. New Castle County (Artesian Water Co. II), 851 F.2d 643, 648 (3d Cir. 1988) (holding that CERCLA authorizes recovery of "response costs" but not damages suffered as a consequence of the response); Mesiti v. Microdot, Inc., 739 F. Supp. 57, 62 & n.3 (D.N.H. 1990) (holding financial losses in the form of $95,000 carrying costs due to delayed sale and site cleanup not recoverable).

251. Loss of the use of water wells is considered natural resource damage; and therefore, only the federal or state government acting as trustee may recover for that loss. Lutz v. Chromatex, Inc., 718 F. Supp. 413, 418-19 (M.D. Pa. 1989); Artesian Water Co. v. New Castle County (Artesian Water Co. I), 659 F. Supp. 1269, 1285 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988).

252. Ambrogi v. Gould, Inc., 750 F. Supp. 1233, 1250 (M.D. Pa. 1990).

253. Fallowfield Dev. Corp. v. Strunk, No. 89-8644, 1990 U.S. Dist. LEXIS 4820, at *12 (E.D. Pa. Apr. 23, 1990) ("[C]osts arising from the purchase and sale of the Farm such as closing costs . . . costs of investigation, the alleged contamination and fraud, lost profits . . . " are not recoverable under CERCLA, but may be under other causes.).

254. 659 F. Supp. 1269 (D. Del. 1987), *aff'd.*, 851 F.2d 643 (3d Cir. 1988).

255. *Id.* at 1285.

made during the passage of the original CERCLA bill.[256] Senator Randolph stated, "[W]e have deleted the Federal cause of action for medical expenses or property or income loss."[257] Thus, authority indicates that costs associated with personal or property damages resulting from the release of hazardous substances are not recoverable under CERCLA.

Plaintiffs, however, are not without an avenue of restitution for their economic losses. Common law actions such as nuisance, strict liability, and trespass may be pursued in state courts or as pendent claims to CERCLA suits in federal courts.[258]

6. Litigation Costs

Litigation expenses include attorneys' fees, expert fees, court costs, and expenses of organizational development and travel. Several courts have addressed these costs,[259] and their analyses and holdings deserve consideration here. Under United States law, a "prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the

256. The statements were made by Sen. Randolph while he was the Chairman of the Senate Environment and Public Works Committee which was working on Senate Bill 1480 (ultimately passed as CERCLA).

257. 126 CONG. REC. 30,932 (1980) (comments of Sen. Randolph).

258. Piccolini v. Simon's Wrecking, 686 F. Supp. 1063, 1068-69 (M.D. Pa. 1988) (holding the relevant test for determining whether pendent jurisdiction may be exercised is the "common nucleus of operative fact" test); *see* Ambromovage v. United Mine Workers of Am., 726 F.2d 972 (3d Cir. 1984).

259. Cases in which courts have held that recovery of attorneys' fees are allowed in private cost recovery actions include: General Elec. Co. v. Litton Indus. Automation Sys., 920 F.2d 1415, 1422 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1390 (1991); Jersey City Redevelopment Auth. v. PPG Indus., Inc., 28 Env't Rep. Cas. (BNA) 1873, 1880-81 (3d Cir. 1988); Key Tronic Corp. v. United States, 766 F. Supp. 865, 870 (E.D. Wash. 1991); Gopher Oil Co. v. Union Oil Co., 757 F. Supp. 998, 1007 (D. Minn. 1991), *aff'd in part, remanded in part*, 955 F.2d 519 (8th Cir. 1992); Shapiro v. Alexanderson, 741 F. Supp. 472, 480 (S.D.N.Y. 1990) (denying defendant's motion for summary judgment to exclude attorneys' fees); Pease & Curren Ref., Inc. v. Spectrolab, Inc., 744 F. Supp. 945, 950 (C.D. Cal. 1990); and Bulk Distrib. Ctrs., Inc. v. Monsanto Co., 589 F. Supp. 1437, 1452 (S.D. Fla. 1984).

A number of courts have denied recovery of attorneys' fees: Mesiti v. Microdot, Inc., 739 F. Supp. 57, 62 (D.N.H. 1990); United States v. Hardage, 750 F. Supp. 1460, 1511 (W.D. Okla. 1990); Fallowfield Dev. Corp. v. Strunk, No. 89-8644, 1990 U.S. Dist. LEXIS 4820 (E.D. Pa. Apr. 23, 1990); T & E Indus., Inc. v. Safety Light Corp., 680 F. Supp. 696, 707 (D.N.J. 1988).

loser."[260] To enable a litigant to recover such fees, a statute must establish congressional intent to authorize the recovery of attorneys' fees.[261] CERCLA does not expressly discuss recovery of attorneys' fees by private parties. However, section 107(a)(4)(B) provides for recovery of all necessary costs of response. Plaintiffs often cite section 101(25) as support for grants of attorneys' fees. Although section 101(25) does not expressly authorize recovery of attorney's fees, it defines "response" to include "enforcement activities related" to responding to a release.[262] The term "enforcement activities" is not defined in the statute.

Thus, the issue is whether a private action to recover response costs is an "enforcement action" within the meaning of section 101(25). The Eighth Circuit ruled that private cost recovery actions are enforcement activities within the meaning of CERCLA.[263] The Eighth Circuit stated that "[a]ttorney fees and expenses necessarily are incurred in this kind of enforcement activity and [that] it would strain the statutory language to the breaking point to read them out of the 'necessary costs' that section § 107(a)(4)(B) allows private parties to recover."[264]

One court reasoned that allowing private action parties to recover attorneys' fees furthered the purpose of CERCLA. In *General Electric Co.*, the Eighth Circuit held that CERCLA is sufficiently explicit to allow for the recovery of attorneys' fees.[265] The court stated that providing for recovery of attorneys' fees is consistent with the main purposes of CERCLA—to encourage "prompt cleanup of hazardous waste sites and

260. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975). *Alyeska* may be easily distinguished from the general scenario of a private cost recovery action. *Alyeska* prohibits the award of attorneys' fees in *the complete absence* of statutory authority. *Id.* at 269. The court of appeals in *Alyeska* awarded attorneys' fees based only on the conclusion that the litigation had benefitted the public and ensured the proper functioning of the governmental system. In contrast to *Alyeska*, the private plaintiff in a cost recovery action bases his or her claim to attorneys' fees on the statutory entitlement to all necessary response costs, which include "enforcement activities related thereto." CERCLA § 101(25), 42 U.S.C. § 9601(25).

261. "[A]bsent explicit congressional authorization, attorneys' fees are not a recoverable cost of litigation." Runyon v. McCrary, 427 U.S. 160, 185 (1976); *General Elec. Co.*, 920 F.2d at 1421 ("We must find more than 'generalized commands;' . . . there must be a clear expression of Congress' intent.") (citation omitted).

262. 42 U.S.C. § 9601(25).

263. "A private party cost recovery action such as this one is an enforcement activity within the meaning of the statute." *General Elec. Co.*, 920 F.2d at 1422; *see also Key Tronic Corp.*, 766 F. Supp. at 871. ("The court finds that a private party may incur enforcement costs, and, therefore, may recover attorneys' fees for bringing a cost recovery action under § 107.") The federal district court in *Key Tronic Corp.* also held that attorneys' fees incurred in searching for PRPs and negotiating a consent decree are recoverable. *Id.* at 872.

264. *General Elec. Co.*, 920 F.2d at 1422.

265. "We therefore conclude that CERCLA authorizes, with a sufficient degree of explicitness, the recovery by private parties of attorney fees and expenses." *Id.*

impose all cleanup costs on the responsible party."[266] These goals would be undermined if private plaintiffs were forced to bear the financial burden of litigation necessary to recover the costs of cleanup.[267] At least one other federal court of appeals has implicitly agreed with the holding of the Eighth Circuit in *General Electric Co.* Although the Third Circuit did not explicitly discuss the availability of attorneys' fees under CERCLA, it granted the Jersey City Redevelopment Authority attorneys' fees and expert witness fees incurred in a cost recovery action.[268]

Several federal district courts have denied recovery of attorneys' fees in private cost recovery suits.[269] These courts refused to recognize private cost recovery actions as "enforcement actions."[270] The exclusion of private cost recovery suits from the term "enforcement actions" may be nothing more than an experiment with semantics. Although a private party cannot bring an enforcement action against another private party under CERCLA as can the United States government,[271] the private party can clean up the site and then bring a cost recovery action.[272] Functionally, the end result is the same; the goals of CERCLA are accomplished by the cleanup and apportionment of the costs to the responsible party.[273] Denying a private action plaintiff attorneys' fees impedes

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266. *Id.*

267. Moreover, "[t]he litigation costs could easily approach or even exceed the response costs, thereby serving as a disincentive to clean the site." *Id.*

268. Jersey City Redevelopment Auth. v. PPG Indus., Inc., 28 Env't Rep. Cas. (BNA) 1873, 1881 (3d Cir. 1988).

269. *See* cases cited *supra* note 259.

270. T & E Indus., Inc. v. Safety Light Corp., 680 F. Supp. 696, 708 n.13 (D.N.J. 1988) (refusing to allow private party to recover legal fees because no statutory provision authorizes such recovery).

271. *Id.*

> It is relevant to recognize, however, that under this "interpretation" of "enforcement costs," state and local governments also would not be able to recover their attorney's fees and litigation costs, because they—just as nongovernment entities—do not have the authority to act under CERCLA §§ 106 and 109.

Mark Atlas, *From* T & E Industries *to* General Electric v. Litton: *Private Party Recovery of Attorneys' Fees Under CERCLA*, 21 Envtl. L. Rep. (Envtl. L. Inst.) 10,206, 10,207 (Apr. 1991).

272. One court even made a distinction between the legal fees incurred during cleanup-related activities and those incurred in enforcement-related activities. The court allowed recovery of attorneys' fees for the former, but denied those related to enforcement. BCW Assoc. v. Occidental Chem. Corp., Civ. A. No. 86-5947, 1988 U.S. Dist. LEXIS 11,275, at *60 n.4 (E.D. Pa. Sept. 29, 1988).

273. Note, however, that in reality those alleged to be responsible do not always pay. In County Line Inv. Co. v. Tinney, 933 F.2d 1508 (10th Cir. 1991), Tinney successfully defended against a cost recovery action based on the plaintiffs' failure to comply with the NCP. The plaintiffs did not conduct a feasibility study, obtain public comments, or show that the remedial action was cost effective. *Id.* at 1514-15. Tinney was also granted $46,390.00 in attorney fees based on an Oklahoma statute that grants reasonable fees to the winner in civil actions to recover amounts due "for labor or services." County Line Inv. Co., v. Tinney, No. 90-5169, 1991 U.S. App. LEXIS 13,927, at *1 (10th Cir. filed June 27, 1991).

Upholding the district court's ruling, the Tenth Circuit rejected the plaintiffs' arguments that

the goal of shifting the entire cost of cleanup to the responsible party. However, regardless of whether CERCLA's goals are attained, some courts still refuse to allow attorneys' fees as one of the elements of recovery.

In *Fallowfield Development Corp. v. Strunk*,[274] a federal district court based its denial of attorneys' fees in a cost recovery action on a House Report which explained, in part, the addition of enforcement activities to the definition of "response."[275] The House Report mentioned only EPA and did not address private cost recovery actions explicitly. The court interpreted this as precluding attorneys' fees. One author has criticized the *Fallowfield* court as ignoring three other congressional statements in its analysis.[276] These statements were: (1) "such costs are recoverable from responsible parties, as removal or remedial costs";[277] (2) " 'response action' [is modified] to include related enforcement activities";[278] and (3) "response [is amended] to include related enforcement activities, thereby permitting recovery of those costs."[279] These three statements serve to cloud the issue, but certainly they are capable of the interpretation that Congress supported the recovery of attorneys' fees. Even the *Fallowfield* court noted that the statute itself is not a model of legislative draftsmanship.[280] As a result, the statements in the Congressional Record should not serve to exclude private cost recovery suits

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the unjust enrichment claim was for the value of the benefit conferred through the closure of the dump and noted instead that the claim was for repayment. *Id.* at *4-5. The Tenth Circuit also rejected the plaintiffs' alternative argument that the court should apportion attorneys' fees between the CERCLA and unjust enrichment claims, and allow recovery of only the latter. *Id.* at *6-7. The Tenth Circuit held that the claims were indivisible and that the entire amount was due. *Id.* at *6-8. Thus, state claims may change the outcome in a CERCLA suit.

274. No. 89-8644, 1990 U.S. Dist. LEXIS 4820, at *13-17 (E.D. Pa. Apr. 23, 1990).

275. *Id.* "[Section 101] also modifies the definition of 'response action' to include related enforcement activities. The change will confirm the EPA's authority to recover costs for enforcement actions taken against responsible parties." H.R. REP. No. 253(I), 99th Cong., 2d Sess., pt. 1, at 66-67 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2848. "Congress drafted Section 101(25) to establish the scope of response costs recoverable throughout CERCLA; thus, the definition of response, on its face, applies to both the Government and private parties. Congress failed to restrict 'enforcement activities' in that definition to governmental actions." Key Tronic Corp. v. United States, 766 F. Supp. 865, 871 (E.D. Wash. 1991).

276. Atlas, *supra* note 271, at 10,209. This commentator cited three statements in the legislative history of SARA to rebut the *Fallowfield* court's argument.

277. H.R. REP. No. 962, 99th Cong., 2d Sess., pt. 1, at 185 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3278.

278. H.R. Rep. No. 253, 99th Cong., 2d Sess., pt. 1, at 66-67 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2848-49.

279. H.R. Rep. No. 253, 99th Cong., 2d Sess., pt. 5, at 6 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3124, 3129.

280. CERCLA is not a paradigm of clarity or precision. It has been criticized frequently for inartful drafting and numerous ambiguities attributable to its precipitous passage.

from the category of enforcement actions.[281]

Even though Congress could have provided specifically for attorneys' fees in the passage of SARA, "the case law was not particularly well developed prior to SARA and thus Congress may not have been aware that courts would interpret CERCLA as disallowing the recovery of attorneys' fees."[282] Additionally, as one commentator pointed out, only one pre-SARA decision addressed private recovery of attorneys' fees, and in that case, the court indicated that attorneys' fees were recoverable.[283] The provision that includes enforcement actions should be read in the spirit of encouraging the environmental remediation intended by Congress in enacting CERCLA.

Although the U.S. Supreme Court has imposed a heavy burden on a plaintiff to show that recovery of attorneys' fees is justified,[284] sufficient support for such recovery can be based on the definition of response. To deny that a cleanup and private cost recovery suit is anything other than an "enforcement action" that satisfies the goals of CERCLA constitutes a failure to understand the principles of CERCLA. In *General Electric*, the Eighth Circuit allowed recovery of attorneys' fees in furtherance of the goals of CERCLA and further encouraged private parties to clean up hazardous waste sites by allowing the private party to pass on *the total cost* to the responsible party.[285]

Expert witness fees are also recoverable by a private action plaintiff. Because expert fees generally fall into the category of planning and development of quality cleanups, they should be recoverable as "necessary

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Problems of interpretation have arisen from the Act's use of inadequately defined terms, a difficulty particularly apparent in the response costs area.

Fallowfield, 1990 U.S. Dist. LEXIS 4820, at *14 (quoting Artesian Water Co. v. New Castle County (Artesian Water Co. II), 851 F.2d 643, 648 (3d Cir. 1988)).

281. *See* General Elec. Co. v. Litton Business Sys., 715 F. Supp. 949, 958-59 (W.D. Mo. 1989) (Congress intended that "CERCLA be given a broad interpretation so as not to restrict the liability of those responsible parties."), *aff'd sub nom.* General Elec. Co. v. Litton Indus. Automation Sys., 920 F.2d 1415 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1390 (1991).

282. Gopher Oil Co. v. Union Oil Co., 757 F. Supp. 998, 1006 n.5 (D. Minn. 1991).

283. Atlas, *supra* note 271, at 10,208. The court held that the plaintiff could not seek to recover any costs until it had begun to undertake a response action. *Id.* On this basis, it did not rule on the question of whether any costs would be recoverable. The plaintiff could recover legal fees after it started implementing a government authorized cleanup. *Id.*

284. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247-48 (1975).

285. In Key Tronic Corp. v. United States, 766 F. Supp. 865, 872 (E.D. Wash. 1991), the court stated that if a court refuses to recognize a private cost recovery action as an enforcement action, "then even innocent purchasers of property who clean up hazardous wastes and subsequently seek recovery from the responsible parties would be unable to recover the entirety of the expenses incurred in holding the responsible parties accountable for their pollution."

costs of response."[286] Thus, they should be included under the heading "response costs."

The *Ambrogi* court also addressed whether several rather novel categories of costs were recoverable. These included the costs of participation in citizen's associations and groups formed to aid in the investigation and cleanup of hazardous wastes and the costs of attending public meetings. The federal district court for the Middle District of Pennsylvania held that these costs were outside the realm of recoverable expenses under section 107.[287]

7. Penalty Provisions

Although it is well established that section 107(a) creates a private right of action to recover necessary costs of response, CERCLA does not authorize injunctive relief or punitive damages in favor of private litigants.[288] The Second Circuit, in *New York v. Shore Realty Corp.*,[289] held that section 106 authorizes only the federal government to obtain injunctive relief and to imply such authority under section 107 would make section 106 "surplusage."[290] Even more important, the standard for abatement under section 106 is more restrictive than the standard under section 107. For example, section 106 allows the federal government to seek injunctive relief only when the government determines that there is an "imminent and substantial endangerment to the public health or welfare or the environment,"[291] while section 107 establishes liability under a broad set of circumstances.

Private cost recovery actions are not designed to punish the polluter. Clearly, no logical definition of "necessary costs of response" could include punitive damages: "By definition, punitive damages do not compensate a plaintiff, nor do they remedy a wrong. Punitive damages are designed to punish a wrongdoer and deter grossly improper conduct."[292] As a result, neither punitive damages nor civil penalties are available to

286. Ambrogi v. Gould, Inc., 750 F. Supp. 1233, 1258 (M.D. Pa. 1990) (stating that expert fees are generally recoverable under § 107, but not in this case because the plaintiff did not indicate that any expenses were necessary or incurred consistent with the NCP).

287. *Id.*

288. To allow a private party to obtain civil penalties and injunctive relief "would be to strain beyond reason the language, scheme, and legislative history of the statute." Brewer v. Ravan, 680 F. Supp. 1176, 1180 (M.D. Tenn. 1988) (interpreting CERCLA prior to the 1986 SARA).

289. 759 F.2d 1032 (2d Cir. 1985).

290. *Id.* at 1049.

291. 42 U.S.C. § 9606(a).

292. Regan v. Cherry Corp., 706 F. Supp. 145, 151-52 (D.R.I. 1989).

the private party plaintiff.[293]

At least one author, however, has proposed allowing good citizen plaintiffs[294] to recover treble damages from a recalcitrant responsible party.[295] Under section 106, the federal government can compel individuals to conduct a cleanup when an "imminent and substantial endangerment to the public health or welfare or the environment" exists. A party who refuses to comply can be liable for up to $25,000 per day in civil fines.[296] If a recalcitrant party refuses to clean up the site and the government responds, the government may recover punitive damages equal to three times the cost of the cleanup.[297] Such punitive damages would be limited to a few recalcitrants.[298]

Imposition of treble damages would in fact encourage recalcitrant PRPs to participate in the cleanup, and may foster more cleanup actions as a whole. However, several problems exist. First, CERCLA limits treble damages to federal responses to emergency situations. Second, such a scheme would allow private plaintiffs to recover a windfall, which is not a purpose of CERCLA and could weaken public support for cleanups.[299] Third, section 113, along with the private cost recovery right established under section 107, already provides a mechanism for responsible parties to seek contribution from those who do not participate in a cleanup.[300] Consequently, industry is already less than happy with the liability scheme of CERCLA and probably would not support a treble damage provision for private parties in cost recovery actions. Considering the differences in the purposes of imposing punitive damages, the goals of CERCLA, and the fact that private party plaintiffs cannot recover for damages, an award of punitive damages to a private party

293. *Id.* at 152. ("[P]unitive damages cannot logically fit within the category of 'necessary costs of response.' ").

294. These are persons who respond to an EPA cleanup order by conducting the necessary work while other responsible parties refuse to participate. In terms of cost recovery, the good citizen is limited to the actual amount of the cleanup allocable to the recalcitrant under either a § 107(a) action or an action for contribution under § 113. The difficulty that a good citizen plaintiff faces in a cost recovery action is that evidence demonstrating the recalcitrant's responsibility is difficult to obtain. *See* James A. Vroman, *A Treble-Cost-Recovery Right Under CERCLA For Private Citizens*, 20 Env't Rep. (BNA) 753 (Sept. 1, 1989).

295. *Id.* at 753.

296. CERCLA § 106(b)(1), 42 U.S.C. § 9606(b)(1).

297. *Id.* § 107(c)(3), 42 U.S.C. § 9607(c)(3).

298. Many private cost recovery actions are not agency-directed actions; thus, this proposal would apply to only a small number of cleanups.

299. Mr. Vroman proposes that, in order to prevent this, a portion of the recovery be deposited in the Superfund. Vroman, *supra* note 294, at 755.

300. 42 U.S.C. § 9613.

plaintiff for improper disposal of hazardous substances seems unwarranted under section 107.

V. POTENTIAL DEFENSES

PRPs should recognize that there is little hope of avoiding liability because CERCLA is concerned with cleaning up hazardous waste, not with being fair to PRPs. This fact is evidenced by the federal courts' broad interpretation of CERCLA's potential defendants,[301] the imposition of strict liability, and joint and several liability,[302] and the limited defenses recognized for such defendants.[303] The following section of this article summarizes the limited defenses to a section 107 private action.

A. *Statutory Provisions*

Some PRPs may avoid liability under CERCLA because they fall within one of the statute's explicit exemptions or defenses, or because the action is time-barred.

1. Exemptions

a. Petroleum Exemption

CERCLA contains very limited exemptions. Section 101(14) exempts petroleum, crude oil, and natural gas from the list of hazardous substances.[304] This subsection is commonly referred to as the "petroleum exclusion."[305] However, petroleum naturally contains some listed hazardous substances. It may have other listed substances added during refining, and may become contaminated with additional hazardous substances upon disposal.[306] Because courts have struggled with the exemption's application, the question of whether the exemption will provide a

301. *See* discussion *supra* part III.

302. The body of case law supporting CERCLA's liability scheme as strict liability, and joint and several is considerable. *E.g.*, New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985); United States v. Bliss, 667 F. Supp. 1298, 1313 (E.D. Mo. 1987); United States v. Conservation Chem. Co., 589 F. Supp. 59, 62-63 (W.D. Mo. 1984).

303. *See infra* notes 304-09 and accompanying text.

304. 42 U.S.C. § 9601(14). At the end of CERCLA's list of lists which sets forth the substances CERCLA includes in its definition of "hazardous wastes," Congress provided the following: "The term does not include petroleum, including crude oil or any fraction thereof . . . and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas)."

305. Jeanmarie B. Tade et al., *Liability for Cleanup of Used Oil: The Petroleum Exclusion After "Wilshire Westwood,"* 5 Toxics L. Rep. (BNA) 862, 863 (Dec. 5, 1990).

306. *See id.* at 863-64.

defense to liability remains uncertain.[307] It is clear, however, that automobile service station operators are exempt from liability for their oil recycling programs.[308] In addition, the petroleum exemption can prevent cost recovery actions for damages caused by leaking underground storage tanks.[309]

b. Good Samaritan Exemption

CERCLA provides a "Good Samaritan" exemption which precludes liability for actions taken while providing assistance in accordance with the National Contingency Plan (NCP)[310] or at the direction of an NCP on-scene coordinator.[311] The provision does not obviate liability for damages resulting from the samaritan's own negligence.[312] A similar provision exempts state or local governments (in the absence of gross negligence or intentional misconduct) that respond to an emergency created by a release or threatened release.[313]

c. Cleanup Contractors' Exemption

Congress also exempts hazardous waste cleanup contractors from liability absent negligence, gross negligence, or intentional misconduct.[314] Because contractors were having difficulty obtaining insurance, Congress acted to assure that an adequate number of response action contractors remained in the market.[315] In addition, methane gas recovery[316] operators are effectively exempt from liability under the statute.[317]

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307. *See, e.g.*, Wilshire Westwood Assocs. v. Atlantic Richfield Corp., 881 F.2d 801, 806-07 (9th Cir. 1989) (dismissing government's claim for response costs incurred in cleanup of gasoline leaked from underground storage tanks because the petroleum exclusion was held to apply to leaded gasoline, although lead is specifically listed as a hazardous substance under CERCLA); City of New York v. Exxon Corp., 633 F. Supp. 609 (S.D.N.Y. 1986) (avoiding issue of how petroleum exclusion applies to waste oil).

308. CERCLA § 114(c), 42 U.S.C. § 9614(c).

309. *See Wilshire Westwood*, 881 F.2d at 801.

310. *See* discussion *supra* parts IV.A-B.

311. CERCLA § 107(d)(1), 42 U.S.C. § 9607(d)(1).

312. *Id.*

313. *Id.* § 107(d)(2), 42 U.S.C. § 9607(d)(2).

314. CERCLA § 119(a)(1)-(2), 42 U.S.C. § 9619(a)(1)-(2).

315. Owen T. Smith, *The Expansive Scope of Liable Parties Under CERCLA*, 63 ST. JOHN'S L. REV. 821, 836 (1989).

316. Methane gas recovery is the process by which landfills recover and burn the methane they generate.

317. CERCLA § 124(a)-(b), 42 U.S.C. § 9624(a)-(b).

2. Other Statutory Defenses

a. Statute of Limitations

SARA added a six year statute of limitations to CERCLA that commences upon the completion of a cleanup.[318] The long period of time required to effect a cleanup can keep a CERCLA site in the public eye for a decade before the statute even begins to run. The resulting uncertainty of when a party will actually complete a cleanup limits the utility of the statute of limitations as a defense.[319]

b. Affirmative Defenses

CERCLA also provides some very limited affirmative defenses. These defenses are available where the release or threatened release of hazardous waste was caused solely by (1) an act of God,[320] (2) an act of war, (3) an act of a third party (other than an employee or agent of the defendant) who is not contractually related to the defendant if the defendant took all reasonable precautions and exercised due care, or (4) any combination of these defenses.[321]

Not surprisingly, few parties have been successful in relying on these statutory defenses.[322] The third party defense[323] has been the source of considerable litigation, but has not resulted in much avoidance of CERCLA liability because of the stringent requirements for its use. These requirements include that there be no contractual relationship with the person who made the omission and a showing that the person asserting the defense "did not know and had no reason to know that any hazardous substance . . . was disposed of . . . at the facility."[324] This lack of knowledge can only be asserted after all appropriate inquiry has been made into the ownership and prior use of the land.[325] Buyers are left

318. CERCLA § 112(d)(1), 42 U.S.C. § 9612(d)(1).

319. *See* James R. Arnold, *Toxic Torts and the Private Recovery of Response Costs Under CERCLA*, 3 NAT. RESOURCES & ENV., Spring 1988, at 23, 25.

320. CERCLA § 101(1), 42 U.S.C. § 9601(1). "[A]ct of God" is given a very limited definition by the statute. The term is confined to natural phenomenon of exceptional character, the effects of which could not have been prevented. *Id.*

321. *Id.* § 107(b)(1)-(4), 42 U.S.C. § 9607(b)(1)-(4).

322. Smith, *supra* note 315, at 832.

323. CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3). SARA added § 101(35) to clarify the third party defense by defining essential terms. 42 U.S.C. § 9601(35). The third party defense is generally termed the "innocent landowner" or "innocent purchaser" defense when it is interpreted in conjunction with SARA. *See, e.g.*, Paul C. Quin, Comment, *The EPA Guidance on Landowner Liability and the Innocent Landowner Defense: The All Appropriate Inquiry Standard: Fact or Fiction?*, 2 VILL. ENVTL. L.J. 143, 144 n.11 (1991).

324. CERCLA § 101(35)(A)(i), 42 U.S.C. § 9601(35)(A)(i).

325. *Id.* Legislative history indicates an intent to eliminate liability for those purchasers who

with a significant amount of uncertainty regarding what constitutes "all appropriate inquiry."[326] There is no analogous provision for the "innocent seller,"[327] primarily because innocent sellers are not PRPs under section 107(a)(2). Former owners are only liable for cleanup costs if waste was deposited on their land during the time of their ownership, or if the waste was deposited prior to their ownership and they knew of the waste or contributed to its release.[328]

B. *Contractual Transfers of Liability*

Partially as a result of the narrow availability of statutory defenses to liability,[329] PRPs have attempted to avoid CERCLA liability through various contract provisions.

1. Indemnification Provisions

CERCLA allows for contractual transfers of response costs. Section

acted without knowledge, but only if they also exercised due care. *See* H.R. CONF. REP. No. 99-962, 99th Cong., 2d Sess. 183, 186-88 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3279-81; *see, e.g.*, United States v. Monsanto Co., 858 F.2d 160, 169 (4th Cir. 1988) (precluding third party defense because of contractual lease relationship and because site owners failed to take precautionary measures against the foreseeable conduct of their lessees), *cert. denied*, 490 U.S. 1106 (1989); New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985) (rejecting third party defense because defendants were among those best able to control the risks associated with hazardous waste on their property, making it impossible for a third party to have solely caused the release); Washington v. Time Oil Co., 687 F. Supp. 529, 532 (W.D. Wash. 1988) (denying innocent landowner defense because defendant failed to establish that some other party was solely responsible for releasing hazardous substances on property). For a detailed discussion of CERCLA's third party defense, see Geoffrey D. Eberle, *The Third Party Defense to CERCLA Liability*, 17 RUTGERS COMPUTER & TECH. L.J. 189 (1991).

326. *See, e.g.*, Eric Baumstark, *Innocent v. Ignorant: When Is an Innocent Purchaser Innocent Under CERCLA?*, 36 WAYNE L. REV. 1319, 1323 (1990) ("A statutory interpretation problem arises . . . because . . . 'appropriate inquiry' is undefined."); Diane H. Nowak, *CERCLA's Innocent Landowner Defense: The Rising Standard of Environmental Due Diligence for Real Estate Transactions*, 38 BUFF. L. REV. 827, 845 (1990) ("The innocent landowner defense has generated widely discrepant views as to what efforts are sufficient to fulfill the obligation of [appropriate] inquiry . . . .").

327. *See* Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 88 (3d Cir. 1988) (stating that a corporate successor may be liable to a responsible party even though predecessor admitted to an "arms length transaction without concealment"), *cert. denied*, 488 U.S. 1029 (1989); *see also* Westwood Pharmaceuticals, Inc. v. National Fuel Gas Distrib. Corp., 767 F. Supp. 456 (W.D.N.Y. 1991) (releasing seller that places hazardous wastes on property from liability for cleanup costs if seller can prove that buyer's actions were the sole cause of subsequent releases); Smith Land & Improvement Corp. v. Rapid-American Corp., 26 Env't Rep. Cas. (BNA) 2023, 2026 (M.D. Pa. 1987) (stating that "there is no injustice in . . . preventing the landowner from recovering against the prior landowner if the condition was obvious at the time of the land sale and the prior landowner did not attempt to conceal the condition . . . ."), *vacated and remanded sub nom.* Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989).

328. CERCLA §§ 107(a)(2), 101(35)(C)-(D), 42 U.S.C. §§ 9607 (a)(2), 9601(35)(C)-(D).

329. *See* discussion *supra* part V.A.

107(e)(1) recognizes, as potentially valid, contracts to insure, hold harmless, or indemnify between private parties.[330] Although such agreements cannot have the effect of relieving the original defendant of underlying liability, they can provide a right to reimbursement or compensation.[331] One need not be a PRP in order to be liable in an indemnity action.[332] However, boilerplate indemnity clauses cannot be used by parties to avoid liability if environmental liabilities were not within their contemplation at the time of sale.[333]

2. Releases

A seller could best alleviate CERCLA liability by obtaining a release from the buyer. Such a release is sometimes referred to as an "as is" clause.[334] This does not relieve the seller from actual liability, but it may allow the seller to pass on the cleanup costs to the buyer. While a seller cannot simply rely on the doctrine of caveat emptor in order to avoid liability,[335] a valid release might bar or reduce the PRP plaintiff's recovery.[336] Sellers should, however, be wary of such contractual releases or

330. 42 U.S.C. § 9607(e)(1).

331. *See, e.g.*, Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1459 (9th Cir. 1986). In such cases, the issue of whether a transfer provision is effective becomes one of contract interpretation. Courts look to contract language as of the time of contracting in order to determine the parties' intent. *Id.* at 1460-62; *see also* Southland Corp. v. Ashland Oil, Inc., 696 F. Supp. 994, 1000-01 (D.N.J. 1988); Chemical Waste Management, Inc. v. Armstrong World Indus., Inc., 669 F. Supp. 1285, 1294-95 (E.D. Pa. 1987).

332. *See* Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155, 157 (7th Cir. 1988) (stating CERCLA does not impose liability on "slipshod architects, clumsy engineers, poor construction contractors, . . . negligent suppliers of on-the-job training," or on "all four rolled into one," absent a contractual indemnification provision).

333. *See* Marmon Group, Inc. v. Rexnord, Inc., 822 F.2d 31, 34-35 (7th Cir. 1987).

334. The potential efficacy of such clauses is generally determined by state law. In *Mardan Corp.*, 804 F.2d 1458-60, the Ninth Circuit found it inappropriate to attempt to fashion a uniform federal rule to govern indemnity clauses in CERCLA actions. Instead, the court turned to the appropriate state law to interpret the clause. *See also* International Clinical Labs., Inc. v. Stevens, 710 F. Supp. 466, 469-70 (E.D.N.Y. 1989) (using state law to determine effect of "as is" clause); Versatile Metals, Inc. v. Union Corp., 693 F. Supp. 1563, 1567 (E.D. Pa. 1988) (using state law to interpret warranty provision).

335. Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 89 (3d Cir. 1988) (recognizing that doctrine of caveat emptor may be applied to equitably mitigate damages, but not to exculpate from underlying liability), *cert. denied*, 488 U.S. 1029 (1989); *see* Westwood Pharmaceuticals, Inc. v. National Fuel Gas Distrib. Corp., 737 F. Supp. 1272, 1280 (W.D.N.Y. 1990) (rejecting caveat emptor defense although sale of subject property predated CERCLA), *aff'd*, No. 988, 91-915, 1992 WL 44918 (2d Cir. Mar. 11, 1992); Rodenbeck v. Marathon Petroleum Co., 742 F. Supp. 1448 (N.D. Ind. 1990) (holding that a release executed by service station lessees which released the lessor "from all claims and obligations of any character or nature whatsoever" precluded causes of action initiated by lessor, including a cause of action based on CERCLA).

336. *See Mardan Corp.*, 804 F.2d at 1461-62 (upholding post-closure release of CERCLA liability because both parties knew that environmental problems at the waste disposal site would require future corrective action).

"as is" clauses, because they will rarely be found effective.[337] But, even where the court declines to give effect to the doctrine of caveat emptor or ignores the existence of an "as is" clause, it may consider the doctrine or the existence of analogous clauses when allocating costs among liable parties.[338]

3. Time Limitations

Another contractual attempt to alleviate CERCLA liability is to place time restrictions on warranties and representations regarding the property. However, courts have refused to enforce these restrictions.[339] In *Southland Corp. v. Ashland Oil, Inc.*,[340] the United States District Court for the District of New Jersey declined to interpret a two-year time limitation on "representations, warranties, promises and agreements"[341] as encompassing a limitation on potential CERCLA liability.[342] Instead, the court ruled that, at best, the language would "only serve to bar those *breach of contract* claims based on indemnity and failure to remove hazardous waste. . . . [It] does not convert the remaining contractual language into an express assumption of liability for all hazardous waste cleanup costs by [the buyer of the property]."[343]

337. CERCLA § 101(35)(C), 42 U.S.C. § 9601(35)(C); AM Int'l, Inc. v. International Forging Equip. Corp., 743 F. Supp. 525, 528-29 (N.D. Ohio 1990) (refusing to give effect to release in sales contract because it conflicted with CERCLA's policy of encouraging cleanups and allowing costs to be apportioned among responsible parties); International Clinical Labs., Inc. v. Stevens, 710 F. Supp. 466, 469 (E.D.N.Y. 1989) (holding "as is" clause bars purchaser from recovery on breach of warranty theory, but not necessarily from a claim based on CERCLA); Southland Corp. v. Ashland Oil, Inc., 696 F. Supp. 994 (D.N.J. 1988) (holding that "as is" clause precludes claims based on warranty, but does not shift liability from one party to another); Channel Master Satellite Sys. v. JFD Elec. Corp., 702 F. Supp. 1229, 1231-32 (E.D.N.C. 1988) (holding that "as is" and indemnity clauses did not prevent buyer from seeking response costs from seller); *see also* Debra L. Baker & Lance L. Shea, *How to Avoid Environmental Liability in Business Transactions*, 43 SW. L.J. 957, 965 (1990).

338. *See* Dery v. Becker (*In re* Sterling Steel Treating, Inc.), 94 B.R. 924, 930-31 (Bankr. E.D. Mich. 1989) (determining that while neither caveat emptor nor the "as is" condition of property are defenses to CERCLA liability, they can be considered by courts in mitigation of amount due); Versatile Metals, Inc. v. Union Corp., 693 F. Supp. 1563, 1569 (E.D. Pa. 1988); Chemical Waste Management, Inc. v. Armstrong World Indus., 669 F. Supp. 1285 (E.D. Pa. 1987).

339. *See* Southland Corp. v. Ashland Oil, Inc., 696 F. Supp. 994, 1001-02 (D.N.J. 1988).

340. 696 F. Supp. 994 (D.N.J 1988).

341. *Id.* at 1001 n.8. The time limitation provided: "All of the representations, warranties, promises and agreements of the parties set forth in this Agreement shall survive the Closing for a period of two (2) years . . . regardless of what investigations the parties may have made before the closing." *Id.*

342. *Id.* at 1002.

343. *Id.* Breach of contract claims in a CERCLA action may be based on a breach of warranty theory. Buyers typically attempt to fill purchase agreements with as many express warranties as possible. These warranties include assurances that the seller: (1) obtained all applicable environmental permits; (2) has always been in compliance with applicable environmental laws and regulations (with the exception of those specifically listed); (3) does not know or has reason to know of

C. *Corporate Veil*

CERCLA does not expressly address whether a court may hold related corporations, corporate officers, or shareholders liable for cleanup costs without first piercing the corporate veil.[344] However, these entities and individuals arguably fall within CERCLA's definition of "persons."[345] Consequently, several courts have held such persons directly liable as "owners," "operators," or "arrangers" under the statute, without ever piercing the corporate veil.[346] These courts reason that Congress could have limited the definition of "person" if it had so chosen.[347] Further, these courts have concluded that to impose liability on the corporation and not on the individuals who are responsible for the decisions which underlie the corporation's handling of hazardous substances would run contrary to congressional intent and would subvert CERCLA's remedial purpose.[348]

Most courts are willing to disregard the corporate veil and hold individual officers and shareholders, as well as corporations, liable for cleanup costs. The Eighth Circuit has stated that to allow the corporate veil to shield such individuals from liability would "open an enormous, and clearly unintended loophole in the statutory scheme."[349] Thus, the court deemed CERCLA's liability scheme to be more important than traditional corporate law. In short, the assertion of the corporate veil as

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litigation either pending or potential; (4) knows of no past or current releases at the site; and (5) is not currently operating under any consent decree, order, or agreement with a government entity regarding health or the environment. Baker & Shea, *supra* note 337, at 965.

344. Joslyn Corp. v. T.L. James & Co., 696 F. Supp. 222, 224 (W.D. La. 1988), *aff'd*, 893 F.2d 80 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1017, *and cert. denied sub nom.* Powerline Supply Co. v. James & Co., 111 S. Ct. 1017 (1991); see also Robert L. Rhodes & Anthony J. Ettore, *Piercing the Corporate Veil for CERCLA Response Costs*, ENVTL. LIABILITY IN COM. TRANSACTIONS, April 1991, at 93; Margaret Murphy & Paul M. Samson, *Corporate Responsibility for Environmental Damages*, 4 INSIGHTS 23 (1990).

345. CERCLA § 101(21), 42 U.S.C. § 9601(21); *see also supra* notes 25-28 and accompanying text. Note that the definition of "person" in CERCLA includes corporations as a person in addition to an individual, but does not specifically refer to officers or shareholders.

346. NEPACCO, 810 F.2d 726, 743-44 (8th Cir. 1986) (finding individual shareholders and officers liable as "arranger"), *cert denied*, 484 U.S. 848 (1987); New York v. Shore Realty Corp, 759 F.2d 1032, 1034 (2d Cir. 1985) (finding corporate officer and shareholder liable as "operator"); United States v. Northernaire Plating Co., 670 F. Supp. 742, 748 (W.D. Mich. 1987) (finding president and sole shareholder liable as "operator" of electroplating business), *aff'd sub nom.* United States v. R.W. Meyer, Inc., 889 F.2d 1497 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057 (1990); Idaho v. Bunker Hill Co., 635 F. Supp. 665, 672 (D. Idaho 1986) (imposing liability on parent corporation which was held to be "owner or operator").

347. *See, e.g., NEPACCO*, 810 F.2d at 743; *see also* Anne D. Weber, *Misery Loves Company: Spreading the Costs of CERCLA Cleanup*, 42 VAND. L. REV. 1469, 1500-01 (1989).

348. *NEPACCO*, 810 F.2d at 743.

349. *Id.*

a defense to CERCLA liability is not likely to be successful.[350] Even a dissolved corporation has been held liable under CERCLA.[351]

D. *Failure to Notify*

Parties who are potentially responsible for costs of a remedial action are entitled to notice that a CERCLA cleanup will commence and must be given an opportunity to comment on proposed cleanup measures.[352] Failure of the plaintiff to meet the statute's notice requirements[353] could constitute a defense to a private CERCLA section 107 action.[354] This is true even where the plaintiff had a good reason to act outside of the requirements.[355]

E. *Bankruptcy*

A purchaser of land that contains hazardous wastes may attempt to escape cleanup responsibility through a bankruptcy proceeding. The attempt to avoid environmental liability through a bankruptcy proceeding creates a conflict between two powerful public policies. Environmental laws that control hazardous wastes deposited on land, especially CERCLA, have been interpreted very broadly in favor of imposing liability. Even innocent purchasers are commonly subject to liability. The Bankruptcy Code, on the other hand, manifests a strong and clearly expressed congressional intent that a debtor be discharged from all claims, both actual and contingent, which arise out of conduct that occurred prior to the bankruptcy petition. Courts have strictly construed the exceptions in the Bankruptcy Code to advance the policy of affording the debtor a fresh start.

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350. *See id. But see* Joslyn Corp. v. T.L. James & Co., 696 F. Supp. 222, 224-26 (W.D. La. 1988) (shielding corporate officers from individual liability under CERCLA because statute did not provide explicit congressional directive to pierce corporate veil), *aff'd*, 893 F.2d 80 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1017, *and cert. denied sub nom.* Power Supply Co. v. James & Co., 111 S. Ct. 1017 (1991).

351. *See* United States v. Sharon Steel Corp., 18 Envtl. L. Rep. (Envtl. L. Inst.) 20,242, 20,245 (D. Utah Aug. 18, 1987).

352. NCP, *supra* note 105, § 300.700(c)(5)-(6). CERCLA requires that cleanup costs be consistent with the NCP, which mandates public notice and comment in the case of remedial response measures. *Id.* If the measures undertaken are removal measures, the party taking the lead need only *attempt* to involve other PRPs in the cleanup. *Id.* For discussion of the NCP requirements, see *supra* part IV.

353. NCP, *supra* note 105, § 300.71(a)(2)(i).

354. Metropolitan Serv. Dist. v. Oregon Metal Finishers, Inc., 32 Env't Rep. Cas. (BNA) 1102, 1104 (D. Or. 1990).

355. *See id.* at 1104 (showing a plaintiff who elected to proceed outside of the formal requirements of public notice in order to avoid construction delays).

The conflict between these laws can be exacerbated by the context in which a corporation seeks bankruptcy protection. The corporation may have been dumping a myriad of wastes over a period of half a century or more. It may also have used agents or contractors for whose actions it is legally liable. The wastes may have been mixed with the wastes of others before, during, or after disposal, or may have been mislabeled. It can take many years or even decades to discover the potential liability. But compared with the time and difficulty in ascertaining the location and character of wastes, the bankruptcy procedure is quick and simple.

The conflict between environmental policy and bankruptcy policy has produced cases that are factually and legally complex. There have been considerable differences of interpretation among the courts that have dealt with the issue of whether CERCLA liability can be avoided through bankruptcy proceedings. Moreover, CERCLA is one of the few environmental laws that has been significantly shaped by judicial opinions rather than EPA regulations. Because the case law has been primarily generated by various federal district courts, the possible results in a given case might vary considerably from district to district.

In bankruptcy proceedings, conduct by land owners relating to hazardous waste is not all treated in the same manner. Conduct can be divided into four categories: (1) pre-petition release or threatened release of hazardous wastes where cleanup or other remedial costs have been incurred; (2) pre-petition injunctive remedies where the creditor has the option of converting an injunction into the right to monetary compensation;[356] (3) pre-petition injunctive or other equitable relief that cannot be converted into a right to payment; and (4) post-petition activities.

Only the first two categories are dischargeable in bankruptcy proceedings. Equitable relief where, for example, a court orders a site to be cleaned up is not generally dischargeable in bankruptcy. The third category usually occurs under state laws that only provide for equitable relief and that limit remedies to contempt or similar enforcement procedures. The fact that the penalties under state statutes or court imposed relief may be monetary civil penalties does not generally render injunctive claims dischargeable. However, there is authority to the contrary.[357]

Post-petition activities are not discharged by bankruptcy. To the

356. Such a right exists if a potentially responsible party is ordered to perform cleanup work and then fails to do so, and others (usually the government) conduct the cleanup and in doing so incur costs.

357. *See* United States v. Whizco, 841 F.2d 147, 150-51 (6th Cir. 1988) (discharging obligation to reclaim a mine site only to the extent that it would force the operator to spend money).

extent that a person continues to own or use land there is a continuing obligation to comply with environmental laws, and a person may not be permitted to transfer or legally abandon the site.[358] In the absence of a pre-petition release or threatened release of hazardous waste, any subsequent liability for environmental cleanup or remedial action is probably not dischargeable in bankruptcy.[359] Even when there is a pre-petition release, liability might still not be dischargeable in bankruptcy.[360] But, a pre-petition release or threatened release that can be remedied by the payment of money damages usually can be discharged.[361]

The court in *In re Chateaugay Corp.(LTV)*[362] held that a discharge in bankruptcy cannot rest upon the mere pre-petition existence of hazardous waste. There must be a pre-petition release or threatened release.[363] If there is a pre-petition triggering event, such as the release or threatened release of hazardous waste, the claim is dischargeable.[364] The court treated CERCLA claims as they would the claims of any other creditor. The court also held that the EPA has first priority for full payment for cleanups necessary to preserve the property involved in the bankruptcy action. However, this priority position is not available to the EPA when the bankrupt entity's liability is based on contamination of other property which is not part of the bankruptcy estate. Under this decision, a person seeking to collect cleanup costs for disposal on land which is not part of the bankruptcy estate must make a claim during the bankruptcy proceedings, although frequently the information necessary to make such a claim has not materialized.[365] This decision makes it easier for polluters to avoid liability and shift the cleanup costs to other healthy entities that may have joint liability.[366] While the meaning of

358. *See* Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 474 U.S. 494, 502 (1986).

359. *See* Pettibone Corp. v. Ramirez, 90 B.R. 918 (Bankr. N.D. Ill. 1988).

360. *See supra* notes 356, 357 and accompanying text.

361. Some of the most publicized disputes involving contingent claims are asbestos cases. In the case of Kane v. Johns-Mansville Corp. (*In re* Johns-Manville Corp.), 36 B.R 743 (Bankr. S.D.N.Y. 1984), *aff'd*, 52 B.R. 940 (S.D.N.Y. 1985), the court appointed a representative for persons exposed to asbestos but whose claims were not yet known. *Id.* at 754-56. Subsequently, future claimants were limited to claims from an asbestos health trust. Thus, future claimants were treated as if they possessed "claims" under the Bankruptcy Code because of pre-petition exposure to asbestos. Kane v. Johns-Manville Corp., 843 F.2d 636, 640 (2d Cir. 1988).

362. 112 B.R. 513 (S.D.N.Y. 1990), *aff'd*, 944 F.2d 997 (2d Cir. 1991).

363. *Id.* at 521-22.

364. *Chateaugay Corp.*, 944 F.2d at 1005-06.

365. *Claims for Response to Pre-petition Releases Discharged in Bankruptcy, Appeals Court Says*, 22 Env't. Rep. (BNA) 1290, 1301 (Sept. 13, 1991).

366. *Bankruptcy Claims—EPA, Industry Admit Defeat in Superfund Exemption Ruling*, ENVTL. POL'Y ALERT, Oct. 2, 1991, at 24, 25.

this case is being debated by the experts, it seems fair to conclude that it will be used to support the position of individuals and businesses seeking to avoid cleanup expenditures through bankruptcy protection.[367] This case seems inconsistent with the position of the Third Circuit in *In re Penn Central Transportation Co.*,[368] also decided in September 1991. The court held that a 1978 bankruptcy reorganization did not discharge the Penn Central Transportation Company from claims not arising until the subsequent passage of CERCLA in 1980.[369]

The major Supreme Court case focusing on CERCLA/bankruptcy issues is *Ohio v. Kovacs*.[370] The Court, in this unanimous decision, held that the obligation to pay money for the cleanup of a hazardous waste site was dischargeable under the Bankruptcy Code. However, in this instance, the cleanup was already underway when the respondent filed a personal bankruptcy petition.

Even if there is a pre-petition release, it is not certain that a court will allow the property to be legally abandoned by the trustee of the bankrupt estate. In *Midlantic National Bank v. New Jersey Department of Environmental Protection*,[371] the Supreme Court dealt with the issue of whether land could be abandoned despite applicable state laws and regulations designed to protect public health and safety. In a five-four decision, the Court held that the trustee in bankruptcy could not abandon the property.[372] Two justices in the majority and one dissenting justice are no longer on the court, so predicting the future value of this case is difficult.

The facts in *Midlantic National Bank* were as follows.[373] Quanta Resources processed waste oil in facilities in New York and New Jersey. Quanta violated its operating permit by accepting oil contaminated with a toxic carcinogen into its New Jersey facilities. When the New Jersey Department of Environmental Protection (NJDEP) discovered this violation, they entered into negotiations with Quanta for the cleanup. In the course of negotiations, Quanta filed a petition for reorganization under Chapter 11. Subsequent to the NJDEP's order requiring a cleanup,

367. Kenneth E. Aaron, *The* Chateaugay *Appeal: Crash at the Intersection of Bankruptcy and Environmental Law*, 6 Toxics L. Rep. (BNA) 535 (Sept. 25, 1991).

368. 944 F.2d 164 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1262 (1992).

369. *Id.* at 168; *see also* United States v. Union Scrap Iron & Metal, 123 B.R. 831, 838 (D. Minn. 1990).

370. 469 U.S. 274 (1985).

371. 474 U.S. 494 (1986).

372. *Id.*

373. *Id.* at 496-500.

Quanta converted the action to a liquidation proceeding under Chapter 7. At this time, contamination was also discovered at the New York site. A trustee was appointed who notified the creditors and Bankruptcy Court of his intention to abandon the property under section 554 of the Bankruptcy Code. The City and State of New York objected, claiming such abandonment would threaten the public's health and safety, as well as violate state and federal environmental law. The Bankruptcy Court, however, approved the abandonment of both the New York and New Jersey sites. In separate judgments, the Court of Appeals reversed.

The Supreme Court held that a trustee in bankruptcy may not abandon property in contravention of a state statute or regulation which is designed to protect the public's health or safety from identifiable hazards.[374] Furthermore, other cases suggest that Congress did not intend for section 554(a) to preempt all state and local statutes.[375] The Court agreed with the lower court that prior to Congress' codification of the rules for abandonment, the judicially developed rule had limited the trustee's ability to abandon property so as to protect legitimate state and local interests.[376] Thus, Congress presumably included this corollary in its codification. Under the Bankruptcy Code, when there are no common law limitations, Congress has expressly provided that the trustee's efforts to marshal and distribute the estate's assets must yield to governmental interests in public health and safety. The Court held that such restraints may be presumed to extend to the abandonment power as well.[377] Finally, the Court found support for restricting the abandonment power under 28 U.S.C § 959(b), as well as other environmental statutes.[378]

At a minimum, this case would allow a state to deal with its environmental concerns out of the assets of the estate before other creditors could be paid. But, presumably this would not be a barrier to attainment of a bankruptcy solution. This opinion is buttressed by *In re Peerless Plating Co.*,[379] in which the court held that CERCLA imposes a duty on the trustee to expend the unencumbered assets of the estate in cleaning up the site.[380] The trustee could not abandon the site with less than full

374. *Id.* at 500.
375. *See* City of New York v. Exxon Corp., 932 F.2d 1020, 1024 (2d Cir. 1991); Wilner Wood Prod. Co. v. Maine Dep't of Envtl. Protection, 128 B.R. 1, 2 (D. Me. 1991).
376. *Midlantic Nat'l Bank*, 474 U.S. at 499.
377. *Id.* at 505.
378. *Id.*
379. 70 B.R. 943 (Bankr. W.D. Mich. 1987).
380. *Id.* at 947.

compliance with CERCLA, and the cleanup costs were recoverable against the estate.[381]

A case of substantial significance is *Jensen v. Bank of America (In re Jensen)*.[382] The facts of *Jensen* were as follows.[383] Jensen Lumber Company (JLC), a closely-held corporation, generated hazardous wastes. The corporation ceased operations and filed a chapter 11 petition on December 2, 1983. On February 13, 1984, the Jensens filed a petition in personal bankruptcy which was closed on February 20, 1985. The JLC case was converted to a chapter 7 case on March 20, 1984, and was closed on March 18, 1987. In March of 1987 the California Department of Health Services (DHS) informed the Jensens they were potentially responsible parties pursuant to California's CERCLA equivalent. A remedial plan was issued October 1988. DHS sought reimbursement of the cleanup costs from the Jensens.

The key issue before the court was when does a claim for reimbursement arise under the state Hazardous Substance Account Act. The court held that the claims arose when the costs were incurred by the state.[384] Therefore, the claim was post-petition and was not discharged by the bankruptcy. In dicta, the court indicated that a private claimant incurring post-petition response costs would also not be barred from seeking contribution or indemnity from a party that had been discharged by a bankruptcy court.

The court in *Jensen* distinguished the tort/bankruptcy cases including the *Johns-Manville* case.[385] In tort cases, even if the state tort cause of action is based on a discovery rule, for bankruptcy purposes, the claim arises at the earliest point in the relationship between the victim and the debtor-wrongdoer. However, under CERCLA or a similar state law, the claim does not arise until the expenditure of recoverable funds, so the claims are not pre-petition if expenditures are made after bankruptcy petitions are filed. The court went on to express its disagreement with the reasoning of the *LTV* case.[386] The case was then reversed by the U.S.

381. But, all cleanup costs are not necessarily treated the same under bankruptcy law. *See* AL Tech Specialty Steel Corp. v. Allegheny Int'l, Inc., 126 B.R. 919, 925 (W.D. Pa. 1991); *see also Court Allows Direct CERCLA Expense Claims, Says Expert Costs Pre-Petition Dischargeable*, 6 Toxics L. Rep. (BNA) 22 (June 5, 1991).

382. 114 B.R. 700 (Bankr. E.D. Cal.), *rev'd*, 127 B.R. 27 (Bankr. 9th Cir. 1990).

383. *Id.* at 701-02.

384. *Id.* at 703.

385. *Id.* at 704.

386. *Id.* at 705. For a discussion of the *LTV* case, see *supra* note 362 and accompanying text.

Bankruptcy Appellate Panel for the Ninth Circuit.[387] The court held that the claims against individual owners of the lumber company could survive a bankruptcy reorganization only if the claims arose after the filing for bankruptcy.[388] Since the claims were based on threatened releases that arose before the individuals filed for bankruptcy, the state agency could not sue for response costs.[389]

If a court follows the reasoning used in *In re Chateaugay Corp.*, whether a party can avoid liability still depends on the presence of a pre-petition release or threatened release. To prove there was a pre-petition release requires an occurrence which meets the definition of a "release" in CERCLA section 101(22). The statute has been interpreted broadly, and the presence of hazardous substances in the soil and groundwater has been held to be sufficient evidence of a release.[390] A "threat of release" has also been broadly construed.[391] This case also required the material discharged to be hazardous. If the EPA has listed the material as hazardous, this test is met.[392] A release must also violate a federal or state statute that justifies a response cost.[393] It should be emphasized that, in order to impose liability, the courts have used a large net to encompass actions within CERCLA. Courts may not be as expansive in their interpretations if the goal is to interpret the terms of CERCLA to allow litigants to avoid cleanup responsibility. But at least some courts seem to believe that giving debtors a new start is more important than forcing them to pay for the cleanup costs created by their own acts.

To make matters more confusing, the 1986 SARA created a new CERCLA section 107(*l*) which imposes a federal lien on all real property which is subject to, or affected by, a removal or remedial action.[394] Under this provision, the lien is imposed at the later date of: (1) the time the costs are incurred by the United States or (2) the time the person is provided written notice by certified mail or registered mail that they are

387. Jensen v. California Dep't of Health Serv., 127 B.R. 27, 32-33 (Bankr. 9th Cir. 1991).

388. *Id. But see* Sylvester Bros. Dev. Co. v. Burlington N.R.R., 133 B.R. 648 (D. Minn. 1991); United States v. Union Scrap Iron & Metal, 123 B.R. 831 (D. Minn. 1990).

389. *Jensen*, 127 B.R. at 32-33.

390. *See* United States v. Mottolo, 695 F. Supp. 615, 623 (D.N.H. 1988).

391. *See* O'Neil v. Picillo, 682 F. Supp. 706, 724 (D.R.I. 1988) (holding that barrels with minuscule leaks constitute a threatened release), *aff'd*, 883 F.2d 176 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 1115 (1990); Vermont v. Staco, Inc., 684 F. Supp. 822, 832 (D. Vt. 1988), *rescinded in part, vacated in part*, No. CIV. 86-190, 1989 WL 225428 (D. Vt. Apr. 20, 1989).

392. *Staco, Inc.*, 684 F. Supp. at 832.

393. Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 670 (5th Cir. 1989).

394. 42 U.S.C. § 9607(*l*). *But see* Reardon v. United States, 947 F.2d 1509, 1558 (1st Cir. 1991) (holding § 107(*l*) to be unconstitutional as a deprivation of a signifigant property interest within the meaning of the due process clause).

potentially liable.[395] At least as to federal claims, this will make avoidance of liability through a bankruptcy proceeding more difficult.

The law concerning both private recovery actions and CERCLA related bankruptcy actions has not gelled. The bankruptcy route is very risky and cannot be used to guarantee favorable results for those seeking to avoid cleanup liability. Nevertheless, there are disturbing signs that some courts will allow polluters to circumvent responsibility for hazardous waste cleanups by using the bankruptcy laws.

VI. CONCLUSION

The large number of hazardous waste sites in the United States coupled with the massive amounts of money and time required to clean them up has caused government entities and private persons to face the reality that they may sue or be sued in private actions under CERCLA. Corporate officers, lending institutions, municipalities, shareholders, and landlords (among others) must now consider potential CERCLA liability when conducting numerous facets of their operations. While changes in business operations may reduce problems resulting from recent activities, CERCLA-based litigation often deals with conduct that occurred decades or more in the past. Thus, private cost recovery actions can be expected to increase as the consequences of prior activities continue to surface.

Since 1990, courts have adopted a more lenient standard to evaluate whether a cleanup is consistent with the National Contingency Plan. The more lenient standard makes it easier to win a private cost recovery action. Thus it may also contribute to an increase in the number of these actions. Nevertheless, although the 1990 NCP makes the application of certain of its requirements more discretionary, it retains sufficient force to preclude cost recovery among private parties for anything less than a cleanup which meets the CERCLA goals of protecting public health and welfare, and the environment.

Private parties who plan to cleanup a release of hazardous substances are well advised to plan carefully and adequately to assure a response action that will meet the mandates of section 107 and the NCP. A prudent party should thoroughly review the requirements of the NCP and the case law during this planning process. Moreover, diligence in

395. CERCLA § 107(*l*), 42 U.S.C. § 9607(*l*).

documenting the appropriateness of response costs is absolutely necessary. Any opportunity to involve local, state, and federal government agencies in the selection of a response action should be exploited. Government involvement does not make certain a private recovery, but it may help in developing a record that indicates a response consistent with the NCP. Public participation should be encouraged throughout the process as is required by the NCP.

The requirement that recoverable costs must be the "necessary costs of cleanup incurred consistent with the NCP" is being interpreted broadly. The leniency in scrutinizing the consistency of response actions with the NCP began in the courts and is supported by the EPA in its promulgation of the 1990 NCP. The new NCP will likely result in more litigation as property owners feel more confident that they can successfully sue recalcitrant parties. The more flexible burden that is now placed on the plaintiff increases the chance of success at trial and reduces the potential profitability for a party that takes a recalcitrant position. Recalcitrant parties will have less success in avoiding payments due to a minor deviation from a previously rigid list of requirements in the NCP. This may encourage previously recalcitrant parties to reconsider a defiant position and participate in the planning and execution of a cleanup of a release for which it is a PRP. As confidence in the probability of recovery increases, such confidence may serve to increase the number of cleanup responses to releases of hazardous substances and assist in the achievement of the goals of CERCLA.