Private Cost Recovery Actions Under Section 107 of CERCLA

Richard C. Belthoff, Jr.*

I. INTRODUCTION

Concern for the environment has increased in recent decades due, in part, to a problem of epic proportions: the inadequate disposal of hazardous waste.[1] Congress, aware of this concern, [2] enacted legislation to address the problem. In 1976, Congress

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* Associate, Grier and Grier, Charlotte, North Carolina; B.S.P. 1980, East Carolina University; J.D. 1984, University of North Carolina.

1. *See* Mott, *Liability for Cleanup of Inactive Hazardous Waste Disposal Sites*, 14 NAT. RESOURCES LAW. 379, 379 (1981-82); Note, *Joint and Several Liability under Superfund*, 13 LOY. U. CHI. L.J. 489, 489 (1982) [hereinafter cited as Note, *Joint and Several Liability*]; Note, *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, 109 (1982) [hereinafter cited as Note, *CERCLA*].

Estimates indicate that only ten percent of the 77.1 billion pounds of hazardous waste generated yearly in the United States is disposed of properly. H.R. REP. No. 1016, 96th Cong., 2d Sess. 4, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 6119, 6153; ENVIRONMENTAL PROTECTION AGENCY, EVERYBODY'S PROBLEM: HAZARDOUS WASTE 15 (Pub. No. SW-826 1980).

> Most of the . . . hazardous wastes produced in the U.S. in the past have been disposed of using environmentally unsound methods. Given a relative surplus of land, an economic system which failed to incorporate environmental damages into product costs, and ignorance of what was occurring underground at disposal sites, past disposal practices have created a large number of situations in which the environment and public health are threatened.

Hazardous and Toxic Waste Disposal: Joint Hearings on S. 1341 and S. 1480 Before the Subcomm. on Environmental Pollution and Resource Protection of the Senate Comm. on Environmental and Public Works (Part 4), 96th Cong., 1st Sess. 82-83 (1979) (statement of Thomas C. Jorling, EPA) [hereinafter cited as *Hazardous and Toxic Waste Disposal*].

The extent of the problem has been discussed extensively in the literature. *See, e.g.*, S. EPSTEIN, L. BROWN & C. POPE, HAZARDOUS WASTE IN AMERICA (1983); FRED C. HART ASSOCIATES, PRELIMINARY ASSESSMENT OF CLEANUP COSTS FOR NATIONAL HAZARDOUS WASTE PROBLEMS (1979); Duetsch, Tarlock & Robbins, *An Analysis of Regulations Under the Resource Conservation and Recovery Act*, 25 WASH. U.J. URB. & CONTEMP. L. 145 (1983); Eckhardt, *The Unfinished Business of Hazardous Waste Control*, 33 BAYLOR L. REV. 253 (1981); Hinds, *Liability Under Federal Law for Hazardous Waste Injuries*, 6 HARV. ENVTL. L. REV. 1 (1982); Lotz, *Liability Issues under CERCLA*, 23 A.F.L. REV. 370 (1982-83); Note, *Superfund: Conscripting Industry Support for Environmental Cleanup*, 9 ECOLOGY L.Q. 524 (1981); Note, *An Analysis of Common Law and Statutory Remedies for Hazardous Waste Injuries*, 12 RUTGERS L.J. 117 (1980).

2. *See* H.R. REP. No. 1491, 94th Cong., 2d Sess. 3-4, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6238, 6241. *See also* Dore, *The Standard of Civil Liability for Hazardous Waste Dispo-*

passed the Resource Conservation and Recovery Act (RCRA),[3] a " 'cradle-to-grave' regulatory scheme for toxic material providing 'nationwide protection against the dangers of improper waste disposal.' "[4] Far reaching as it was, however, RCRA contained serious regulatory gaps. For example, RCRA was prospective and applied to abandoned and inactive hazardous waste disposal sites only to the extent they posed an imminent hazard.[5] However, these abandoned and inactive hazardous disposal sites were precisely the sites posing the greatest threat to the environment.[6] Therefore, on December 11, 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[7] to provide funding and procedures to deal with these sites.

Although RCRA and CERCLA provide for several methods whereby the federal government can force responsible parties to clean up an inadequate waste disposal site,[8] the U.S. Environmental Protection Agency (EPA) has neither the time nor the manpower to address all of the sites. Therefore, CERCLA allows

sal Activity: Some Quirks of Superfund, 57 NOTRE DAME LAW. 260, 263 (1981) ("Contrary to popular belief, federal involvement in environmental protection is longstanding").

3. Resouce Conservation and Recovery Act, Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified as amended at 42 U.S.C. §§ 6901 to 6991 (1982)).

4. H.R. REP. No. 1491, *supra* note 2, at 11, *reprinted in* 1976 U.S. CODE CONG., *supra* note 2, at 6249. *See generally* Goldfarb, *The Hazards of Our Hazardous Waste Policy*, 19 NAT. RESOURCES J. 249, 253 (1979).

5. H.R. REP. No. 1491, *supra* note 2, at 2, *reprinted in* 1976 U.S. CODE CONG., *supra* note 2, at 6239. In addition, RCRA provides no help if a financially responsible owner of a site cannot be located. H.R. REP. No. 1016, *supra* note 1, at 22, *reprinted in* 1980 U.S. CODE CONG., *supra* note 1, at 6125.

6. Note, *CERCLA*, *supra* note 1, at 112 n. 22.

> For decades, thousands upon thousands of tons of hazardous chemical wastes have been deposited in our environment. The sites where they were dumped, with their contents of longlasting chemicals, now represent lethal time capsules which year by year release their toxic contents into our surface waters, our groundwaters, and seriously degrade our landscape, and that essential element of our life support system—our water supply.

Hazardous and Toxic Waste Disposal, supra note 1, at 6 (statement of Thomas C. Jorling, EPA). *See also* ENVIRONMENTAL PROTECTION AGENCY, OIL AND SPECIAL MATERIALS CONTROL DIVISION, DAMAGES AND THREATS CAUSED BY HAZARDOUS MATERIAL SITES (May 1980); 126 CONG. REC. S14,966 (daily ed. Nov. 24, 1980) (statement of Sen. Stafford). *See generally* Note, *Inactive or Abandoned Hazardous Waste Disposal Sites: Coping with a Costly Past*, 53 S. CAL. L. REV. 1709, 1710 (1980).

7. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified at 42 U.S.C. §§ 9601 to 9656 (1982)).

8. Such methods include injunction and administrative orders. *See, e.g.*, 42 U.S.C. §§ 6973 & 9606 (1982).

private parties to clean up an inadequate hazardous waste disposal site and recover their costs from responsible parties.[9] These "private const recovery actions" are the focus of this Article.

This Article first discusses, in general terms, the overall scheme of CERCLA. Then, the implementation of private cleanups and cost recovery actions is discussed, including a detailed analysis of applicable court decisions. In addition, suggestions are offered regarding how private cost recovery actions can be made more effective. This Article concludes that private cleanups and cost recovery actions are effective tools to address the hazardous waste disposal problem, but the impact of these cleanups and cost recovery actions is limited by the ambiguities in the statutory scheme and the inconsistent judicial decisions.

II. CERCLA Overview

A. *Background*

Congress passed CERCLA after one and one-half years of debate and the consideration of several versions of the Act.[10] However, as elections quickly approached in the closing days of the Congressional session, and as memories of Love Canal[11] passed through their minds, members of the Ninety-Sixth Congress hurriedly enacted a compromise version which was much less comprehensive than the original Senate proposal.[12] Many supporters of more comprehensive bills nevertheless favored the compromise version seeing it as an opportunity to resolve quickly, even if imperfectly, the major problems associated with hazardous waste disposal and fearing they may get less by postponing consideration of these matters until the next session.[13]

9. *See id.* § 9607.

10. Note, *CERCLA*, *supra* note 1, at 120 & n. 57.

11. Because of its national notoriety, Love Canal may have beenn the major consciousness-raising episode that led to the enactment of CERCLA. *See* Tripp, *Liablilty Lssues in Litigation under the Comprehensive Environmental Respone Act*, 52 UMKC L. Rev. 364, 365 (1984). However there have been other incidents such as "Times Beach" and "Valley of the Drums." *See* Note, *Private Cost Recovery Actions Under CERCLA*, 69 Minn. L. Rev. 1135, 1135-37 & nn. 5-7 (1985).

12. *See* Bulk Distib. Centers, Inc. v. Monsanto Co., 589 F. Supp. 1437 (S.D. Fla. 1984); Cadillac Fairview/California, Inc. v. Dow Chemical Co., 21 Env't Rep. Cas. (BNA) 1108, 1112 (C.D. Cal.), *modified*, 21 Env't Rep. Cas. (BNA) 1584 (C.D. Cal. 1984); Note *CERCLA*, *supra* note 1, at 120 n. 59 (a victim's compensation provision was omitted from the final bill and the "Superfund" was only 25% of the amount originally proposed).

13. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability ("Superfund") Act of 1980*, 8 Colum. J. Envtl. L. 1, 34 (1982).

Due to the hasty drafting during the closing days of the lame-duck session, the legislative history of CERCLA is riddled with uncertainty and many last minute compromises remain largely unexplained.[14] Nevertheless, the Committee Reports make clear that the major purpose behind CERCLA is to remedy the inadequacies of prior environmental legislation, particularly RCRA.[15] Because RCRA generally applies to abandoned or inactive sites only if the site poses an imminent hazard,[16] Congress enacted CERCLA to pick up where RCRA left off and establish a means to control and finance governmental and private response actions to hazardous substance releases at abandoned and inactive waste disposal sites.[17]

CERCLA empowers EPA with the authority to respond, or compel response to, actual or threatened releases of hazardous substances.[18] Generally, CERCLA provides for reporting of releases,[19] response authorities that can undertake remedial or abatement actions,[20] liability for removal expenses and damages,[21] and a "Superfund" to meet response costs and to pay for damages to natural resources.[22]

"Hazardous substance" is defined as materials so designated by the Clean Water Act (Federal Water Pollution Control Act),[23] the Clean Air Act,[24] the Solid Waste Disposal Act (RCRA),[25] and the

14. *Bulk Distib.*, 589 F. Supp. at 1441; United States v. Price, 577 F. Supp. 1103, 1109 (D.N.J. 1983); Note, *Liability for Generators of Hazardous Waste: The Failure of Existing Enforcement Mechanisms*, 69 GEO. L. J. 1047, 1056-81 (1981). The hasty drafting is also evident in the Act's cross-references to other environmental laws. *See* 42 U.S.C. § 9601 (10) (1982) ("federally permitted release") (12 cross-references).

15. *Price*, 577 F. Supp. at 1109 (citing H.R. REP. No. 1016, *supra* note 1, at 18, *reprinted in* 1980 U.S. CODE CONG., *supra* note 1, at 6120).

16. *Bulk Distrib.*, 589 F. Supp. at 1441.

17. *Id. See also* City of Philadelphia v. Stepan Chemical Co., 544 F. Supp. 1135, 1142-43 (E.D. Pa. 1982); H.R. REP. No. 1016, *supra* note 1, at 6120.

18. *See* 42 U.S.C. §§ 9604, 9606.

19. *Id.* § 9603.

20. *Id.* §§ 9604, 9606.

21. *Id.* § 9607.

22. *Id.* §§ 9608, 9631, 9641.

23. Federal Water Pollution Control Act, ch. 758, tit. I, 76 Stat. 843 (1968) (codified as amended at 33 U.S.C. §§ 1251 to 1376 (1982)). The FWPCA is also referred to as the Clean Water Act. *See* Clean Water Act of 1977, Pub. L. No. 95-217, § 1, 91 Stat. 1567.

24. Clean Air Act, Pub. L. No. 88-206, 77 Stat. 393 (1963) (codified as amended at 42 U.S.C. §§ 7401 to 7642 (1982)).

25. *See supra* note 3.

Toxic Substances Control Act,[26] as well as materials designated pursuant to section 102 of CERCLA.[27] Petroleum is not a "hazardous substance" unless the oil or any fractionated part is designated as hazardous under one of the listed acts.[28] In addition, natural gas, natural gas liquids, liquefied natural gas, and synthetic gas usable for fuel are not hazardous[29] substances.[30] Recently, regulations were promulgated listing all 698 of the CERCLA hazardous substances.[31]

26. Toxic Substances Control Act, Pub. L. No. 94-469, 90 Stat. 2003 (1976) (codified as amended at 15 U.S.C. §§ 2601 to 2629 (1982)).

27. 42 U.S.C. § 9601(14). Specifically,

> "Hazardous substance" means (A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the charactistics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C. § 6901 *et seq.*] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C. § 6901 *et seq.*] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C. § 412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15.

Id.

28. *Id.* § 9602.

29. *Id.* § 9601(14).

30. *Id.*

31. *See* 50 Fed. Reg. 13,456, 13,475-512 (April 4, 1985) (to be codified at 40 C.F.R. §§ 302.1-302.6).

B. *Liability*

CERCLA imposes liability upon the release[32] of a reportable quantity[33] of a hazardous substance that is not released pursuant to a "federally permitted release."[34] Upon the release of a reportable quantity of a hazardous substance, the notification provisions of CERCLA require that any person in charge of a vessel[35] or a facility,[36] either onshore[37] or offshore,[38] from which the hazardous substance is released must notify the National Response

32. "Release" is broadly defined as:

> any spilling, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leeching, dumping, or disposing into the environment, but excludes (A) any release which results in exposure to persons soley within a workplace, with respect to a claim which such persons may assert against the employer of such persons, (B) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine, (C) release of source, by product, or special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954 . . . if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commisssion under section 170 of such Act . . . or, for the purposes of Section 9604 of this title or any other response action, any release of source by product, or special nuclear material from any processing site designated under section 7912(a)(1) or 7942(a) of this title, and (D) the normal application of fertilizer. . . .

42 U.S.C. § 9601(22).

33. "Reportable quantities" were designated by section 102 of CERCLA as either one pound or the amount established for a particular substance under the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1321(b)(4). 42 U.S.C. § 9602(b). However, regulations have superseded the original "reportable quantities" and have set specific "reportable quantities" for 698 substances. *See* 50 Fed. Reg. at 13,475-512. *See also* 50 Fed. Reg. 13,514, 13,518-522 (April 4, 1985) (proposed reportable quantity amendments for 105 substances).

34. "Federally permitted release" includes, *inter alia*, discharges in compliance with a permit under the FWPCA or RCRA. 42 U.S.C. § 9601(10). The legislative history indicates that compliance with a permit is not a defense to liability: "[a] federal permit is not 'a license to create threats to public health or the environment . . . .' While the exemptions from liability for federally permitted releases are provided to give regulated parties clarity in their legal duties and responsibilities, these exemptions are not to operate to create gaps . . . . Accidents—whatever their cause—[are not] exempt . . . . " 126 CONG. REC. S 14,965 (daily ed. Nov. 24, 1980) (statement of Sen. Randolph)).

35. " '[V]essel' means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water . . . ." 42 U.S.C. § 9601(28).

36. "Facility" is defined as

> (A) Any building, structure. installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel . . . .

Id. § 9601(9).

Center[39] (NRC) of the release immediately after obtaining knowledge of such release.[40] The NRC must convey the notification to all appropriate Government agencies, as well as the Governor of the affected State.[41] Failure to notify carries a fine of up to $10,000 and imprisonment of up to one year.[42]

In addition, "any person who owns or operates or who at the time of disposal owned or operated, or who accepted hazardous substances for transport and selected, a facility at which hazardous substances . . . are or have been stored, treated, or disposed of" must have notified the EPA within 180 days after December 11, 1980 of "any known, suspected, or likely releases" of hazardous substances from such facility.[43] Persons who failed to notify are not entitled to any limitation of liability or any defense listed in section 107 and are subject to criminal penalties.[44]

37. " '[O]nshore facility' means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land or non-navigable waters within the United States . . . ." *Id.* § 9601(18).

38. "Offshore facility" is defined as

> any facility of any kind located in, on, or under, any of the navigable waters of the United States, and any facility of any kind which is subject to jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel . . . .

Id. § 9601(17).

39. The FWPCA originally established the National Response Center. 33 U.S.C. § 1251.

40. 42 U.S.C. § 9603(a).

41. *Id.*

42. *Id.* § 9603(b).

43. *Id.* § 9603(c). A facility holding a permit under Subtitle C of RCRA need not have notified. *Id.*

44. *Id.* Section 107(c)(1) provides that liability shall not exceed:

> (A) for any vessel which carries any hazardous substance as cargo or residue, $300 per gross ton, or $5,000,000, whichever is greater;
>
> (B) for any other vessel, $300 per gross ton, or $5,000,000, whichever is greater;
>
> (C) for any motor vehicle, aircraft, pipe line (as defined in the Hazardous Liquid Pipe Line Safety Act of 1979 [49 U.S.C.A. 2001 *et seq.*]), or rolling stock, $50,000,000 or such lesser amount as the President shall establish by regulation, but in no event less than $5,000,000 (or, for releases of hazardous substances as defined in section 9601(14)(A) of this title into the navigable waters, $8,000,000). Such regulations shall take into account the size, type, location, storage, and handling capacity and other matters relating to the likelihood of release in each such class and to the economic impact of such limits on each such class; or
>
> (D) for any facility other than those specified in subparagraph (C) of this paragraph, the total of all costs of response plus $50,000,000 for any damages under this subchapter.

C. *Enforcement*

Section 104 of CERCLA authorizes the President[45] to respond to an actual or threatened release into the environment[46] of a pollutant or contaminant[47] which may present an imminent and substantial danger[48] to the public health or welfare.[49] The President is authorized to remove or arrange for the removal of,[50] or pro-

45. Section 115 of CERCLA authorizes the President "to delegate and assign any duties or powers imposed upon or assigned to him and to promulgate any regulations necessary to carry out the provisions of this subchapter." 42 U.S.C. § 9615. Ronald Reagan delegated much of his authority to various federal agencies. *See* Exec. Order No. 12,316, 46 Fed. Reg. 42,237 (1981), *as amended by* Exec. Order No. 12,418, 48 Fed. Reg. 20,891 (1983). For a discussion of each agency's role, see generally *Implementation of the Environment Response, Compensation and Liability Act of 1980: Hearings Before the Subcommittee on Environmental Pollution of the Committee on Environment and Public Works*, 97th Cong., 1st Sess. (1981).

46. "Environment" is defined as

(A) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States under the Magnuson Fishery Conservation and Management Act . . . , and (B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States . . . .

42 U.S.C. § 9601(8).

47. "Pollutant or contaminant" includes, but is not limited to,

any element, substance, compound, or mixture, including disease-causing agents, which after release into the environment and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunction in reproduction) or physical deformations, in such organisms or their offspring. The term does not include petroleum, including crude oil and any fraction thereof which is not otherwise specifically listed or designated as hazardous substances under section 9601(14)(A) through (F) of this title, nor does it include natural gas, liquefied natural gas, or synthetic gas of pipeline quality (or mixtures of natural gas and such synthetic gas).

Id. § 9604(a)(2).

48. CERCLA contains no definition of "imminent and substantial danger to the public health or welfare." *See* Note, *CERCLA*, *supra* note 1, at 123 n. 80.

49. 42 U.S.C. § 9604(a)(1).

50. "Remove" or "removal" is defined as

the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary [sic] taken in the event of a 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 of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a 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 not otherwise provided for, action taken under section 9604(b)

vide remedial action[51] for, hazardous substances or pollutants or contaminants, or take any other response measure deemed necessary, provided that all actions are consistent with the National Contingency Plan.[52] The President cannot act if he or she determines that such removal and remedial action will be done properly by a responsible party.[53] In addition, the President must consult with the affected state or states prior to taking any remedial action,[54] and the state must make available an acceptable waste disposal facility for offsite storage, destruction, or treatment of the hazardous substances.[55] The state must also agree to assume future maintenance of the removal and remedial action[56]

> of this title, and any emergency assistance which may be provided under the Disaster Relief Act of 1974 . . . .

Id. § 9601(23).

51. "Remedy" or "remedial action" is defined as

> those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or a threatened release of a hazardous substance into the environment, 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, but is 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 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 and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or welfare. The term does not include offsite transport of hazardous substances, or the storage, treatment, destruction, or secure disposition off site of such hazardous substances or contaminated materials unless the President determines that such actions (A) are more cost-effective than other remedial actions, (B) will create new capacity to manage, in compliance with subtitle C of the Solid Waste Disposal Act [RCRA], hazardous substances in addition to those located at the affected facility, or (C) are necessary to protect public health or welfare or the environment from a present or potential risk which may be created by further exposure to the continued presence of such substances or materials . . . .

Id. § 9601(24).

52. *Id.* § 9604(a)(1). See 40 C.F.R. §§ 300.1-300.81 (1984) (National Contingency Plan); 50 Fed. Reg. 47,912 (1985)(revised NCP)(to be codified at 40 C.F.R. §§ 300.1-300.84).

53. 42 U.S.C. § 9604(a)(1).

54. *Id.* § 9604(c)(2).

55. *Id.* § 9604(c)(3)(B).

56. *Id.* § 9604(c)(3)(A).

and agree to pay ten percent of the costs of the remedial action.[57] Remedial actions must be cost-effective by striking a balance between the need for protection of public health, welfare, and the environment with the availability of money from the Fund.[58] In addition, response actions cannot continue after $1 million has been obligated or six months have elapsed absent extenuating circumstances.[59]

Two additional enforcement mechanisms were also created by CERCLA. First, if there is an imminent and substantial danger to the public health or welfare or the environment because of an actual or threatened release, the President may require the Attorney General of the United States to seek an injunction to abate the danger or threat.[60] Second, after notice to the affected state, the President may issue an order to the responsible party to respond to a release to protect the public health or welfare and the environment.[61]

D. *Response Costs*

CERCLA also created the Hazardous Substance Response Trust Fund ("Superfund").[62] The "Superfund" is funded by industry and the federal government,[63] and finances cleanup of hazardous waste sites and the restoration of natural resources.[64] The Fund may be used, *inter alia*, for the payment of governmental response costs incurred pursuant to section 104 and the payment of any claim by any other person for necessary response costs incurred as a result of carrying out the National Contingency Plan.[65] Specific procedures exist for making claims against the Fund.[66]

57. *Id.* § 9604(c)(3)(C)(i).

58. *Id.* § 9604(c)(4).

59. *Id.* § 9604(c)(1).

60. *Id.* § 9606(a).

61. *Id.* Failure to comply with such an order subjects a person to a fine up to $5,000 per day. *Id.* § 9606(b). However, this section of CERCLA has been held by at least one court to violate the due process clause of the United States Constitution. Aminoil, Inc. v. EPA, 559 F. Supp. 69, 75-76 (C.D. Calif. 1984).

62. 42 U.S.C. § 9632. The Post-Closure Liability Trust Fund was also created and is used to monitor and maintain closed facilities. *Id.* § 9641.

63. 42 U.S.C. § 9631(b).

64. *See* 42 U.S.C. § 9611.

65. *Id.* § 9611(a). For a list of more specific uses of the fund, see *id.* § 9611(c).

66. *Id.* § 9612.

Liability for response costs is determined pursuant to section 107.[67] Costs of response may be recovered from four classes of persons: (1) owners and operators of facilities (or vessels subject to U.S. jurisdiction); (2) persons who owned or operated a facility at the time hazardous substances were disposed of there; (3) persons (generators) who arranged to have hazardous substances taken to a facility for disposal or treatment; and (4) persons who transported hazardous substances for disposal or treatment to a facility selected by the transporter.[68] To recover, a plaintiff must establish that: (1) the defendant is a person liable under section 107; (2) the expenses incurred at the hazardous waste site were "response costs", or money spent responding to contamination; (3) it responded to a "release or threatened release"; (4) the substances released or threatened to be released were "hazardous substances"; (5) the hazardous substances were released or threatened to release from a "facility"; and (6) the response activity was consistent with the National Contingency Plan.[69]

67. *Id.* § 9607.

68. *See Id.* More specifically, section 107 provides:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—
>
> (1) the owner and operator of a vessel (otherwise subject to the jurisdiction of the United States) 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 owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such 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, *from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—*
>
> (a) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;
>
> (b) any other necessary costs of response incurred by any other person consistent with the national contingency plan; and
>
> (c) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.

42 U.S.C. § 9607 (italicized language applies to all prior sections).

69. *Id. See also* W. FRANK & T. ATKESON, SUPERFUND: LITIGATION AND CLEANUP 93 (1985).

III. PRIVATE COST RECOVERY ACTIONS

A. *Introduction*

Private cost recovery actions are suits brought by parties other than the government against a responsible party listed in section 107 for costs incurred by responding to a release or threat of release of a hazardous substance. As a defense to a private cost recovery action, many defendants have argued that the action does not exist.[70] However, section 107(a)(4)(B) imposes liability on responsible parties for "any other necessary costs of response incurred by any other person consistent with the national contingency plan",[71] and almost every court discussing the issue has held or implied that section 107(a)(4)(B) creates a private right of action for the recovery of response costs.[72] One court noted that "there can't be any serious question but section [107(a) or (b)] creates a private cause of action to recover the costs of response incurred by any private party, *that is what it says*."[73] The one distict court to hold otherwise held that section 107 did not create a private cause of action because CERCLA does not contain a citizens' suit provision like RCRA or FWPCA.[74] The court held that the omission indicated that Congress did not intend to create a

70. *See, e.g.*, *Bulk Distrib.*, 589 F. Supp. at 1444.

71. 42 U.S.C. § 9607(a)(4)(B).

72. *See, e.g.*, *Bulk Distrib.*, 589 F. Supp. at 1443; Jones v. Inmont Corp., 584 F. Supp. 1425, 1428 (S.D. Ohio 1984); Pinole Point Properties, Inc., v. Bethlehem Steel Corp., 596 F. Supp. 283, 285 (N.D. Cal. 1984); Wickland Oil Terminals v. Asarco, Inc., 590 F. Supp. 72, 77 (N.D. Cal. 1984); D'Imperio v. United States, 575 F. Supp. 248, 253 (D.N.J. 1983); Wehner v. Syntex Corp., 22 Env't Rep. Cas. (BNA) 1373, 1375 (E.D. Mo. 1983); City of Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135, 1142-43 (C.D. Pa. 1982)("action expressly autherized by CERCLA").

> [Section 107] gives private parties the right to seek response costs from the responsible persons rather than making a claim pursuant to [section 111] against the Hazardous Substance Response Trust Fund. The ability of [a] plaintiff to claim against the Fund does not preclude it from seeking to recover its response costs from the defendant. Section [107] does set forth a private right of action by which parties may seek reimbursement of those costs from the responsible persons.

Dedham Water Co. v. Cumberland Farms Dairy, Inc., 588 F. Supp. 515, 517 (D. Mass. 1983).

73. Homart Dev. Co. v. Bethlehem Steel Corp., 22 Env't Rep. Cas. (BNA) 1357 (N.D. Cal. 1984)(emphasis added). *See also* Velsicol Chem. Corp. v. Reilly Tar & Chem. Corp., 21 Env't Rep. Cas. (BNA) 2118, 2121 (E.D. Tenn. 1984) ("This court is likewise persuaded that the plain language of the statute provides [a] right to sue under section [107].").

74. *See* Walls v. Waste Resources Corp., 761 F.2d 311, 318 (6th Cir. 1985).

private cause of action.[75] However, the Sixth Circuit Court of Appeals swiftly reversed.[76]

B. *Proper Plaintiffs*

1. Potentially Responsible Parties

Liability under section 107 may exist merely because one is the present owner of a hazardous waste site.[77] Thus, many present owners are potentially responsible parties ("PRPs") under CERCLA.[78] Few courts have addressed the issue whether one PRP has standing to sue another PRP;[79] however, most of the plaintiffs involved in the cases which considered the standing issue were PRPs.[80]

In *City of Philadelphia v. Stepan Chemical Co.*,[81] the plaintiff City sought to recover from various generators and transporters the cleanup costs and consequential damages resulting from the illegal dumping of industrial waste in a landfill intended only for city use. The City was a PRP because it owned and operated the landfill where the hazardous wastes were dumped.[82]

The defendants argued that the term "any other person" as used in section 107(a)(4)(B) does not include a party subject to liability under the Act.[83] They pointed to several inconsistencies which would result in the administration of CERCLA's funding provisions if the City were allowed to bring its action.[84] For example, defendants argued that because the President could reim-

75. *See id.*

76. *Id.*

77. *See* 42 U.S.C. § 9607(a)(1)(B). *See also* United States v. Carolawn Co., 21 Env't Rep. Cas. (BNA) 2124, 2127-29 (D.S.C. 1984) (held that chemical company holding title to hazardous waste site for one hour, claiming it had acted only as "conduit" in transfer of title with no true ownership interest in the property, could be owner and operator under section 107).

78. *See Pinole Point*, 596 F. Supp. at 291 (present owner of hazardous waste disposal site is a potentially liable party under section 107(a)).

79. Malter & Muys, *Private Cost Recovery and Contribution Actions Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980*, HAZARDOUS WASTES, SUPERFUND, AND TOXIC SUBSTANCES (ALI-ABA COURSE OF STUDY MATERIALS) 95, 96 (Nov. 1984).

80. *See, e.g.*, Bulk Distrib. Centers, Inc. v. Monsanto Co., 589 F. Supp. 1437 (S.D. Fla. 1984); Wickland Oil Terminals v. Asarco, Inc., 590 F. Supp. 72 (N.D. Cal. 1984).

81. 544 F. Supp. 1135 (E.D. Pa. 1982).

82. *See id.* at 1141; 42 U.S.C. § 9607(a)(1).

83. 544 F. Supp. at 1141.

84. *Id.*

burse a PRP from the Fund[85] and the government can then sue the PRP because of its subrogation rights,[86] the PRP could then sue another PRP who could in turn claim against the Fund, resulting in a "merry-go-round" of litigation.[87]

In rejecting the defendants' argument, the court conceded that the defendants' approach possessed "a degree of analytical neatness."[88] However, the court could not ignore the end result of defendants' logic: that the City, which did not voluntarily allow the hazardous substances to be placed on its property, and which sustained damages as a result of defendants' illegal disposal, would be precluded from recovering its cleanup costs from the responsible parties.[89] Thus, the court rejected defendants' position because such preclusion was not compelled by either the language of CERCLA, the legislative history or the environmental objectives which CERCLA was designed to achieve.[90]

The court then considered the term "any other person" in context with the other provisions of section 107. It noted that the first category of "persons" entitled to recover response costs consists of the federal and state governments, and the federal and state governments are subsumed within the definition of "person."[91] The court found further that, in context, "the term 'any other person' is quite conceivably designed to refer to persons other than federal or state governments and not, as defendants argued, to persons other than those made responsible under the Act."[92] Thus, the court held that "although not a model of clarity, the provision does not specifically exclude parties who may be liable for the costs of governmental action nor does its language necessarily support such a construction."[93]

85. *See* 42 U.S.C. § 9611(a)(2) ("The President shall use the money in the fund for . . . payment of any claim for necessary response costs incurred by any other person as a result of carrying out the [NCP].").

86. *See id.* § 9612(c)(1) ("Payment of any claim by the Fund under this section shall be subject to the United States Government acquiring by subrogation the rights of the claimant to recover those costs of removal or damages for which it has compensated the claimant from the person responsible or liable for such release.").

87. 544 F. Supp. at 1141. *See generally Pinole Point*, 596 F. Supp. at 291.

88. 544 F. Supp. at 1142.

89. *Id.*

90. *Id.* The defendants in *Pinole Point* raised the same procedural arguments; however, the court followed *Stepan Chemical* and rejected defendants' argument. *Pinole Point*, 596 F. Supp. at 291.

91. 544 F. Supp. at 1142.

92. *Id.*

93. *Id.*

In addition, the court considered the legislative history of CERCLA and its key objective: facilitating the prompt cleanup of hazardous waste sites by creating a means to finance governmental and private responses and by placing the ultimate financial burden upon the responsible parties.[94] "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."[95] Thus, the court could not attribute to Congress an intention to preclude the City from maintaining its action.[96] Although the City may have been liable to the federal or state government if either had commenced cleanup, "the dispositive consideration is that the City did not operate a hazardous waste disposal facility on the premises and it asserts that it did not voluntarily permit the placement of the hazardous substances on its property."[97] In addition, the City undertook cleanup and now seeks to recover from the parties allegedly involved in the illegal dumping and who are expressly liable for the response costs.[98] Thus, the court could not conclude that the City's right to maintain its action was barred by the hypothetical possibility that had the federal or state government brought suit, the City would also be liable.[99] "The parade of horrors posited by defendants does not counsel against such a result."[100]

> The simple fact is that there has been no expenditure of superfund monies nor have the federal or state governments commenced an action against the City or anyone else. Rather,

94. *Id.* at 1143.
95. *Id.*
96. *Id.*
97. *Id.* (footnote omitted).
98. *Id.*
99. *Id.* The court noted that the "city [did not] take serious exception to defendants' characterization of its potential liability . . . ." *Id.* n.10. In addition, the court noted that at least one commentator has argued persuasively that the imposition of CERCLA liability may be unwarranted where an entity falls within the technical definition of a PRP but has little or no connection with the creation of the hazardous condition.

> *Superfund's strict liability standards should be confined to those parties who engaged in substantial and purposeful hazardous waste disposal activity for commercial profit after the enactment of this statute.* Automatic application of strict liability to parties whose conduct was substantially unrelated to the present danger posed by the hazardous waste release or who did not obtain commercial benefit from their conduct, does not appear to be compelled by the environmental concerns which gave rise to Superfund.

Id. (quoting Dore, *supra* note 2, at 276) (emphasis added).

100. *Id.* at 1143.

> a party which has incurred response costs seeks to recover them from responsible parties, an action expressly authorized by CERCLA. This action is not barred because of some theoretical inconsistencies with statutory provisions which have not been made operative in this case.[101]

In a more recent case, *Velsicol Chemical Corp. v. Reilly Tar & Chemical Corp.*,[102] the defendant insisted that the term "any other person" must refer to persons other than PRPs. However, the court concluded, after a fair reading of section 107, that the term "means any other person other than the United States or a State."[103] "The defendant attempt[ed] to distinguish *Stepan* [*Chemical*] on the ground that Velsicol knowingly and voluntarily, and for commercial advantage, took control of a coal tar tank on the hazardous waste site."[104]

> Besides the fact that this allegation is disputed by Velsicol, plaintiff is correct in insisting that the dispositive consideration in *Stepan* was that the plaintiff City "did not operate a hazardous waste disposal facility on the premises and it asserts that it did not voluntarily permit the placement of the hazardous substances on its property." As the plaintiff's pleadings in the instant case cannot possibly be construed to establish that Velsicol operated a hazardous waste disposal facility or that it voluntarily permitted the placement of the coal tar on the property, defendant's arguments must fail.[105]

Thus, the court held that the "non-culpable" PRP stated a cause of action under section 107.

Although "non-culpable" PRP's may have standing, "culpable" PRP's may not. The court in *D'Imperio v. United States*[106] stated in dictum that "[i]n order to seek recovery under [section 107(a)(4)(B)] it is necessary for the plaintiff to prove that he himself is not liable for these costs."[107] In addition, in *Mardan Corp. v. C.G.C. Music, Ltd.*,[108] the court held that the defense of unclean hands was available to a defendant against a "culpable" plaintiff since section 107 actions are equitable in nature.[109] The plaintiff

101. *Id.*

102. 21 Env't Rep. Cas. (BNA) 2118 (E.D. Tenn. 1984).

103. *Id.* at 2123.

104. *Id.*

105. *Id.* (quoting *Stepan Chem.*, 544 F. Supp. at 1143).

106. 575 F. Supp. 248 (D.N.J. 1983).

107. *Id.* at 253.

108. 600 F. Supp. 1049 (D. Ariz. 1984).

109. *Id.* at 1058.

in *Mardan* was itself guilty of releasing hazardous substances into the environment and the court barred the plaintiff's cost recovery action against another "culpable" potentially responsible party because the defendant raised the defense of unclean hands. Thus, "culpable" defendants, those who have themselves contributed to the hazardous waste site, may not be allowed to recover their costs under section 107.

2. *Other Plaintiffs*

Plaintiffs other than PRPs have been involved in section 107 litigation. In *Dedham Water Company v. Cumberland Farms Dairy, Inc.*,[110] the court held that a party using an aquifer to supply water to nearby communities had a private right of action for damages against a defendant whose releases of hazardous materials allegedly leached into the aquifer. In addition, in *Jones v. Inmont Corp.*,[111] landowners adjoining an illegal waste dump site were allowed to sue the generators of the hazardous waste under section 107 for their response costs. "In light of the plain language of the act itself, and the broad judicial interpretation reflected in the *Stepan Chemical* case, the plaintiffs in the instant case have the right to sue under CERCLA's liability provision."[112]

C. *Proper Defendants*

1. Present Owners and Operators

The first of four classes of defendants liable under CERCLA section 107 are owners and operators of vessels or facilities from which there are releases or threatened releases of hazardous substances.[113]

110. 588 F. Supp. 115 (D. Mass. 1983).
111. 584 F. Supp. 1425 (S.D. Ohio 1984).
112. *Id.* at 1428.
113. 42 U.S.C. § 9607(a)(1).

> "[O]wner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore or an offshore facility, any person owning or operating such facility, and (iii) in the case of any abandoned facility, any person who owned, operated or otherwise controlled such activities at such facility immediately prior to such abandonment. Such term 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. § 9601(20)(A).

In *Walls v. Waste Resources*,[114] a group of residents sued the present owners, operators, and users of a local landfill utilized as a hazardous waste dumping ground. The district court dismissed plaintiffs' section 107 claims because CERCLA does not contain a citizen suit provision like RCRA and FWPCA.[115] However, the Sixth Circuit Court of Appeals reversed because the district court's holding was inconsistent with the literal language of section 107(a), and was also at odds with congressional intent in enacting CERCLA.[116] Thus, the suit against present owners and operators was allowed to proceed.[117]

In *New York v. Shore Realty Corp.*,[118] Shore Realty obtained a 3.2 acre site upon which the prior owners illegally operated a hazardous waste storage facility. The site was purchased for development purposes, and Shore never operated the facility. However, the State of New York commenced cleanup and brought suit against Shore under section 107(a)(1) for its response costs.

As a defense, Shore argued that section 107(a)(1) was inapplicable because Shore neither owned the site at the time of disposal nor caused the presence or release of any hazardous waste.[119] Section 107(a)(1) could not include all owners, Shore claimed, because then the word "owned" in section 107(a)(2) would be superfluous because an owner "at the time of disposal" would necessarily be included in section 107(a)(1).[120] In addition, the defendant argued that the scope of section 107(a)(1) should be no greater than that of section 107(a)(2), and both are limited by the phrase "at the time of disposal" in section 107(a)(1).[121]

However, the Court of Appeals for the Second Circuit disagreed and held that section 107(a)(1) "unequivocally imposes strict liability on the current owner of a facility from which there is a release or threat of release [because section 107(a)(1)] applies to all current owners and operators, while section [107(a)(2)] primarily covers prior owners and operators."[122] A huge loophole

114. 761 F.2d 311 (6th Cir. 1985).
115. *Id.* at 317.
116. *Id.*
117. *Id.* at 318. *See also* Dedham Water Co. v. Cumberland Farms Dairy, Inc., 588 F. Supp. 515 (D. Mass. 1983).
118. 759 F.2d 1032 (2d Cir. 1985).
119. *Id.* at 1043.
120. *Id.*
121. *Id.*
122. *Id.* at 1044.

would be created in CERCLA if the court accepted Shore's arguments:

> It is quite clear that if the current owner of a site could avoid liability merely by having purchased the site after chemical dumping had ceased, waste sites certainly would be sold, following the cessation of dumping, to new owners who could avoid the liability otherwise required by CERCLA. Congress had well in mind that persons who dump or store hazardous waste sometimes cannot be located or may be deceased or judgment-proof. [This court] will not interpret section [107(a)] in any way that apparently frustrates the statute's goals, in the absence of a specific congressional intention otherwise.[123]

2. Prior Owners and Operators

The second class of defendants are persons who owned or operated the facility at the time of disposal of hazardous substances.[124]

In *Velsicol Chemical Corp. v. Reilly Tar & Chemical Corp.*,[125] the plaintiff Velsicol bought property from the defendant Reilly Tar upon which was located a tank containing coal tar sludge. Velsicol sought a declaratory judgment stating that Reilly Tar was responsible for Velsicol's cleanup costs. The court noted that the defendant was a prior owner who owned the facility at the time of disposal and, therefore, was liable under section 107(a)(2).[126]

In *Cadillac Fairview/California, Inc. v. Dow Chemical Co.*,[127] it was held that prior owners having no involvement with any hazardous waste disposal may not be held liable. There, plaintiff Cadillac bought property containing hazardous waste from defendant Cabot's successors in interest and sought a declaratory judgment stating that Cabot was liable under CERCLA for Cadillac's cleanup costs. Cabot argued on its motion to dismiss that the scope of liability under CERCLA was not so broad as to include a party who merely owned the site at a previous point in time and who neither deposited nor allowed others to deposit hazardous waste on the site.

123. *Id.* at 1044 (citations omitted).

124. 42 U.S.C. § 9607(a)(3).

125. 21 Env't Rep. Cas. (BNA) 2118 (E.D. Tenn. 1984).

126. *See id.* at 2121.

127. 21 Env't Rep. Cas. (BNA) 1108 (C.D. Cal.), *modified*, 21 Env't Rep. Cas. (BNA) 1584 (C.D. Cal. 1984).

The court noted that the only category of defendant that Cabot might fit was a prior owner at the time of disposal pursuant to section 107(a)(2).[128] However, plaintiff did not allege that Cabot was an owner at the time of disposal, but merely that Cabot owned the site after such disposal and prior in time to plaintiff.[129] Thus, the court held that Cabot, a "non-culpable" intermediate owner, was not liable under section 107.[130]

3. Arrangers of Disposal and Treatment (Generators)

The third class of defendants are persons, usually gener ators, who "arrange for disposal or treatment, or arrange with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such persons, or by any other party or entity, at any facility owned or operated by another party or entity and containing such substances."[131]

In *City of Philadelphia v. Stepan Chemical Co.*,[132] the plaintiff City sought to recover cleanup costs from the defendant generators who arranged with two transporters to dispose of the generators' wastes. The transporters illegally dumped the wastes at a landfill owned by the City. The court did not grant the generator defendants' motion for judgment on the pleadings because the defendants were liable as arrangers under section 107(a)(3).

In a recent case, *Missouri v. Independent Petrochemical Corp.*,[133] a company arranged to have its dioxin-contaminated waste sprayed as a dust suppressant at a horse ranch. The dioxin contaminated soil at the horse ranch was eventually excavated and deposited at a hazardous waste dumping site. The State of Missouri contended that the defendant was liable as an arranger. The defendant argued that it was not liable as an arranger because it did not arrange to have its waste transported to the hazardous waste dumping site from which there was a release, but only to the horse ranch. However, the court held that the dioxin was released into the environment when it was transported to and disposed of at the hazardous waste site and defendant could be

128. *Id.* at 1113.
129. *Id.*
130. *Id.*
131. 42 U.S.C. § 9607(a)(3). *See generally* Comment, *"Arranging for Disposal" Under CERCLA: When is a Generator Liable?*, 15 ENVTL L. REP. (ENVTL. L. INST.) 10,160 (1985).
132. 544 F. Supp. 1135 (E.D. Pa. 1982).
133. 610 F. Supp. 4 (E.D. Mo. 1985).

liable as an arranger.[134] The hazardous waste site was the depository of the first release from the ranch.[135]

4. Transporters

The last category of defendants are persons who accept hazardous substances for transport to disposal or treatment facilties, or sites selected by them, from which there is a subsequent release.[136]

The transporters in *Stepan Chemical* are examples of the fourth category of defendants. The transporters accepted hazardous waste for transport and selected the facility from which there was a subsequent release.[137]

5. Corporate Officers

Even the corporate veil may not provide insulation from liability.[138] For example, in *United States v. Northeastern Pharmaceutical & Chemical Co.*,[139] the United States sought to hold liable a vice-president of NEPACCO who was the immediate supervisor of the facility from which the hazardous waste originated and who had direct knowledge and supervision of the disposal at the hazardous waste site. The United States contended that the vice-president was an arranger under section 107(a)(3).[140]

The defendant argued that he neither owned nor possessed the hazardous waste as required by section 107(a)(3) because he was a corporate officer of NEPACCO, the owner of the waste. However, the court held that a person arranging for the disposal of hazardous waste is not required to actually own or possess the waste.[141] The court relied on the "owned or possessed . . . by any other part or entity" language in section 107(a)(3).[142] Thus, the defendant vice-president could be liable under section 107(a)(3).

134. *Id.* at 5.

135. *Id.*

136. 42 U.S.C. § 9607(a)(4).

137. *Stepan Chem.*, 544 F. Supp. at 1139-41. *See also Jones*, 584 F. Supp. at 1427; *Georgeoff*, 562 F. Supp. at 1301-02.

138. *See, e.g.*, United States v. Mottolo, 605 F. Supp. 898 (D.N.H. 1984).

139. 579 F. Supp. 823 (W.D. Mo. 1984).

140. *Id.* at 847.

141. *Id.* (citing 42 U.S.C. § 9607(a)(3)).

142. *Id.* (quoting 42 U.S.C. § 9607(a)(3)).

In addition, the court held that the vice-president could be classified as an "owner or operator" because the definition of "owner or operator" encompasses a person who owns an interest in the facility and is actively participating in its management.[143] Thus, the vice-president could be liable under section 107(a)(1) as well as section 107(a)(3).[144]

In conclusion, the court found sufficient evidence to impose liability upon the defendant vice-president. "To hold otherwise and allow [the defendant] to be shielded by the corporate veil 'would frustrate congressional purpose by exempting from the operation of the Act a large class of persons who are uniquely qualified to assume the burden imposed by [CERCLA]."[145]

D. *Liability Issues*

1. Strict Liability

CERCLA does not specify when liability may be imposed.[146] However, section 101(32) provides that " 'liable' or 'liability' under this subchapter shall be construed to be the standard of liability which obtains under section 1321 of Title 33."[147] Section 1321 of Title 33 (section 311 of the Clean Water Act (FWPCA)) imposes strict liability upon certain designated parties subject only to specifically enumerated defenses.[148]

Although both the early House and Senate versions of CERCLA contained strict liability language, the sponsors removed this language from the compromise version and inserted a reference

143. *Id.* at 848.

> Such a construction appears to be supported by the intent of Congress. CERCLA promotes the timely cleanup of inactive hazardous waste sites. It was designed to insure, so far as possible, that the parties responsible for the creation of hazardous waste sites be liable for the response costs in cleaning them up. Congress has determined that the persons who bore the fruits of hazardous waste disposal also bear the costs of cleaning it up.

Id. (footnote omitted).

144. *Id.*

145. *Id.* at 849 (quoting Apex Oil Co. v. United States, 530 F.2d 1291, 1293 (8th Cir. 1976)).

146. *Stepan Chem.*, 544 F. Supp. at 1140 n.4.

147. 42 U.S.C. § 9601(32).

148. *See* United States v. LeBeouf Brothers Towing Co., 621 F.2d 787, 789 (5th Cir. 1980), *cert. denied*, 452 U.S. 906 (1981); Steuart Transp. Co. v. Allied Towing Corp., 596 F.2d 609, 613 (4th Cir. 1979); Burgess v. M/V Tamano, 564 F.2d 964, 982 (1st Cir. 1977), *cert. denied*, 435 U.S. 941 (1978). *See also Shore Realty*, 759 F.2d at 1042; *NEPACCO*, 579 F. Supp. at 844; United States v. Tex-Tow, Inc., 589 F.2d 1310 (7th Cir. 1978)).

to liability under section 311 of the Clean Water Act (FWPCA).[149] Although the language was removed, "[t]he legislative history clearly establishes Congress' understanding that it was incorporating a standard of strict liability into CERCLA."[150] Thus, defendants who have argued that Congress intended to reject strict liability by dropping the language from the bill have consistently failed to convince the courts.[151] Nevertheless, it seems that this current view produces harsh results, particularly where only minor contributors are found liable. The result is especially unfair where the liable party is chosen merely because of its deep pocket.

2. Causation

The courts have also consistently refused to read a causation requirement into section 107.[152] In *New York v. Shore Realty Corp.*,[153] Shore argued that section 107 imposed a requirement of causation. However, the court held that section 107 "unequivocally imposes strict liability on the current owner of a facility from which there is a release or threat of release, *without regard to causation*."[154] The court stated that Shore's causation argument was at odds with the structure of the statute: "Interpreting section [107(a)] as including a causation requirement makes superfluous the affirmative defenses provided in section [107(b)], each of which carves out from liability an exception based on causation."[155]

The court also supported its interpretation with the legis lative history by noting that Congress specifically rejected including a

149. *See* S.1480, 96th Cong., 2d Sess. § 4(a), 126 CONG. REC. S30,908; *see also* H.R. 7020, 96th Cong., 2d Sess. § 3071(a)(1)(D), 126 CONG. REC. 26,779.

150. *See* 126 CONG. REC. S14,964 (daily ed. Nov. 24, 1980) (remarks of Sen. Randolph) ("[w]e have kept strict liability in the compromise, specifying the standard of liability under section 311 of the Clean Water Act . . . ."); 126 CONG. REC. H11,787 (daily ed. Dec. 3, 1980) (remarks of Rep. Florio) ("[t]he standard of liability in these amendments is intended to be the same as that provided in section 311 of the [Clean Water Act]; that is, strict liability.")).

151. *See, e.g.*, *Shore Realty*, 759 F.2d at 1044; United States v. S.C. Recycling & Disposal, Inc., 20 Env't Rep. Cas. (BNA) 1753, 1756 (D.S.C. 1984); United States v. Conservation Chem. Co., 589 F. Supp. 59, 62 (W.D. Mo. 1984).

152. *See, e.g.*, *S.C. Recycling*, 20 Env't Rep. Cas. (BNA) 1753, 1756-57 (D.S.C. 1984). *But see Georgeoff*, 562 F. Supp. at 1306 (N.D. Ohio 1983) ("Intervening cause does not act as a defense; rather, it acts as to negate causation, an element of the § 9607 cause of action.").

153. 754 F.2d 1032.

154. *Id.* at 1044 (emphasis added) (footnote omitted).

155. *Id.*

causation requirement in section 107(a).[156] The early House version contained a causation requirement imposing liability only upon "any person who caused or contributed to the release or threatened release."[157] However, the compromise version, to which the House later agreed, contained no causation requirement.[158] Thus, Shore's reliance upon remarks by various representatives of the House describing the causation requirement in terms of the usual common law principles of causation, including proximate cause, was inapposite.[159]

In *United States v. Wade*,[160] several generator defendants argued that the government must prove that a particular defendant's waste is presently at the site and has been the subject of a removal or remedial measure or, in the alternative, that, at a minimum, governmental costs must be linked to waste of the sort created by the generator.[161] The generator defendants' focused on the use of the word "such" in referring to the "hazardous substances" contained at a "facility" in section 107(a)(3).[162] The court noted that section 107(a)(3) could be read to require that a facility contain a particular defendant's waste.[163] However, the section could be read merely to require that hazardous substances like those found in a defendant's waste be present.[164]

The court believed that Congress intended the less stringent requirement.[165] The government's experts admitted that the identity of a generator of a specifiic quantity of waste could not be stated with certainty using existing scientific techniques.[166] A determination could only be made as to whether a site contained the same kind of hazardous substances as found in a generator's

156. *Id.*

157. H.R. 7020, 96th Cong., 2d Sess. § 3071(a), 126 CONG. REC. 26,779, *quoted in Shore Realty*, 759 F.2d at 1044.

158. 759 F.2d at 1044 (citing 126 CONG. REC. 31,981-82).

159. "Indeed, an opponent of the bill, Representative Broyhill, argued that one of the defects of the bill was that the owner of a facility could be held 'strictly liable . . . entirely on the basis of having been found to be an owner . . . . There is no language requiring any causal conviction [*sic*: connection] with a release of a hazardous substance.' " *Id.* at 1634 n.19 (quoting 126 Cong. Rec. 31,969 (1980)).

160. 20 Env't Rep. Cas. (BNA) 1277 (E.D. Pa. 1983).

161. *Id.* at 1280.

162. *Id.* at 1281. See 42 U.S.C. § 9607(a)(3).

163. 20 Env't Rep. Cas. at 1281.

164. *Id.*

165. *Id.*

166. *Id.* at 1282.

waste.[167] If a plaintiff were required to "fingerprint" wastes, it would eviscerate the statute.[168] The court stated that generator's were adequately protected by requiring plaintiff's to prove that a defendant's waste was disposed of at the site and that the substances making the waste hazardous are also present.[169] In addition, defendant's contention would lead to ludicrous results.[170] "For example, assuming wastes could be 'fingerprinted,' once all the hazardous substances in a generator's waste had migrated from the 'facility' the generator could no longer be held liable."[171]

Next, the court discussed the generator defendant's argument that governmental costs must be linked to waste created by them. The court stated that the literal language of the statute did not support defendant's argument.[172] Section 107 imposes liability upon a generator who "(1) disposed of its hazardous substances (2) at a facility which now contains hazardous substances of a sort disposed of by the generator (3) if there is a release of that or some other type of hazardous substances (4) which causes the incurrence of response costs."[173] Thus, the release need only be of a hazardous substance, and not necessarily one contained in the defendant's waste.[174] "The only required nexus between the defendant and the site is that the defendant have dumped his waste there and that the hazardous substances found in the defendant's waste are also found at the site."[175]

In sum, a showing of causation is not required. This view, like the strict liability requirement, seems likely to cause unjust results. Although most courts disagree, it would appear to be more equitable to require some causal connection between response costs and a particular defendant's hazardous waste.

3. Joint and Several Liability

Although joint and several liability was deleted from the compromise bill, the courts have held that joint and several liability

167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.* (footnote omitted).
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*

applies unless a defendant can prove that the harm is divisible and his share of responsibility.[176]

> A reading of the entire legislative history in context reveals that the scope of liability and term joint and several liability were deleted to avoid a mandatory legislative standard applicable in all situations which might produce inequitable results in some cases. *The deletion was not intended as a rejection of joint and several liability.* Rather, the term was omitted in order to have the scope of liability determined under common law principles, where a court performing a case by case evaluation of the complex factual scenarios associated with multiple-generator waste sites will assess the propriety of applying joint and several liability on an in dividual basis.[177]

Courts cite the need for a uniform federal rule in this area: "To insure the development of a uniform rule of law, and to discourage business [sic] dealing in hazardous substances from locating primarily in states with more lenient laws, [CERCLA] encourage[s] the further development of a Federal common law in this area."[178]

The legal basis for joint and several liability arises from section 101(32) of the Act and the imposition of joint and several liability under section 311 of the Clean Water Act (FWPCA).[179] In addition, the courts have also considered the Restatement of Torts in determining whether joint and several liability applies.[180]

Although the application of joint and several liability is not mandatory, in light of two recent opinions, *United States v. Chem-Dyne Corp.*[181] and *United States v. South Carolina Recycling and Disposal, Inc.*,[182] defendants may find it difficult proving divisible harm.

176. *See, e.g.*, United States v. Chem-Dyne Corp., 572 F. Supp. 802, 810 (S.D. Ohio 1983). *See generally* Hall, *The Problem of Unending Liability for Hazardous Waste Management*, 38 BUS. LAW. 593, 603-604 (1983); Note, *CERCLA*, *supra* note 1; Note, *Allocating the Costs of Hazardous Waste Disposal*, 94 HARV. REV. 584, 588-89 (1981).

177. *Chem-Dyne*, 572 F. Supp. at 808 (citations omitted) (emphasis added).

178. 126 CONG. REC. H11,787 (Dec. 3, 1980) (statement of Rep. Florio), *quoted in Chem-Dyne*, 572 F. Supp. at 809.

179. *See* 42 U.S.C. § 9601(32)(1982); United States v. M/V Big Sam, 681 F.2d 432, 438-39 (5th Cir. 1982), *on petition for reh'g and suggestions for reh'g en banc*, 693 F.2d 451 (5th Cir. 1982); United States v. Hollywood Marine, Inc., 519 F. Supp. 688, 692 (S.D. Tex. 1981); United States v. Bear Marine Services, 509 F. Supp. 710, 718-19 (E.D. La. 1980), *vacated leave to appeal*, 696 F.2d 1117 (1st Cir. 1983).

180. *See Chem-Dyne*, 572 F. Supp. at 810; United States v. Wade, 20 Env't Rep. Cas. (BNA) 1277, 1286 (E.D. Pa. 1983); RESTATEMENT (SECOND) OF TORTS §§ 432A, 433B (1965).

181. 572 F. Supp. 802 (S.D. Ohio 1983).

182. 20 Env't Rep. Cas. (BNA) 1753, 1756 (D.S.C. 1984).

In *Chem-Dyne,* the court noted that the "volume of waste of a particular generator is not an accurate predictor of the risk associated with the waste because the toxicity or migratory potential of a particular hazardous substance generally varies independently with the volume of the waste."[183] The court in *South Carolina Recycling* reiterated *Chem-Dyne,* then added: "Such arbitrary or theoretical means of *cost* apportionment do not diminish the indivisibility of the underlying harm, and are matters more appropriately considered in an action for contribution between responsible parties after plaintiff has been made whole."[184]

183. 572 F. Supp. at 811.

184. 20 Env't Rep. Cas. (BNA) at 1759 (footnote omitted) (emphasis in original). In a footnote, the court continued:

> For some recent applications of this principle, see In the Matter of the Complaint of Berkely Curtis Bay Co., 557 F. Supp. 335 [13 ELR 20,698] (S.D.N.Y. 1983) (although it was theoretically possible to apportion responsibility for an oil spill between two defendants 65%-35%, joint and several liability was nonetheless imposed); City of Perth Amboy v. Madison Industries, Inc., Sup. Ct. *cf.* N.J. Appellate Div., A-1127-81T3 and A-1276-81T3 (Consolidated) [13 ELR 20,554] (April 21, 1983) (two waste generators held jointly and severally liable for contaminating a pond even though one of the generator's substances contaminated only the pond water and the other generator's substances contaminated only the pond sediments); State of New York v. Schenectady Chemicals, Inc., Reuselaer Co. Index No. 144654 [13 ELR 20550] (in N.Y. Sup. Ct. Feb. 18, 1983) (joint and several liability could be imposed even though volumetric contributions of defendants were known). As noted in the RESTATEMENT (SECOND) OF TORTS, "[i]n recent years the trend, both of legislation and of decisions in absence of it, has been toward recognition of the right of contribution; and a substantial majority of states now grant contribution." § 886A, Comment (a). *See* Edmonds v. Compagnie General Transatlantique, 443 U.S. 256, 260 n.8 (1979). Such evolving principles of common law were intended by Congress to guide the courts in fleshing out CERCLA's liability provisions. *Chem-Dyne,* . . . . Under the RESTATEMENT, questions of determining "equitable shares of the liability" with respect to an indivisible injury are appropriately resolved in an action for contribution among parties held jointly and severally liable. *Chem-Dyne* . . . .

Id. at 1759 n.8.

One of the earlier House versions of CERCLA contained an amendment proposed by Representative Gore outlining a formula for apportioning damages. *See* 126 CONG. REC. 26,781, 26,783, 26,785 (1980).

> Under the Gore Amendment, a court had the *power* to impose joint and several liability whenever a defendant could not prove his contribution to any injury; however, a court could still apportion damages in this situation according to the following criteria:
>
> (i) the ability of the parties to demonstrate that their contribution to a discharge, release or disposal of a hazardous waste can be distinguished;
>
> (ii) the amount of hazardous waste involved;
>
> (iii) the degree of toxicity of the hazardous waste involved;
>
> (iv) the degree of involvment by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste;

4. Contribution

Although several courts have stated in dicta that contribution is available under section 107,[185] it was not until recently that a court explictly held that a right of contribution exists.[186] In *Wehner v. Syntex Agribusiness, Inc.*,[187] the court held that CERCLA implicitly recognizes a right of contribution. The court based its holding on a reading of section 107(e)(2) which provides:

> Nothing in this title . . . shall bar a cause of action that an owner or operator or any other person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person.[188]

The court also found support for its holding in the legislative history,[189] the reported cases,[190] and the scholarly commentary.[191]

> (v) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and
>
> (vi) the degree of cooperation with Federal, State, or local officials to prevent any harm to the public health or the environment.

United States v. A & F Materials, 578 F. Supp. 1249, 1256 (S.D. Ill. 1984). *See generally* Note, *The Right to Contribution for Response Costs Under CERCLA*, 60 NORTE DAME LAW. 345 (1985).

185. *See, e.g., Shore Realty*, 21 Env't Rep. Cas. at 1432; *S.C. Recycling*, 20 Env't Rep. Cas. at 1759 & n.8; *A & F Materials Co.*, 578 F. Supp. at 1261; *Chem-Dyne*, 572 F. Supp. at 807 n.3; *NEPACCO*, 579 F. Supp. at 845 n.26. *But see* United States v. Westinghouse Elec. Corp., 22 Env't Rep. Cas. (BNA) 1230, 1234 (S.D. Ind. 1983).

186. *See, e.g.*, Colorado v. Asarco, Inc., 616 F. Supp. 822, 828 (D. Colo. 1985); Wehner v. Syntex Agribusiness, Inc., 22 Env't Rep. Cas. (BNA) 1732, 1735 (E.D. Mo. 1985). *See also* United States v. Ward, 22 Env't Rep. Cas. (BNA) 1235, 1238 (E.D.N.C. 1984), *modified*, 23 Env't Rep. Cas. (BNA) 1341 (E.D.N.C. 1985).

187. 22 Env't Rep. Cas. (BNA) 1732, 1735 (E.D. Mo. 1985).

188. 42 U.S.C. § 9607(a)(2), *quoted in Wehner*, 22 Env't Rep. Cas. at 1735.

189. 22 Env't Rep. Cas. at 1735.

> A provision similar to the above-quoted section was included in the House version of what became CERCLA. H.R. 7020, 96th Cong., 2d Sess. Representative Gore in speaking about the House version stated that any defendant who paid all the response costs to a plaintiff "would then have the right to go against the other 'non-apportioned' defendants for contribution . . . ." 126 CONG. REC. [H]26,785 (1980) (statement by Rep. Gore). In addition, the Justice Department has interpreted § 9607(e)(2) as allowing for contribution among joint tortfeasors. 126 CONG. REC. 31,966 (1980).

Id.

190. *Id.* (citing *Chem-Dyne*, 572 F. Supp. at 807 n.3).

191. For a more detailed analysis of the right to contribution, see *Colorado v. Asarco, Inc.*, 616 F. Supp. 822 (D. Colo. 1985).

E. *Relief Available*

1. Cost Recovery

Section 107 provides for the recovery of "any other necesssary costs of response incurred by any other person consistent with the national contingency plan . . . ."[192] All courts have held that actual clean-up costs are recoverable.[193]

2. Declaratory Relief

Declaratory judgment actions generally have failed on ripeness grounds.[194] In *D'Imperio v. United States*,[195] the court dismissed plaintiff's prayer for a declaration of non-liability because plaintiff's action failed to present an actual controversy since EPA had not yet given the suit to the attorney general's office for action under section 107. The letter sent to Dr. D'Imperio indicating that he might be liable for cleanup costs was insufficient to present a sufficiently real and immediate fear of agency action.[196] In addition, under the Administrative Procedure Act, only "final agency action" is subject to judicial review, and the letter was not sufficient to constitute "final agency action."[197] The court added that if plaintiff had already incurred expenses it might not have ruled that the declaratory judgment action was not ripe for review.[198]

192. 42 U.S.C. § 9607(a)(4)(B).

193. *See, e.g., Shore Realty*, 759 F.2d at 1043.

194. *See, e.g., Bulk Distrib.*, 589 F. Supp. at 1446 (not ripe because, *inter alia*, Bulk had not obtained government approval of its clean-up proposal); *Wickland Oil*, 590 F. Supp. at 76 (not ripe because state agency action does not constitute CERCLA enforcement action in absence of cooperative agreement under section 104(d)(1)).

195. 575 F. Supp. 248 (D.N.J. 1983).

196. *Id.* at 251.

> It is clear, as the plaintiffs assert, that a party may seek a declaration of non-liability under the Declaratory Judgment Act. The actual enforcement of a statute or regulation, or the commencement of a suit by a private party is no prerequisite of a suit to establish non-liability. Nevertheless, not everyone who fears that a government agency or private party may seek to compel enforcement of a law or agreement may bring suit under the Declaratory Judgment Act. One's fears must be sufficiently real and immediate, based on the actions or representations of one's potential adversary or based on actions one desires to take which may run afoul of a law or agreement, valid or otherwise.

Id. at 251 (citations omitted).

197. *Id.* at 252.

198. *Id.* at 253. *See* Levin Metals Corp. v. Parr-Richmond Terminal Co., 608 F. Supp. 1272, 1275 (N.D. Cal. 1985) (court dismissed declaratory judgment action because plaintiff failed to allege that it had incurred costs).

In *Pinole Point Properties, Inc. v. Bethlehem Steel Corp.*,[199] the court allowed a declaratory judgment action to proceed where the plaintiff had expended funds for investigation and cleanup, and distinguished *D'Imperio* on the ground that the governmental action was still too hypothetical. The court noted that other courts have not hesitated to grant declaratory relief when either the government or a private party has expended response costs.[200] In *State of Ohio ex rel. Brown v. Georgeoff*,[201] the court granted declaratory relief to the state because the state had already incurred $875,000 in response costs and also held the defendant liable for costs not yet incurred.[202] In addition, in refusing to dismiss a private plaintiff's claim for declaratory relief for future response costs, the court in *Jones v. Inmont*[203] stated:

> To require either the government or a private party to complete cleanup prior to filing suit would defeat the dual purposes of CERCLA to promote rapid response to hazardous situations and to place the financial burden on the responsible parties. Therefore, as the plaintiff's complaint does allege that they have already incurred some portion of the response costs necessary to clean up the site, the controversy is sufficiently real to allow the Court to determine defendant's liability for future costs.[204]

Thus, the *Pinole Point* court denied the defendant's motion to dismiss plaintiff's declaratory judgment action.[205]

3. Injunctive Relief

A private right of action for injunctive relief is unavailable [206] In *Velsicol Chemical Corp. v. Reilly Tar & Chemical Corp.*,[207] the court held that the plaintiff lacked standing to seek injunctive relief because an action to abate the actual or threatened release of hazardous substances from a facility under section 106 may be brought only by the attorney general of the United States. In *New*

199. 596 F. Supp. 283 (N.D. Cal. 1984).
200. *Id.* at 291.
201. 562 F. Supp. 1300 (N.D. Ohio 1983).
202. *Id.* at 1316.
203. 584 F. Supp. 1425 (S.D. Ohio 1984).
204. *Id.* at 1430.
205. *Pinole Point*, 596 F. Supp. at 292.
206. *See, e.g.*, *Cadillac Fairview*, 21 Env't Rep. Cas. at 1116-17; McCastle v. Rollins Envtl. Servs., 514 F. Supp. 936, 940 (N.D. La. 1981).
207. 21 Env't Rep. Cas. at 2118.

York v. Shore Realty Corp.,[208] the court held that injunctive relief was not available under section 107. New York argued that despite the lack of any explicit authority the court had the inherent power to grant injunctive relief under CERCLA.[209] However, the court responded that Congress did not intend to authorize injunctive relief under section 107 because the express injunctive authority granted EPA in section 106 would be redundant if injunctive relief were available under section 107.[210] In addition, if injunctive relief were available under section 107, the standard for granting such relief would conflict with the section 106 standard because relief under section 106 is appropriate only when EPA determines there is an imminent and substantial danger, and section 107 contains no such limitation.[211]

F. *Costs Recoverable*[212]

1. Cleanup Costs

Costs incurred during the actual remedial or removal action are recoverable if consistent with the National Contingency Plan.[213]

2. Investigative Costs

The court in *Wickland Oil Terminals v. Asarco, Inc.*,[214] held that costs incurred in conducting tests to determine the nature and extent of any hazardous substances at the site conducted prior to promulgating a cleanup plan were costs of "development" and

208. 754 F.2d 1032, 1049 (2d Cir. 1985).

209. *Id.*

210. *Id.*

211. *Id.*

212. EPA has listed the following as recoverable costs under CERCLA:

1. Investigations, monitoring, surveys, testing, and other information-gathering necessary or appropriate to identify the existence and extent of the release or threat thereof, the source and nature of the hazardous substances, pollutants or contaminants involved, and the extent of danger to the public health, welfare or the environment.
2. Planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations necessary or appropriate to plan and direct response actions.
3. Planning, legal, fiscal, economic, engineering, architectural and other services necessary to recover the costs of the reponse actions.

Bulk Distrb., 589 F. Supp. at 1452 n.28 (quoting EPA, MEMORANDUM ON COST RECOVERY ACTIONS UNDER CERCLA (Aug. 26, 1983)).

213. 42 U.S.C. § 9607(a)(4)(B) (1982).

214. 590 F. Supp. 72 (N.D. Cal. 1984).

not "response" costs.[215] Once "clean-up" costs were incurred, investigative costs could be recovered.[216]

Similarly, in *Bulk Distribution Centers, Inc. v. Monsanto Co.*,[217] the court held that the case law did not support the view that investigative costs were "response" costs.[218] In *United States v. Price*,[219] the government's section 107(a) action was dismissed because "EPA ha[d] not yet undertaken any clean-up effort and as such ha[d] not incurred any costs pursuant thereto."[220] EPA had conducted only a site review prior to suit, and a solution feasibility study was not yet completed at the time the suit was filed.[221] "The *Price* court explained that those costs incurred 'during the investigatory stage, or in producing the feasibility study,' did not entitle the EPA to relief because 'the government must first begin the cost of clean-up and incur some expenses before it can initiate an action.' "[222]

In addition, in *Environmental Defense Fund v. Lamphier*,[223] the court denied Virginia's claim for response costs because costs had been incurred only for inspecting the waste site and sampling the chemicals.

> Response costs are defined under 42 U.S.C. § 9601(25) as the costs for removal, remedy and remedial action. Under 42 U.S.C. § 9601(23) and (24), removal and remedial actions are defined as "the cleanup or removal of released hazardous substances from the environment," and actions to prevent, minimize or mitigate damage to the public health or welfare. There is no doubt that the state may have such costs in the future, *but they have not incurred them during their investigation.*[224]

215. *Id.* at 77. Part of the reason the court held that investigative costs were not "response" costs was that the court held that an authorized governmental cleanup program must commence before a private party can state a claim for damages under CERCLA and the plaintiff's costs were incurred prior to any governmental action. *See also D'Imperio*, 575 F. Supp. at 253.

216. *See Wickland Oil*, 590 F. Supp. at 77.

217. 589 F. Supp. 1437 (S.D. Fla. 1984).

218. *Id.* at 1451.

219. 577 F. Supp. 1103 (D.N.J. 1983).

220. *Id.* at 1110.

221. *Bulk Distrib.*, 589 F. Supp. at 1451; (citing United States v. Price, 523 F. Supp. 1055, 1059 (D.N.J. 1981); *Price*, 577 F. Supp. at 1110).

222. *Bulk Distrib.*,, 589 F. Supp. at 1451 (quoting *Price*, 577 F. Supp. at 1110).

223. 12 ENV'T L. REP. (ENVT. L. INST.) 20,843 (E.D. Va. 1982), *aff'd*, 714 F.2d 331 (4th Cir. 1983)(emphasis added).

224. *Id.* at 20,844.

However, investigative costs were held to be response costs in *Velsicol Chemical Corp. v. Reilly Tar & Chemical Corp.*[225] Defendant Reilly Tar sought to dismiss plaintiff's claim for damages under CERCLA because defendant contended that investigative costs were not response costs. The court held that since CERCLA defines "response" as "remove, removal, remedy, and remedial action",[226] costs of response "obviously refers to the costs of removal and remedial action. It is difficult to see how costs of identifying and determining how to allay the environmental problem presented by the coal tar tank are not subsumed within the definition of response costs."[227] The court noted that the purpose of CERCLA is "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."[228] The court then added that "[s]hould Velsicol succeed in its attempt to place responsibility for the coal tar tank on defendant, it should be able to recover any costs spent in remedying the problem, including investigative costs."[229]

3. Other Costs

Costs incurred from medical testing and the loss of use of wells for drinking water and farming purposes may be recoverable response costs.[230] Attorney's fees are recoverable in suits brought by the United States to recover costs incurred in section 104 actions[231] and may be recoverable in private suits under section 107.[232] The *NEPACCO* court held that the Government may recover prejudgment interest from the date of demand on a defendant for response costs.[233] However, no court in a private recovery

225. 21 Env't Rep. Cas. (BNA) 2113, 2122 (E.D. Tenn. 1984).

226. 42 U.S.C. § 9601(25).

227. 21 Env't Rep. Cas. at 2121.

228. *Id.* at 2122 (quoting *Stepan Chem.*, 544 F. Supp. at 1142-43). *See also Jones*, 584 F. Supp. at 1429; *Price*, 577 F. Supp. at 1110.

229. 21 Env't Rep. Cas. at 2132.

230. *Jones*, 584 F. Supp. at 1429.

231. *NEPACCO*, 579 F. Supp. at 851 ("The Court finds that CERCLA specifically allows for the recovery of attorney's fees.").

232. *Bulk Distrib.*, 589 F. Supp. at 1452.

233. *NEPACCO*, 579 F. Supp. at 852.

action has dealt with the issue.[234] Lost profits are not recoverable.[235]

In *Mardan Corp. v. C.G.C. Music, Ltd.*,[236] the court held that RCRA compliance costs were response costs under CERCLA. Mardan attempted to operate a hazardous waste lagoon under RCRA interim regulations, but was repeatedly found to be substandard. Eventually, Mardan determined that it was too costly to comply with the regulations and entered into a Consent Agreement and Final Order to close the lagoon pursuant to RCRA post-closure requirements. Mardan brought suit against C.G.C., the prior owner and operator of the lagoon, to recover the RCRA closure costs. Defendant argued that CERCLA only applied to *abandoned* and *inactive* sites, and implicit in its argument was the notion that RCRA and CERCLA are mutually exclusive. However, the court, basing its decision, *inter alia*, on the first clause of section 107 which provides that "[n]otwithstanding any other provision of law [liability may be imposed]",[237] and because RCRA facilities were specifically exempted from the notice requirements of section 103(c) of CERCLA but not the liability provisions of section 107(a), held that CERCLA operates independent of and in addition to RCRA and "it is evident that CERCLA applies both to active and inactive waste disposal sites and . . . Mardan's RCRA compliance costs may . . . be considered 'response costs' under CERCLA."[238]

G. *Prerequisites to Recovery*

1. Presentment of Claim

Several courts have held or implied that presentment of a demand letter sixty days prior to initiating suit is a prerequisite to filing a section 107 action.[239]

> Presentment of a demand letter to other potentially responsible parties is a condition precedent to bringing a cost recovery action under section [107(a)(4)(B)]. This requirement is de-

234. Malter & Muys, *supra* note 79, at 101.

235. Mola Dev. Corp. v. United States, 22 Env't Rep. Cas. (BNA) 1443, 1446 (C.D. Cal. 1985).

236. 600 F. Supp. 1049 (D. Ariz. 1984).

237. 42 U.S.C. § 9607(a).

238. 600 F. Supp. at 1055.

239. *See, e.g.*, *Bulk Distrib.*, 589 F. Supp. at 1448; United States v. Allied Chem. Corp., 587 F. Supp. 1205, 1207 (N.D. Cal. 1984).

rived from a reading of sections [101(4)], [107], and [112] *in pari materia*. Section [112(a)] provides:

> All claims which may be asserted against the Fund . . . shall be presented in the first instance to the . . . person known to the claimant who may be liable under section 107 of this title. *In any case where the claim has not been satisfied within 60 days of presentation . . . , the claimant may elect to commence an action in court against such . . . person or to present the claim to the Fund for payment.*

42 U.S.C. § 9612(a) (1983) (emphasis added). Section [101(4)] defines a "claim" as "a demand in writing for a *sum certain*." *Id.* § 9601(4) (emphasis added). Reading these sections together with section [107(a)(4)(B)], it appears that before a private claimant can commence a cost recovery action against other private parties, it must serve on them a letter demanding a "sum certain" to cover the costs of the clean-up operation.[240]

However, several courts refused to dismiss because the plaintiff substantially or constructively complied with section 112.[241] In *United States v. Allied Chemical Corp.*,[242] the defendant argued that plaintiff's demand letter was deficient because the letter did not demand a sum certain. However, the letter did state that Allied was responsible " 'on a continuing basis' for 'remedial measures.' "[243] Thus, the court stated, "[t]his language logically puts

240. *Bulk Distrib.*, 589 F. Supp. at 1448 (footnote omitted).

> If the procedures outlined by the EPA for cost-recovery actions brought by the government are any indication, the demand letter should include a discussion of the chemical spill site, including its location, the nature of the spill, the clean-up efforts already undertaken, and a clear statement of the past and future costs of the response activity broken down into general categories.

Id. at 1449.

241. *See, e.g., Dedham Water Co.*, 588 F. Supp. at 517; ("constructively complied"); *Stepan Chem.*, 544 F. Supp. at 1143-44. The court in dicta stated it was "inclined to reject defendants' mechanistic interpretation of the claims procedure under section 112(a) . . . ." 544 F. Supp. at 1144. The court pointed out that

> [i]n *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231 (3rd Cir. 1980), *cert. denied*, 449 U.S. 1096, 101 S. Ct. 893, 66 L. Ed. 2d 824 (1981), the Court of Appeals adopted a "pragmatic approach" to the 60 day notice provision contained in section 505(b) of the Clean Water Act, 33 U.S.C. § 1365(b)(1). It determined that interpreting noncompliance to divest the court of jurisdiction would simply result in a dismissal and refiling of premature suits, a result characterized as "excessively formalistic." *Id.* at 243. *See also Pymatuning Water Shed Citizens for a Hygenic Environment v. Eaton*, 644 F.2d 995 (3rd Cir. 1981). Applying this reasoning, even if a timely claim was not made in this case, it is highly unlikely that this fact alone will require dismissal of the City's CERCLA claim. *Id.* at 1144 & n.14.

242. 587 F. Supp. 1205 (W.D. Cal. 1984).

243. *Id.* at 1208.

Allied on notice that the government considers Allied responsible for the costs of these 'remedial measures.' "[244] Because only a portion of the estimated costs had been expended at the time demand was made, it was unreasonable to expect that the government should have been able to claim a definite sum of money from the defendant for the alleged harm.[245] Consequently, given the circumstances of the case and plaintiff's inability to ascertain the exact amount of damage, the court found that plaintiff's letter gave defendant "fair notice" of the claim and was in "substantial compliance" with the procedural requirements of section 112(a).[246]

Constructive compliance has also been found with respect to the sixty day notice requirement. In *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*,[247] notice letters were sent on October 8 and suit was filed on October 21, a period much less than sixty days. Even so, the court held that the plaintiff "constructively complied" with the notice provisions because the plaintiff filed a supplemental complaint alleging notice and the defendant already knew of the liability because letters were sent previously by the EPA.[248]

Several courts have rejected the holdings of the aforementioned cases and held that the procedural requirements of sections 111 and 112 are not applicable to section 107 actions.[249] The court in *Wehner v. Syntex Corp.*[250] based its holding upon the "notwithstanding any other provision or rule of law and subject only to the defenses sent forth in subsection (b)" language contained in section 107(a).[251]

244. *Id.*

245. *Id.*

246. *Id. Contra Bulk Distrib.*, 589 F. Supp. at 1448-50 (dismissing section 107 action because demand letter failed to include a demand for a "sum certain").

247. 588 F. Supp. 515 (D. Mass. 1983).

248. *Id.* at 516-17.

249. *See, e.g., Pinole Point*, 596 F. Supp. at 288; *Homart Dev. Co.*, 22 Env't Rep. Cas. (BNA) at 1367 (N.D. Cal. 1984); *Wehner v. Syntex Agribusiness, Inc.*, 22 Env't Rep. Cas. at 1275. *See also* State of New York v. General Elec. Co., 592 F. Supp. 291, 299-301 (N.D.N.Y. 1984)(sixty day notice requirement is not jurisdictional).

250. 22 Env't Rep. Cas. (BNA) 1375 (E.D. Mo. 1983).

251. *Id.* (quoting 42 U.S.C. § 9607(a)). *See also Homart Dev. Co.*, 22 Env't Rep. Cas. at 1367 ("The fact that section [107] in its opening language contains the provision that 'not withstanding any other provision of law,' that language clearly shows that this is a separate and independent remedy, which is not tied in with §§ [111] and [112], or any of the other provisions of the Act. So it is clearly unrelated to the claims procedure, which has its own independent procedural provisions in section [sic] [111] and [112].").

In *Pinole Point*, the court also stated that the opening clause of section 107 suggested a basis of liability separate and independent from sections 111 and 112.[252] The court continued, however, stating that the defendant's attempt to join section 107 to sections 111 and 112 did not make sense.[253] The requirement in section 112 that persons claiming against the Fund first obtain federal approval of their response costs makes perfect sense in light of the limited availability of federal funds.[254] However, the requirement does not make sense when applied to actions not involving the government.[255] "Moreover, while it is true that section 112(a) permits private parties to choose between suing under section 107 or claiming against the fund, nothing in section 112(a) limits section 107's cause of action to claims that could be asserted against the fund."[256]

However, one commentary suggests that section 107 cannot be *completely* independent.[257] The commentary notes that a defendant may raise the section 112(d) statute of limitations on natural resource damages or raise the defense that a section 107(j) federally permitted release was involved.[258]

2. Incurrance of Governmental Costs

Some courts have held that before a plaintiff can bring a section 107 action the government must incur some response costs.[259] The courts' decisions are based on the "any *other* necessary costs of response incurred by any other person . . ." language in section 107(a)(4)(B).[260]

> Under section [107(a)], the costs for which a responsible party may be liable include governmental response costs and "any *other* necessary costs of response incurred by any other person consistent with the national contingency plan." The phrase "any other necessary costs of response" indicates that the incurrence of some governmental response costs under CERCLA is a prerequisite to the recovery of "other" response costs in-

252. 596 F. Supp. at 288.
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.*
257. *See* Malter & Muys, *supra* note 79, at 162.
258. *Id.*
259. *See, e.g., Bulk Distrib.*, 589 F. Supp. at 1448; *Wickland Oil*, 590 F. Supp. at 77.
260. *See, e.g., Wickland Oil*, 590 F. Supp. at 77 (quoting 42 U.S.C. § 9607(a)(4)(B) (emphasis added)).

> curred by a private party. A contrary interpretation would render the word "other" surplusage.[261]

However, the "any other necessary costs of response" rationale was rejected in *Artesian Water Co. v. New Castle County*.[262] The court stated that "it is much more reasonable to infer that Congress used the word 'other' simply to differentiate between government response costs and private response costs rather than as an oblique but substantial qualification to the broad language of Section 107(a)(4)(3) [sic] authorizing suits by private parties."[263] Thus, the court held that CERCLA does not require the prior incurrence of governmental costs.[264]

3. Governmental Approval of Clean-up Plan

The court in *Bulk* held that "before a private claimant can commence a remedial operation and a cost recovery action, it must win governmental approval of its clean-up plan."[265] The decision was based mainly upon policy considerations:

> If the court permitted Bulk to begin clean-up operations without prior governmental approval, then what assurance would there be that the plan was extensive enough to alleviate the danger given Bulk's limited resources? Moreover, having retrieved the hazardous substances, what assurance would there be that Bulk would dispose of them in such a manner so as to protect the public from future threats posed by the same chemicals?
>
> In this court's view, the only practical way to safeguard the public's interest, while fairly mediating the competing concerns of the parties potentially responsible for cleaning up the release, is for the government to approve the clean-up proposal before it is implemented by the private parties.
>
> The government certainly is in a better position than are private parties to pass judgment on the efficacy of a clean-up proposal. To begin with, state or federal environmental agencies possess scientific and technological sophistication, along with an appreciation of the problems arising from hypertechnical environmental standards. Additionally, the clean-up proposal must comply with laws that the state or federal governments

261. *Bulk Distrib.*, 589 F. Supp. at 1447 (quoting 42 U.S.C. § 9607(a)(4)(B) (emphasis added)).

262. 605 F. Supp. 1348, 1357 n.11 (D. Del. 1985).

263. *Id.*

264. *Id.*

265. 589 F. Supp. at 1444.

enforce, so it follows that their approval of a plan would be desirable to reduce a party's exposure to liability.[266]

In addition, in *Wickland Oil*, the court held that absent government approval, there can be no "response" costs.[267]

4. Governmental Initiation of Clean-Up

Wickland Oil held that "an authorized governmental cleanup program, initiated by the EPA or by state authorities pursuant to a cooperative agreement, must commence before a private party can state a claim for relief."[268]

5. Consistency with NCP[269]

(a) Inclusion on NPL

To recover under section 107, a plaintiff must show that its costs were incurred consistent with the National Contingency Plan. In *Cadillac Fairview*, the court held that a site must be included on the National Priorities List before cleanup activity can be consistent with the NCP: "The fact that the EPA refuses to list the site on the List for further inquiry shows that clean up activity on the site is not consistent with the plan."[270]

However, most courts have rejected this interpretation.[271] In *Bulk*, the court stated that "[t]he result in *Cadillac Fairview* is neither supported by the NCP nor the case law. [Section] 300.67(a)(2) [of the NCP] permits recovery actions for . . . site[s] not listed on the NPL. A site's inclusion on the NPL does not represent a determination of liability; the list is primarily an informational tool."[272]

Subsequently, the *Cadillac Fairview* court "clarified" its earlier decision and held that listing on the NPL was not required.[273] However, a private litigant cannot bring a cause of action for cost

266. *Id.* at 1446.

267. 590 F. Supp. at 77.

268. *Id.*

269. Several cases have held that consistency with the NCP cannot be determined by the pleadings and should be considered on a case-by-case basis. *See Pinole Point Properties*, 596 F. Supp. at 290; *Homart Dev. Co.*, 22 Env't Rep. Cas. at 1367-68; *Jones*, 584 F. Supp. at 1430; *Dedham Water Co.*, 588 F. Supp. at 517-18; *Stepan Chem.*, 544 F. Supp. at 1144.

270. 21 Env't Rep. Cas. at 1115.

271. *See, e.g., Jones*, 584 F. Supp. at 1429-30; *Pinole Point Properties*, 596 F. Supp. at 290-91; *Homart Dev. Co.*, 22 Env't Rep. Cas. at 1367.

272. *Bulk Distrib.* 589 F. Supp. at 1445 n.18.

273. *See* 21 Env't Rep. Cas. at 1586.

recovery unless there has been some type of prior governmental action, including, but not limited to, listing on the NPL.[274]

(b) Prior Governmental Action or Approval

Several courts have held that some sort of prior governmental action, whether it be supervision of a cleanup or preauthorization, must exist before a plaintiff can show consistency with the NCP.[275] In *Mardan Corp. v. C.G.C. Music, Ltd.*,[276] the court held that supervision need not be pursuant to a CERCLA action. Supervision under RCRA was sufficient because the danger that the plaintiff's cleanup efforts would be "haphazard and ineffectual" did not exist.[277]

However, in *Pinole Point*, the court held that preauthorization was not needed to show consistency with the NCP.[278] In *Pinole Point*, the defendants argued that section 107's language requiring that recoverable costs be "consistent with the [n]ational [c]ontingency [p]lan" is the same as the requirement in section 111(a) that costs recoverable from the fund be incurred "as a result of carrying out the [n]ational [c]ontingency [p]lan."[279] However, the court noted that section 111(a)(2) contains an additional requirement for Superfund claims not found in section 107 in "that such costs must be approved under said plan and certified by the responsible federal official."[280] Thus, "[i]f 'consistency with' the NCP *included* governmental approval and/or certification, the second clause of [section 111(a)(2)] would be unnecessary and statutes should be read to avoid surplusage."[281] Thus, "[c]onsistency with the NCP and government pre-authorization are . . . distinct requirements, only the first of which must be satisfied for recovery under section 107(a)(4)(B)."[282]

The court also supported its decision by quoting the Preamble to the NCP:

274. *Id.*

275. *See, e.g.*, *Wickland Oil*, 590 F. Supp. at 77-78; *Bulk Distrib.*, 589 F. Supp. at 1450-51; *Cadillac Fairview*, 21 Env't Rep. Cas. at 1587.

276. 600 F. Supp. 1049 (D. Ariz. 1984).

277. *Id.* at 1054.

278. 598 F. Supp. at 288.

279. *Id.* (quoting 42 U.S.C. §§ 9607(a)(4)(B) & 9611(a)(2)).

280. *Id.* (quoting 42 U.S.C. § 9611(a)(2)).

281. *Id* at 289-90 (emphasis in original).

282. *Id.* at 290.

> [Section 300.25(d)] has been rewritten to require that persons who intend to undertake response actions and seek reimbursement from the Fund, must obtain pre-authorization in order for the response action to be considered consistent with the Plan for purposes of section [111(a)(2)] of CERCLA . . . . *Section 300.25(d) does not apply to private parties who undertake response actions, but do not intend to seek reimbursement from the Fund.*[283]

The italicized language makes it clear that federal preauthorization of supervision is not required to show consistency with the NCP for purposes of section 107.[284]

However, in *Artesian Water Co. v. New Castle County*,[285] the court held that remedial actions must be governmentally approved while removal actions do not. The court considered the individual sections of the NCP and concluded that the removal sections do not require preauthorization.[286]

The court specifically considered section 300.68 of the NCP, the section dealing with remedial actions, which provides that

> [t]he lead [federal or state] agency shall evaluate the adequacy of clean-up proposals submitted by responsible parties or determine the level of clean-up to be sought through enforcement efforts, by consideration of the factors discussed in paragraphs (e) through (j) of this section. The lead agency will not, however, apply the cost balancing considerations discussed in paragraph (k) of this section to determine the appropriate extent of responsible party clean-up.[287]

Then, it concluded that preauthorization by the lead agency was required for remedial actions taken by a private party.[288]

283. *Id.* (quoting 44 Fed. Reg. 31,180, 31,196 (July 16, 1982) (emphasis added)).

284. *Id.* The court also stated that appearance on the NPL was not required to show consistency. *Id.*

285. 605 F. Supp. 1348 (D. Del. 1985).

286. *Id.* at 1358.

287. 40 C.F.R. § 300.68(c) (1984), *quoted in Artesian Water Co.*, 605 F. Supp. at 1349.

288. 605 F. Supp. at 1349. The court also considered public policy reasons and stated that it believed

> that the public is generally benefited and the environment better protected by a system in which the government bears the ultimate responsibility for balancing competing interests to arrive at environmentally sound and cost-effective remedial actions. Furthermore, in contrast to removal actions, remedial actions are long term and permanent in nature allowing greater time for study and analysis. Under such circumstances, requiring governmental authorization of private remedial actions is unlikely to have the same negative impact on public health and the environment as such a requirement would in the context of removal actions.

Id. at 1361.

The EPA has clarified the matter in its revisions to the NCP.[289] Under the revisions, a private party need not obtain preauthorization to show consistency with the NCP.[290] To show consistency with the NCP for removal actions, a plaintiff need only show that it acted in circumstances warranting removal and implemented the removal action consistent with section 300.65 of the revised NCP.[291] For remedial actions, the plaintiff must provide for an appropriate analysis of remedial alternatives, select the cost-effective response, and consider the factors discussed in paragraphs (c) through (i) of section 300.68.[292] Thus, preauthorization or supervision is no longer needed to prove consistency with the NCP.[293]

In sum, it seems that requiring the government to incur costs prior to bringing a private suit fails to advance any purpose of the Act. In addition, requiring governmental approval of a clean-up plan prior to suit is consistent with the Act, as the absence of such approval would allow a plaintiff to conduct inadequate clean-up and then saddle the defendant with the costs. However, under the new regulations, plaintiffs do not need to obtain approval. It remains to be seen how the new regulations will affect clean-ups and cost recovery actions.

H. *Defenses*

1. Statutory, Contractual, and Equitable

Section 107(b) lists the defenses applicable to cost recovery actions.[294] The defenses include acts of God or war, acts or omissions of third parties, or a combination of the enumerated defenses.[295] The EPA often argues that the section 107(b) de-

289. *See* 50 Fed. Reg. 47,912, 47,977 (1985).

290. *Id.* (to be codified at 40 C.F.R. § 300.71(a)(2)).

291. *Id.* (to be codified at 40 C.F.R. § 300.71(a)(2)(i)).

292. *Id.* (to be codified at 40 C.F.R. § 300.71(a)(2)(ii)).

293. To insure a proper response, the revised NCP provides that "[p]ersons performing response actions which are neither Fund-financed nor pursuant to enforcement action under section 106 of CERCLA shall comply with all otherwise legally applicable Federal, State and local requirements, including permit requirements as appropriate." *Id.* (to be codified at 40 C.F.R. § 300.71(a)(4)).

294. 42 U.S.C. § 9607(b).

295. *Id.* More specifically, section 107(b) provides:

> There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

fenses are exclusive, and many courts agree.[296] However, although section 107(a) suggests that the subsection (b) defenses are exclusive,[297] the Act itself indicates that other defenses are available.[298] For example, the defenses of federally permitted release[299] and the statute of limitations[300] are available. In addition, the recent case of *Mardan Corp. v. C.G.C. Music, Ltd.*[301] suggests that other defenses, such as contractual and equitable defenses, are also available.

In *Mardan*, the plaintiff Mardan sought to recover its cleanup costs under section 107. Prior to bringing suit, Mardan had entered into several contractual agreements with the defendants. Based on these agreements, the defendants raised several contractual defenses. The plaintiff argued that the contractual defenses were unavailable since such defenses are not enumerated in section 107(b).[302]

The court rejected Mardan's argument because it could not withstand close analysis:

> As defendants have suggested, Mardan's interpretation would result in defendants being held liable even if they had already paid Mardan's Section 107(a) claim in a prior law suit since res judicata, payment, and accord and satisfaction are not listed as defenses in subsection (b). Similarly under Mardan's interpre-

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

Id.

296. Malter & Muys, *Private Cost Recovery Actions Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980*, NEW DIRECTIONS IN SUPERFUND AND RCRA (ALI-ABA COURSE OF STUDY MATERIALS) 157, 168 (1985).

297. 42 U.S.C. § 9607(a) ("notwithstanding any other provision or rule of law, *and subject only to the defenses set forth in subsection (b) of this section* . . . .") (emphasis added).

298. Malter & Muys, *supra* note 296, at 169 (citing 42 U.S.C. §§ 9607(j) & 9612(d)).

299. *See* 42 U.S.C. § 9607(j).

300. *See id.* § 9712(d).

301. 600 F. Supp. 1049 (D. Ariz. 1984).

302. *Id.* at 1056.

> tation of the statute, defendants would not be able to raise such defenses as statute of limitations, waiver, laches, etc. For the forgoing reasons, *the defenses in subsection (b) cannot be considered as exclusive*.[303]

The defendants also raised the defense of unclean hands. The defendants based their argument on the *Stepan Chemical* case where the court held that one PRP could sue another PRP if the first was merely a passive party who did not participate in the creation of the hazardous waste site.[304] The defendants argued that *Stepan Chemical* restricted private causes of action to those in which the plaintiff himself was not responsible in some way for creating the hazardous condition.[305] The court held that since section 107 actions are equitable actions in the nature of restitution, the defense of unclean hands is applicable in a section 107 action, and barred Mardan's cause of action.[306]

2. Retroactive Application[307]

Several defendants have argued that CERCLA is unconstitutionally retroactive.[308] A retroactive application is one which "creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past . . . ."[309] However, "a statute is not retroactive merely because it draws upon antecedent facts for its operation."[310]

Two issues arise with respect to the retroactive defense: (1) whether the responsible parties are liable for acts committed prior to enactment of CERCLA; and (2) whether the responsible parties are liable for response costs incurred prior to enactment.[311]

303. *Id.* at 1056 n.9 (emphasis added).

304. *Id.* at 1057.

305. *Id.*

306. *Id.*

307. *See generally* Blaymore, *Retroactive Application of Superfund: Can Old Dogs Be Taught New Tricks?*, 12 B.C. ENVTL. AFF. L. REV. 1 (1985).

308. *See, e.g.*, United States v. Shell Oil Co., 605 F. Supp. 1064, 1072 (D. Colo. 1985).

309. *Georgeoff*, 562 F. Supp. at 1303 (quoting Society for Propagating the Bible v. Wheeler, 22 F. Cas. 756 (C.C.D.N.H. 1984) (No. 13,156).

310. *Id.* (quoting Neild v. Dist. of Columbia, 110 F.2d 246, 255 (D.C. Cir. 1940)).

311. *Shell Oil*, 605 F. Supp. at 1072. A third issue is whether costs incurred prior to the publication of the NCP are recoverable. Several courts have rejected defendants' arguments and held that costs incurred prior to publication of the NCP are recoverable. *See, e.g.*, United States v. Wade, 20 Env't Rep. Cas. (BNA) 1849 (E.D. Pa. 1984).

Generally, the courts have not had difficulty in imposing liability on responsible parties for acts committed prior to enactment.[312] In *State of Ohio ex rel. Brown v. Georgeoff*,[313] the state brought suit against several transporters of hazardous wastes to recover cleanup costs incurred at a dump where the transporters deposited hazardous substances. The defendant transporters argued that CERCLA should not be construed to impose liability for acts occurring prior to enactment.[314] The court, basing its holding upon the legislative history, held that CERCLA authorizes suits which impose liability retroactively.[315] In addition, in *United States v. South Carolina Recycling and Disposal, Inc.*,[316] the defendants argued that retroactive application of section 107 violated their due process rights. The court noted that although a statute may upset settled expectations, it is not necessarily unconstitutional.[317] "This is true even though the effect of the legislation is to impose a new duty or liability based on past acts."[318] Thus, the court rejected defendant's argument. However, in a recent opinion, *Nunn v. Chemical Waste Management, Inc.*,[319] the court held, without discussion, that CERCLA was not retrospective and did not apply to acts occuring prior to enactment.

Although most courts agree that CERCLA imposes liability for prior acts, the courts have split on the issue of whether preenactment response costs are recoverable.[320] For example, the court in *United States v. Wade*[321] denied recovery because, *inter alia*, the legislative history privides no clear indication that Congress even considered preenactment response costs.[322] In addition, the court was troubled by the combined effect of the statute of limita-

312. *See, e.g., Shell Oil*, 605 F. Supp. 1064 (D. Colo. 1985); *S.C. Recycling*, 20 Env't Rep. Cas. (BNA) 1753 (D.S.C. 1984); *NEPACCO*, 579 F. Supp. 1984 (W.D. Mo. 1984); *A & F Materials*, 578 F. Supp. 1249 (S.D. Ill. 1984); *Georgeoff*, 562 F. Supp. 1300 (N.D. Ohio 1983); United States v. Outboard Marine Corp., 556 F. Supp. 54 (N.D. Ill. 1982); *Reilly Tar*, 546 F. Supp. 1100 (D. Minn. 1982); *Wade*, 546 F. Supp. 785 (E.D. Pa. 1982)). *See also* Caldwell v. Gurley Refining Co., 22 Env't Rep. Cas. (BNA) 1588 (8th Cir. 1985).

313. 562 F. Supp. 1300 (N.D. Ohio 1983).

314. *Id.* at 1302.

315. *Id.* at 1313-14.

316. 20 Env't Rep. Cas. (BNA) 1753 (D.S.C. 1984).

317. *Id.* at 1761.

318. *Id.* (quoting Usery v. Turner Elkhorn, 428 U.S. 1, 16 (1976)).

319. 22 Env't Rep. Cas. (BNA) 1763, 1766 (D. Kan. 1985).

320. *See, e.g., Shell Oil*, 605 F. Supp. at 1076 (allowing recovery); *Wade*, 20 Env't Rep. Cas. at 1851 (denying recovery).

321. 20 Env't Rep. Cas. (BNA) 1849 (E.D. Pa. 1984).

322. *Id.* at 1850.

tions and a holding that preenactment costs are recoverable.[323] "It is one thing to entertain a lawsuit in which the acts giving rise to liablity occurred well in the past but in which response to those is ongoing. It is quite another to permit actions in which all relevant acts took place in the indeterminate past."[324]

However, in *United States v. Shell Oil Co.*,[325] the court held that preenactment response costs are recoverable. The court discussed the two issues raised by retroactivity and stated that resolution of the first was more difficult because if defendants knew at the time of disposal that one day they would be held liable some might have acted quite differently.[326] However, the court agreed with the other cases holding that imposing CERCLA liability for preenactment acts did not offend due process.[327] The court then turned to the second issue and stated that it did not raise the same due process issues.[328] The court continued:

> In what way could Shell have acted to reduce its liability in 1975 when the Army commenced cleanup at the [waste site] if it had known that CERCLA would be enacted in 1980? Once it is accepted that Shell may be liable for its pre-CERCLA acts, it is irrelevant, from a due process perspective, whether the government commenced cleanup before or after the Act became law on December 11, 1980. There are no serious due process concerns in holding responsible parties liable for pre-CERCLA response costs.[329]

3. Statute of Limitations

In *United States v. Mottolo*,[330] the defendant raised the statute of limitations contained in section 112(d) as a defense against the State of New Hampshire's section 107 action.[331] The court considered three alternative interpretations of the statute: (1) the de-

323. *Id.*
324. *Id.*
325. 605 F. Supp. 1064 (D. Colo. 1985).
326. *Id.* at 1072.
327. *Id.*
328. *Id.* at 1073.
329. *Id.*
330. 605 F. Supp. 898 (D.N.H. 1985).
331. Section 112(d) provides:

No claim may be presented, nor may an action be commenced for damages under this subchapter, unless that claim is presented or action commenced within three years from the date of the discovery of the loss or December 11, 1980, which ever is later: *Provided, however*, that the time limitations contained herein shall not begin to run against a minor until he reaches 18 years of age or a legal representative is duly

fendants argued that section 112(d) applied to any type of claim or judicial action under CERCLA; (2) New Hampshire argued that the section applied to claims against the Fund and judicial actions for damages to natural resources, but not to cost recovery actions; and (3) the United States, as *amicus curiae*, argued that the statute applied to Fund claims and judicial actions for damages to natural resources, but not to Fund claims and judicial actions for cost recovery.[332] The court adopted New Hampshire's interpretation.[333]

The court based its holding, *inter alia*, on the use of the terms "claim," "action," "costs," and "damages" as used throughout CERCLA.[334] First, the terms "claim" and "action" are not used interchangeably in CERCLA.[335] "Claim" is "a demand in writing for a sum certain" and consistently refers to demands against the Fund for compensation.[336] "Action" is not defined in CERCLA; however, it consistently refers to judicial actions, whether suits brought by the United States to reimburse the Fund, suits by governmental or private parties to recover costs under section 107, or suits brought to recover damages to natural resources.[337] Second, the terms "costs" and "damages" are also mutually exclusive.[338] "Damages" means injury or loss of natural resources and is used consistently in the context of natural resources or reference to the exclusive standing of federal or state governments to recover for natural resource damages.[339] "Costs" is not defined; however, it is used consistently to refer to costs of removal, response, or remedial action incurred in connection with releases of hazardous substances.[340] Thus, the statute of limitations contained in section 112(d) applies to claims made against the Fund and actions for damages to natural resources, but not to actions for the recovery of costs brought under section 107.

appointed for him, nor against an incompetent person unless his incompetency ends or a legal representative is duly appointed for him.

42 U.S.C. § 9612(d).

332. 605 F. Supp. at 901.

333. *Id.* at 902.

334. *Id.* at 903. The court also considered grammar, punctuation, and the legislative history. *Id.* at 903.

335. *Id.* at 904.

336. 42 U.S.C. § 9601(4).

337. *Mottolo,* 605 F. Supp. at 904.

338. *Id.*

339. *See* 42 U.S.C. §§ 9601(6), 9607(a)(4)(C) & 9607(f).

340. *See* 42 U.S.C. § 9607(a)(4)(A)-(C).

After holding that section 112(d) did not apply to judicial actions for the recovery of response costs, the court attempted to find an applicable statute of limitation.[341] Since CERCLA contains no other statute of limitations, the general rule would be to seek an analogous federal or state statute of limitation.[342] However, where the claim is equitable in nature, as are claims brought pursuant to section 107, the doctrine of laches should apply.[343] But, if suit is brought by the Federal or State government in its sovereign capacity, "even the doctrine of laches may not be applied to bar the suit."[344] Thus, New Hampshire's section 107 action was not barred by any statute of limitations nor the doctrine of laches.[345] The court concluded that Congress intended to allow federal and state governments to undertake cost recovery actions at any time.[346]

4. Eleventh Amendment and Sovereign Immunity

In *United States v. Union Gas Co.*,[347] the defendant Union Gas filed a third-party complaint against the Commonwealth of Pennsylvania. As a defense, Pennsylvania argued that the Eleventh Amendment to the U.S. Constitution barred the suit.[348] The court noted that Congress may abrogate states' sovereign immunity by explicit statutory mandate,[349] and Union Gas argued that Congress abrogated the states' immunity when it enacted CERCLA.

Union Gas argued that since the definition of "person" in CERCLA includes "state," a state is liable to a private person under section 107.[350] However, the court applied the principle embodied in the "clear statement rule"—that a state cannot be sued

341. 605 F. Supp. at 909.

342. *Id.*

343. *Id.*

344. *Id.*

345. *Id.* The court added that its analysis and conclusion would be applicable even if CERCLA provided a legal, rather than an equitable, cause of action. *Id.* at 909.

346. *Id.* at 909-10.

347. 575 F. Supp. 949 (E.D. Penn. 1983).

348. *Id.* at 950. The Eleventh Amendment provides:

> The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI.

349. 575 F. Supp. at 950.

350. *Id.* at 953.

under federal law unless Congress provides a clear statement that it intended to abrogate the states' immunity with respect to that law[351]—and rejected defendant's argument. The court noted that a similar argument had been rejected by the Supreme Court in *Employees v. Missouri Public Health Department*[352] where the Court refused to imply abrogation merely because the definition of "employeer" in the statute included state-run institutions.

The court in *United States v. Mottolo*[353] held that the Eleventh Amendment barred a suit against the State of New Hampshire by a Delaware corporation. The court considered only the literal language of the amendment; it did not consider the definition of "person" included in CERCLA.[354]

However, in *Artesian Water Co. v. New Castle County*,[355] the defendant county argued that the Delaware Tort Claims Act provided it with immunity from section 107 liability. The court noted that the definition of "person" includes "political subdivision[s] of a State," and held that without question the County fell within the definition of "person" and, consequently, within CERCLA's liability provisions.[356] The court distinguished *Union Gas* on the ground that the Eleventh Amendment does not apply to counties.[357]

In a later opinion in *United States v. Mottolo*,[358] the court discussed the differences between Eleventh Amendment immunity and sovereign immunity. "[T]he Eleventh Amendment represents a restraint upon the federal judicial power to hear suits against an unconsenting State, whereas the doctrine of sovereign immunity goes to the question of whether the sovereign may be sued at all."[359] Here, the State of New Hampshire initiated the litigation in federal court and the private plaintiff counterclaimed.[360] Thus, the court held that Eleventh Amendment immunity and sovereign immunity are waived "with respect to any counterclaim asserted by a defendant which arises out of the same

351. *Id.* at 950.
352. 411 U.S. 279 (1973), *cited in Union Gas*, 575 F. Supp. at 953.
353. 22 Env't Rep. Cas. (BNA) 1026 (D.N.H. 1984).
354. *Id.* at 1031.
355. 605 F. Supp. at 1348 (D. Del. 1985).
356. *Id.* at 1354. *See* 42 U.S.C. § 9601(21).
357. 605 F. Supp. at 1351.
358. 605 F. Supp. 898 (D.N.H. 1985).
359. *Id.* at 910.
360. *Id.*

event underlying the State's claim and which is asserted defensively in recoupment for the purpose of diminishing the State's recovery" by filing suit as a plaintiff.[361]

The author of a recent article argued that Congress abrogated the state's sovereign immunity when it included states within the class of parties liable under CERCLA.[362] The author argued that the court in *Union Gas* erred in deciding the sovereign immunity issue because of an overbroad reading of the *Employees* decision.[363] "In [*Employees*], the Supreme Court declined to interpret the FLSA liability provision as covering the states because the relevant definition had originally *excluded* the states and, when the definition was amended, no change was made in the liability provision."[364] In addition, the author argued that the legislative history of CERCLA demonstrates that Congress intended to allow private parties to sue the states under section 107.[365] Thus, future courts could interpret the sovereign immunity issue differently.

It seems clear that Congress intended to allow states to be found liable, since the term is included in the definition of "person." To find otherwise would appear to discourage certain cleanup actions and clearly frustrate the Act's purposes.

IV. CONCLUSION

Section 107 of CERCLA provides plaintiffs a means to recover costs expended in responding to hazardous waste releases. However, many ambiguities in the Act remain unresolved because of disagreement among the courts.

One such unresolved issue is the extent to which a potentially responsible party can recover its response costs from another potentially responsible party. Although the courts have ruled that "non-culpable" potentially responsible parties have standing to recover their costs, and several courts have indicated that "culpable" potentially responsible parties do not, the intent of the Act would be furthered if all potentially responsible parties were allowed to recover. If a potentially responsible party is a minor

361. *Id.*

362. Thomas, *Superfund and the Eleventh Amendment: Are the States Immune from § 107 Suits?*, 14 ENVTL. L. REP. (ENVTL. L. INST.) 10,156, 10,158 (1984).

363. *Id.*

364. *Id.*

365. *Id.* at 10,160.

contributor of hazardous waste at a site, it is unfair to prevent that party from recovering its costs, especially if the party is willing to undertake a cleanup operation. In addition, potentially responsible parties will be more likely to conduct a cleanup operation if allowed to recover their costs. Should a plaintiff be liable for some of the cleanup costs, apportionment is available through counterclaims and contribution actions brought by the other responsible parties.

Other issues that need to be reconsidered by the courts are strict liability, causation, and joint and several liability. Strict liability causes harsh results when minor contributors of hazardous waste, or contributors of only mildly toxic waste, are liable for all the costs of a cleanup operation, especially if the party is sued instead of others merely because of its deep pocket.

In addition, proving causation in fact should be required before a plaintiff can recover its costs. A mere showing that there has been a release of any hazardous substance at a site should not be enough to recover. Thus, a causal connection between the response costs and a particular defendant's waste should be required.

Although the application of joint and several liability is not mandatory, the courts have applied the concept to all defendants, even when apportionment may have been possible. Joint and several liability also produces a harsh result, particularly when a minor contributor, who happens to have a deep pocket, becomes liable for all the costs of a cleanup. Contribution actions do not ease the harsh result because of the legal costs involved. Apportionment criteria have been proposed in the past and should be reconsidered by the courts. Joint and several liability is not mandated by the Act and should not be utilized merely because of its ease of application. Bankrupting one defendant to avoid apportioning liability does not further the purposes of the Act.

Courts must also agree on prerequisites to bringing a private cost recovery action. At this time, the courts are split on the issue of whether the government must incur costs prior to suit or whether the plaintiff must obtain approval of its cleanup plan prior to bringing suit. Requiring the government to incur costs prior to bringing a private suit does not advance the purposes of the Act. However, requiring governmental approval of a cleanup plan prior to suit does advance the purposes of the Act by offering greater protection to the environment. Without approval, a

plaintiff could plan and conduct a shoddy cleanup and then attempt to saddle a defendant with the costs. If the plaintiff conducts an inadequate cleanup, more problems may be created than existed originally. However, if the plan is approved by experienced and knowledgeable parties, inadequate cleanup is less likely to occur.

Defenses are also an issue that must be considered by the courts. Section 107(a) appears to state that the defenses in subsection (b) are exclusive. However, the courts should not consider this as absolute. Since CERCLA presents an equitable type of action, equitable defenses should be available to defendants as the *Mardan* court concluded. In addition, defendants should be able to raise contractual defenses.

Finally, Eleventh Amendment immunity and sovereign immunity need to be reconsidered by the courts. Although there are decisions to the contrary, it seems clear that Congress intended that states be liable when it put the word "state" in the definition of "person" in the Act. Allowing states to assert immunity frustrates the purposes of the Act. Plaintiffs will be unwilling to conduct cleanup operations if the only responsible defendant is a state and the state can assert its immunity and thereby avoid responsibility.

Although the private cost recovery action has several problems and is still in a stage of development, the action provides an effective means to protect the environment from abandoned and inactive hazardous waste sites. If parties are willing to conduct cleanup operations, the private cost recovery action should allow them to recover their costs from the responsible parties. As more abandoned and inactive waste sites are discovered, and cleanup operations initiated, litigation involving private cost recovery actions will expand, and the private cost recovery action will develop into a defined body of law and provide continuing protection from abandoned and inactive wastes sites.