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COERCION VS. COOPERATION: SUGGESTIONS FOR THE BETTER EFFECTUATION OF CERCLA (SUPERFUND)

Eve L. Pouliot

I. INTRODUCTION

PASSED by Congress in 1980, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), better known as Superfund, imposes strict liability on potentially responsible parties (PRPs) for the improper disposal of hazardous substances.¹ Congress enacted CERCLA to address the serious problem that hazardous waste sites pose to human health and the environment. By imposing strict liability on PRPs, Congress attempted to ensure that the parties responsible for creating hazardous waste sites pay for their cleanup.² While viewed as a federal cleanup law, CERCLA actually places responsibility on the PRPs. Because CERCLA gives the Environmental Protection Agency an authoritarian grant of power, however, it reduces the incentive for PRPs to voluntarily participate in a hazardous waste site's cleanup and frustrates its very purpose.

Section 107(a) of CERCLA³ imposes joint and several,⁴ as well as strict,⁵

1. 42 U.S.C. §§ 9601-9675 (codified as amended at Supp. I (1989)).

2. David E. Jones & Kyle E. McSlarrow, . . . *But Were Afraid to Ask: Superfund Case Law, 1981-1989*, 19 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 10,430, 10,442 (Oct. 1989).

In response to widespread concern over the improper disposal of hazardous wastes, Congress enacted CERCLA, a complex piece of legislation designed to force polluters to pay for costs associated with remedying their pollution. *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability Act of 1980*, Senate Committee of Environment and Public Works ("A Legislative History"), S. Doc. No. 14, 97th Cong., 2d Sess. 320 (1983) (stating that one of the statute's principal goals is "assuring that those who caused chemical harm bear the costs of that harm. . .").

United States v. Alcan Aluminum Corp., 964 F.2d 252, 257-58 (3d Cir. 1992).

3. 42 U.S.C. § 9607(a) (Supp. I 1989).

4. Even though its role in creating the hazardous waste site may be small, a PRP may be held jointly and severally liable where the harm is indivisible. The PRP can then seek contribution from other PRPs. *United States v. R.W. Meyer, Inc.*, 932 F.2d 568, 570 n.2 (6th Cir. 1991).

5. The Second Circuit stated:

Congress intended that responsible parties be held strictly liable, even though an explicit provision for strict liability was not included in the compromise. Section 9601(32) provides that "liability" under CERCLA "shall be construed to be

liability on a broad spectrum of so-called PRPs.⁶ The section defines four classes of PRPs: (1) the current owners and operators of the site or facility;⁷ (2) persons who owned and/or operated the facility at the time of the disposal or spill;⁸ (3) persons, typically the "generators" of the hazardous substance, who arranged for its disposal or treatment at the facility;⁹ and (4) persons who transported the hazardous substance and who arranged for its disposal at the facility.¹⁰ The trend of recent decisions shows that the courts are expanding the possible classes of PRPs so that almost any party who comes in contact with the site is liable.¹¹

Section 107(a) also imposes liability for cleanup costs on PRPs.¹² It authorizes the government and others to seek reimbursement of cleanup costs from PRPs.¹³ Liabilities include the cost of investigation, removal or remedial action, and natural resource and assessment damages.¹⁴ The section further provides that PRPs will be responsible for all other "necessary costs" of response incurred by any person who comports with the goals of CERCLA.¹⁵ While the statute fails to expressly define "necessary cost," courts have liberally construed its meaning.¹⁶ Given the vagueness surrounding the

the standard of liability" under section 311 of the Clean Water Act . . . which courts have held to be strict liability.

New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985).

6. Cheryl Laurenz, Note, *Landowner Liability and Toxic Waste: Application of CERCLA in United States v. Monsanto*, 34 S.D. L. REV. 392 (1989).

7. See *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986) (discussing generally owner/operator liability), *cert. denied*, 484 U.S. 848 (1987).

8. See *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86 (3d Cir. 1988) (holding liable the previous owner who had owned the subject land at the time of the disposal), *cert. denied*, 488 U.S. 1029 (1989).

9. See *United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989). See generally Laurenz, *supra* note 6 (discussing the implications of *Monsanto* in detail).

10. See *Jersey City Redevelopment Auth. v. PPG Indus.*, 18 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,364 (D.N.J. Sept. 3, 1987) (holding that defendant was not liable as a transporter since he did not choose the facility where the hazardous substance was to be disposed).

11. Recent decisions indicate courts are expanding liability under CERCLA to extend to parent and successor corporations, lenders, states, and suppliers. See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) (holding that CERCLA permits cost recovery actions to be filed against states and that Congress has the authority to authorize such suits pursuant to the Commerce Clause); *United States v. Distler*, 20 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,942 (W.D. Ky. Feb. 9, 1990) (holding successor corporation liable under the substantial continuity test for the predecessor corporation's CERCLA liability); *United States v. Kayser-Roth Corp.*, 724 F. Supp. 15 (D.R.I. 1989) (holding parent corporation liable since it had the power to control the subsidiaries' environmental policies at the time the hazardous wastes were generated); *In re Peerless Plating Co.*, 17 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,826 (W.D. Mich. Mar. 12, 1987) (holding that costs incurred by the EPA in a response action are recoverable against the bankrupt estate); *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573 (D. Md. 1986) (holding bank, which had acquired a site that constituted a "facility" under § 107(a) through foreclosure, liable for response action costs); *Idaho v. Bunker Hill Co.*, 635 F. Supp. 665 (D. Idaho 1986) (holding that a parent corporation of a wholly owned subsidiary is a "owner or operator" under § 107(a), if the parent corporation owned the subsidiary at the time of the disposal(s)).

12. 42 U.S.C. § 9607(a) (Supp. I 1989).

13. *Id.*

14. *Id.* § 9607(a)(4)(A)-(D).

15. *Id.*

16. See *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664 (5th Cir. 1989) (holding that the

term "necessary cost" and the courts' willingness to liberally define it, PRPs are potentially liable for almost any cost connected to site cleanups. The courts' current trend toward expanding liability under section 107(a) makes cost recovery actions a potent instrument for effectuating cleanups.¹⁷

As the reach of CERCLA liability expands, it is important to recognize how the current application of the law affects the behavior of its target class — PRPs. After an analysis of the provisions of CERCLA, PRPs who join forces with the United States Environmental Protection Agency (EPA) in undertaking a response action are at a greater disadvantage than those who wait to be sued for reimbursement in a cost recovery action. Thus, the current structure of the law dissuades PRPs from voluntarily becoming involved at the inception of a cleanup action.

This Comment examines how the present construction of CERCLA discourages PRPs from voluntarily undertaking responsibility for their part in creating the hazardous waste sites. Section II provides a brief overview of the provisions of CERCLA that are relevant in understanding why the current structure discourages voluntary PRP participation. Section III examines the provisions of CERCLA and how they interact to frustrate its very purpose. Finally, Section IV explores possible alternatives that could improve the structure of the statute so that PRPs would be motivated to voluntarily undertake cleanup actions.

II. OVERVIEW OF CERCLA AND ITS PROVISIONS

A. SITE SELECTION

Once a site is identified as a potential danger, the EPA¹⁸ can pursue one of two alternatives. It can respond directly, as authorized by section 104 of CERCLA,¹⁹ or it can compel PRPs to respond, as authorized by section 106

security and site investigation costs were recoverable); *Tanglewood E. Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568 (5th Cir. 1988) (holding that relocation costs are recoverable); *Cadillac Fairview/Cal. v. Dow Chem. Co.*, 840 F.2d 691 (9th Cir. 1988) (holding that security costs were recoverable); *T & E Indus. v. Safety Light Corp.*, 680 F. Supp. 696 (D.N.J. 1988) (holding that the billable time of corporate official involved in cleanup efforts could be recoverable if facts were proved); *United States v. Northernair Plating Co.*, 685 F. Supp. 1410 (W.D. Mich. 1988), *aff'd sub nom. United States v. R.W. Meyer, Inc.*, 889 F.2d 1497 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057 (1990) (holding that the government could recover its indirect costs and administrative expenses); *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823 (W.D. Mo. 1984) (holding that the EPA & the Justice Department could recover labor costs).

17. "The courts have breathed fiery life into the liability and cost recovery provisions of § 107 by giving them a 'broad and liberal construction.'" *Jones & McSlarrow, supra* note 2, at 10,442.

18. Congress authorized the President to administer CERCLA. The President has, however, delegated the bulk of that authority, at least for non-federal sites, to the Environmental Protection Agency's Administrator. Exec. Order No. 12,580, 52 Fed. Reg. 2923 (1987); see also 42 U.S.C. § 9615 (Supp. I 1989) (designating the EPA as the delegatee of the President's authority).

19. 42 U.S.C. § 9604(a) (Supp. I 1989). Where the President determines "imminent and substantial endangerment to public health or welfare or the environment" exists because of an "actual or threatened release" of a hazardous substance, "the President is authorized to act . . .

of CERCLA.²⁰ The configurations of site cleanup are called response actions. CERCLA requires these actions, to the greatest extent possible, to be in accordance with the provisions of the National Oil and Hazardous Substances Pollution Contingency Plan.²¹ The Plan, commonly referred to as the National Contingency Plan (NCP), is a comprehensive regulatory scheme developed by the EPA to serve as a blueprint for government cleanups.²²

Subpart E of the NCP, entitled "Hazardous Substance Response," outlines the process of CERCLA actions.²³ It establishes a method for ranking waste sites and sets forth procedures for the subsequent response actions. Specifically, it identifies methods for inventorying sites, suggests techniques for cleanup, and coordinates intergovernmental cleanup activities.²⁴ As required by section 105(a) of CERCLA, all response actions must be consistent with the NCP and, therefore, the requirements set out in Subpart E of the NCP.²⁵

There are two types of response actions: immediate short-term removal actions²⁶ and permanent remedial actions.²⁷ After the site is identified, the EPA conducts a preliminary assessment to determine whether the site's condition warrants a removal or remedial action. If an immediate action is not necessary to abate an imminent danger, then the EPA conducts a prelimi-

to remove or arrange for the removal of, and provide for remedial action . . . or take any other response measure consistent with the [NCP] which the President deems necessary." *Id.*

20. 42 U.S.C. § 9606(a) (Supp. I 1989). Where the President determines the existence of "imminent and substantial endangerment to public health or welfare or the environment" because of an "actual or threatened release" of a hazardous substance, the President can either order (unilateral administrative order) a PRP(s) to undertake the response action or "require the Attorney General of the United States to secure such relief" from the PRP(s) in the appropriate federal district court. *Id.*

21. 42 U.S.C. § 9605(a) (Supp. I 1989).

22. Lawrence E. Starfield, *The 1990 National Contingency Plan — More Detail and More Structure, But Still a Balancing Act*, 20 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 10,222, 10,226 (June 1990).

23. 40 C.F.R. § 300.400-440 (1991).

24. Fredrick R. Anderson, *Negotiation and Informal Agency Action: The Case of Superfund*, 1985 *DUKE L.J.* 261, 271.

25. 42 U.S.C. § 9605(a) (Supp. I 1989).

26. Removal action is defined as:

the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release or 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.

42 U.S.C. § 9601(23) (Supp. I 1989).

27. 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 threatened release of 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 of welfare or the environment.

Id. § 9601(24).

nary investigation, called a Remedial Site Evaluation,²⁸ in order to determine whether the site is ripe for a remedial action.²⁹ The EPA uses the data collected in this investigation to score the site under the Hazard Ranking System (HRS).³⁰ If the site scores over the threshold level (28.5), it is placed on the National Priorities List (NPL).³¹ The EPA can undertake remedial action only at sites that have been placed on the NPL.³²

Once a site has been placed on the NPL, the EPA may choose to spend Superfund³³ resources to remedy the problem; however, a site's placement on the NPL does not necessarily imply that Superfund monies will be spent to clean it up.³⁴ After the EPA selects a site for remedial action,³⁵ it assigns the site either to the Superfund program, where fund monies will be expended to undertake the cleanup action or to the enforcement personnel in the site's region.³⁶ Enforcement personnel will attempt to compel the site users or other identifiable PRPs "to act by means of an administrative order and, if necessary, litigation conducted by the Department of Justice."³⁷ The EPA primarily bases its choice of assignment upon the determination of whether there are PRPs who will carry out the remedial action "properly and promptly."³⁸

B. SITE INVESTIGATION

The next step in the CERCLA process, after the EPA places a site on the NPL, is to conduct the remedial investigation and feasibility study (RI/FS).

28. 40 C.F.R. § 300.410(h) (1991) (stating that if a removal assessment indicates that remedial action may be required, then EPA should initiate a remedial site evaluation).

29. *Id.* § 300.425.

30. *Id.* § 300 app. A.

31. *Id.* § 300 app. B.

32. *Id.* § 300.425(b)(1).

33. Superfund is a trust fund which is derived from general federal revenues and an excise tax on specified chemicals. 42 U.S.C. § 9631 (Supp. I 1989). It acts as a reserve of capital that is used to finance cleanup costs where a PRP cannot be identified or, in the government's estimation, cannot "properly and promptly" carry out a designated cleanup action. 42 U.S.C. § 9611 (Supp. I 1989).

34. 40 C.F.R. § 300.425(b)(2) (1991).

35. *See* 40 C.F.R. § 300.68(a) (1984) (stating that all sites included on the NPL become scheduled for remedial actions).

36. Anderson, *supra* note 24, at 288; *see also supra* notes 19-20 and accompanying text (referring to CERCLA provisions that authorize each of these alternatives).

37. Anderson, *supra* note 24, at 288. How enforcement personnel go about securing compliance from PRPs varies from region to region. *See infra* text accompanying notes 149, 154. The EPA can issue a 'unilateral administrative order' (UAO) that orders the PRPs to implement the EPA's chosen remedy. 42 U.S.C. § 9606(a) (Supp. I 1989). If the PRPs refuses to comply with the order, the Department of Justice can seek compliance using the federal courts. Furthermore, if the PRPs fail to comply with the order and fail to have sufficient cause for its non-compliance, penalties of \$25,000 per day can be levied on the offender. *Id.* § 9606(b).

38. 42 U.S.C. § 9604(a) (Supp. I 1989).

When the President determines that such action will be done *properly and promptly* by the owner or operator of the facility or vessel or by any other responsible party, the President may allow such person to carry out the action, conduct the remedial investigation, or conduct the feasibility study in accordance with section 122.

Id. (emphasis added).

This is perhaps the most important aspect of the cleanup process.³⁹ The remedial investigation (RI) characterizes the conditions at the site by determining the extent and movement of the contamination.⁴⁰ Using the information collected in the RI, the feasibility study (FS) produces a set of alternative cleanup approaches that could be implemented at the site.⁴¹ The EPA screens the alternatives, chooses and evaluates the best, and then selects a remedy.⁴² After the EPA designates the chosen cleanup action, either the EPA or PRPs undertake the action. Under either option, the party undertaking the response action can seek reimbursement or contribution from identifiable PRPs in a section 107(a) cost recovery action.⁴³

C. SEEKING REIMBURSEMENT — COST RECOVERY ACTIONS

1. *Elements of a Recovery Action*

CERCLA section 107 authorizes "recovery actions" whereby the government or any other person can seek reimbursement of costs expended during removal or remedial actions.⁴⁴ The elements necessary to establish a prima facie case under section 107 are the following:

- 1) the site fits within the "facility" category;⁴⁵
- 2) there was a release or threatened release of a hazardous substance at

39. "The RI/FS have become the centerpiece of the remedial program." Anderson, *supra* note 24, at 290.

40. *Id.*; see also Starfield, *supra* note 22, at 10,228.

41. Starfield, *supra* note 22, at 10,228.

42. *Id.* EPA narrows the list of alternatives to the best ones (usually between three and nine alternatives). Then they evaluate the remaining alternatives using the "Nine Criteria:" 1) overall protection of human health and the environment; 2) compliance with other applicable environmental regulations; 3) long term effectiveness; 4) reduction of toxicity, mobility, or volume; 5) short term effectiveness; 6) implementability; 7) cost; 8) state acceptance; and 9) community acceptance. *Id.* Section 117 of CERCLA requires the EPA to publish a proposed remedial action plan (RAP) and to provide the community in which the site is located with the opportunity to comment on the proposed action. Criteria eight and nine are evaluated based on the response received by the EPA during this comment period. Once the EPA conducts its evaluation of the proposed actions, it selects the best alternative and issues a record of decision (ROD) which sets forth the chosen alternative. 42 U.S.C. § 9617 (Supp. I 1989).

43. 42 U.S.C. § 9607(a) (Supp. I 1989). Section 113(f) of CERCLA authorizes PRPs to seek contribution from other parties who are "liable or potentially liable under § 107(a) . . . during or following any civil action taken under section 106 . . . or under section 107(a)." 42 U.S.C. § 9613(f) (Supp. I 1989). Thus, a PRP who has undertaken a response action or been held liable for the cost of one, may seek contribution in a cost recovery action, as authorized by section 107(a), pursuant to section 113(f).

44. See *supra* notes 12-17 and accompanying text (discussing the scope of cost recovery actions under section 107(a)).

45. 42 U.S.C. § 9601(9) (Supp. I 1989) defines "facility" as follows:

The term "facility" means (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.; see *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 842-43 (4th Cir. 1992) (limiting the term "facility" to extend only to the area where the hazardous substances are found/stored, not the entire site of the property).

the facility;⁴⁶

3) the release or threatened release caused the plaintiff to incur response costs;⁴⁷

4) the defendant falls within one of the four classes of "covered persons" defined in § 9607(a);⁴⁸

5) costs are consistent with the NCP.⁴⁹

Courts have broadly interpreted each of these elements.⁵⁰ Moreover, the defenses available in cost recovery actions are quite limited.⁵¹ Thus, cost

46. 40 C.F.R. § 302 (1991) (listing substances classified as hazardous).

47. Jones and McSlarrow state:

[P]rivate parties must add to their pleadings an allegation that their costs of response were "necessary." Compare CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A) (1989) . . . (stating that the government plaintiffs may recover "all costs of removal or remedial action") with CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B) . . . (stating that all other parties may recover only "necessary costs of response").

Jones & McSlarrow, *supra* note 2, at 10,443. Courts have, however, defined "necessary cost" broadly. See *supra* note 16 and accompanying text (discussing the broad range of costs that courts have held recoverable as necessary costs of response actions).

48. See *supra* notes 7-10 and accompanying text (discussing the four classes of "covered persons").

49. Two different standards apply to the analysis of this element - consistency with the NCP. The standards differ according to who the plaintiff in the cost recovery action is. Jones & McSlarrow, *supra* note 2, at 10,443. The government enjoys a rebuttable presumption that the costs incurred are not inconsistent with the NCP. *Id.* Defendants are liable for "all costs of removal and remedial action incurred by the United States Government or a State or an Indian Tribe not inconsistent with the [NCP]." 42 U.S.C. § 9607(a)(4)(a) (Supp. I 1989) (emphasis added). In contrast, private parties, such as PRP(s) seeking contribution from other PRP(s), have an affirmative burden to prove that their costs are consistent with the NCP. *Id.* Defendants are liable for "any other necessary costs of response incurred by any other person consistent with the [NCP]." *Id.* § 9607(a)(4)(B) (emphasis added). Thus, under the current statute, the government has a substantially easier task in proving this element of its case. See *infra* note 132 and accompanying text (discussing how some courts have required "substantial compliance" as opposed to "strict compliance"); see Jones & McSlarrow, *supra* note 2, at 10,442.

50. See generally Jones & McSlarrow, *supra* note 2, at 10,442-46 (providing an analysis of recent case law, which shows how courts are liberally interpreting these elements).

51. 42 U.S.C. § 9607(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 —

(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.

42 U.S.C. § 9607(b) (Supp. I 1989).

recovery actions strongly favor the plaintiff. This is typical of strict liability cases however.

2. Possibility of Punitive Damages

In addition to its expansive liability features, section 107 of CERCLA provides for the imposition of punitive damages.⁵² As recognized in *Solid State Circuits, Inc. v. EPA*,⁵³ Congress intended to allow the EPA, in its discretion, to bring a claim for up to three times the amount of actual costs incurred by the Superfund against any PRPs who without sufficient cause failed to comply with an EPA order.⁵⁴ The court noted that Congress included this provision to ensure that PRPs would perform the clean-up activities without delay so that the EPA would not find it necessary to perform the response action itself, thereby aiding the statute's primary goal of having those who created the problem pay for it.⁵⁵ The statute, however, does not provide for the imposition of punitive damages when private parties or PRPs seek to hold other PRPs liable.

3. Counterclaims

While counterclaims are normally permitted when the cause of action accrues out of the same transaction or occurrence,⁵⁶ it is not always clear whether the courts will allow such counterclaims to be brought against the government. In government-initiated CERCLA cases, counterclaims are allowed.⁵⁷ Once "the government institutes a cost recovery action, it thereby waives sovereign immunity as to compulsory counterclaims seeking to diminish or defeat the government's recovery that arises out of the same transaction or occurrence that underlies the government's action."⁵⁸ Courts usually allow counterclaims based on the doctrine of recoupment.⁵⁹ Coun-

52. 42 U.S.C. § 9607(c)(3) provides:

If any person who is liable for a release or threat of release of a hazardous substance fails without sufficient cause to properly provide removal or remedial action upon order of the President pursuant to section 9604 or 9606 of this title, such person may be liable to the United States for punitive damages in an amount at least equal to, and not more than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action. The President is authorized to commence a civil action against any such person to recover the punitive damages, which shall be in addition to any costs recovered from such person pursuant to section 112(c) of this title [. . .].

42 U.S.C. § 9607(c)(3) (Supp. I 1989).

53. 812 F.2d 383 (8th Cir. 1987).

54. *Id.* at 388.

55. *Id.*

56. FED. R. CIV. P. 13.

57. Jones & McSarrow, *supra* note 2, at 10,441.

58. *Id.*

59. United States v. Moore, 703 F. Supp. 455, 458-59 (E.D. Va. 1988). The court held that once the government had initiated a CERCLA suit, it had consented "to the assertion of counterclaims under the doctrine of recoupment." *Id.* The doctrine of recoupment holds that a counterclaim is allowable if it asserts "a claim arising out of the same transaction or occurrence which is the subject matter of the government's suit and seeks relief only to the extent of diminishing or defeating the government's recovery." Frederick v. United States, 386 F.2d 481, 488 (5th Cir. 1967); see also United States v. Nicolet, Inc., 17 Env'tl. L. Rep. (Env'tl. L.

terclaims provide defending PRPs with a mechanism to challenge the government's expenditures in cost recovery actions.⁶⁰

III. WHY CERCLA ACTIONS DISCOURAGE VOLUNTARY PARTICIPATION BY PRPS

A. THE POWER TRIP

1. *Historical Backdrop*

Shortly after Congress passed CERCLA,⁶¹ one critic responded quickly that an important obstacle to expedient response action would be "the unwillingness of private parties to sit idly by while the government incurs a huge cleanup bill on their behalf."⁶² Shortly thereafter, however, the EPA was criticized for the slow pace at which cleanups progressed, its failure to provide adequate remedies for hazardous waste sites, and its alleged "sweet-heart" deals with PRPs that reduced cleanup costs at the expense of effectiveness.⁶³ As a result of obvious flaws in CERCLA,⁶⁴ Congress passed the Superfund Amendments and Re-authorization Act (SARA) in 1986.⁶⁵

The amendments made to CERCLA under SARA sought to:

- (i) better define cleanup standards;
- (ii) enlarge the available resources for investigations and cleanups; and
- (iii) clarify and emphasize the EPA's authority under CERCLA.⁶⁶

As a result of the amendments, CERCLA now explicitly provides that no PRP shall incur any benefit, direct or indirect, for its involvement with the response action.⁶⁷ This historical insight helps explain the EPA's current

Inst.) 21,274 (E.D. Pa. Mar. 19, 1987) (allowing counterclaims based on recoupment but denying tortious injury claims).

60. See *United States v. Mottolo*, 605 F. Supp. 898 (D.N.H. 1985) (allowing counterclaim challenging extra costs incurred by government because of inadequate supervision on its behalf). *But cf.* *United States v. Azrael*, 765 F. Supp. 1239 (D. Md. 1991) (holding that counterclaims against the government must fail where they relate to actions taken by the EPA and its contractors during the removal actions at the site of hazardous waste cleanup, since waivers of sovereign immunity at §§ 9601(20)(D) and 9620(a)(1) do not apply to government regulatory actions pursuant to CERCLA's cleanup provisions, which are actions that are expressly exempt under §§ 9607(d)(1) and (2)). The express exemptions under §§ 9607(d)(1) and (2) have certain exceptions, however, that allow liability to attach where the federal government has acted negligently and/or the state and local governments have acted with gross negligence. 42 U.S.C. § 9607(d)(1)-(2) (Supp. I 1989).

61. Congress hastily passed CERCLA. The original Act contained a number of technical errors and ambiguities due to Congress's limited understanding of hazardous wastes and the problems they posed to the environment. Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation & Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 34 (1982).

62. Randy M. Mott, *Defenses Under Superfund*, NAT. RESOURCES L. NEWSL., May 1981, at 1.

63. See *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1417 (6th Cir. 1991); see also Anderson, *supra* note 24, at 279-80. Anderson accredits part of CERCLA's early failures with the administration of the EPA during that time period. *Id.*

64. *Akzo*, 949 F.2d at 1417.

65. Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified as amended at 42 U.S.C. §§ 9601-9675 (Supp. I 1989)).

66. *Akzo*, 949 F.2d at 1147.

67. CERCLA § 104(a) now provides:

negotiation posture with PRPs. The EPA has developed as its primary objective in negotiations, to maintain ultimate, if not complete, control over any action undertaken.⁶⁸ Thus, given the SARA amendments and the EPA's tight control over the entire process, any envisioned bargains for PRPs who voluntarily become active in the response action appear to be illusory.

2. Examples

A recent example of the EPA's need for control came in August 1990 when the Assistant Administrator of the Office of Solid Waste and Emergency Response (OSWER), Don R. Clay, issued a new policy directive. The directive stated that the EPA's future policy regarding remedial investigations/feasibility studies (RI/FS) was that only the EPA could conduct them.⁶⁹ Since a RI/FS is the proverbial "tail that wags the dog" with respect to constructing a cleanup plan, the EPA's attempt to control this step indicates its intention to retain ultimate control over the entire response action.

Beyond controlling the construction of a response action, the EPA also seeks one hundred percent of cost recovery for any action it undertakes from identified PRPs.⁷⁰ Since liability is joint and several, there is really no need for the EPA to waste time and resources attempting to identify other PRPs — unless the current PRP is financially unable to fund or perform the entire cleanup. Therefore, one could ascertain that the EPA's main objective is to find at least one PRP who can pay for the designated response action.⁷¹

In *United States v. Cannons*⁷² the EPA's conduct exhibited its authoritarian approach to negotiation with regard to cost recovery. The *Cannons* case is indicative of the extent to which the EPA will go to ensure that it receives one hundred percent reimbursement of its costs. In this case, the

In no event shall a potentially responsible party be subject to a lesser standard of liability, receive preferential treatment, or in any other way, whether direct or indirect, benefit from any such arrangements as a response action contractor, or as a person hired or retained by such a response action contractor, with respect to the release or facility in question.

42 U.S.C. § 9604(a) (Supp. I 1989).

68. "EPA Policy calls for strict control of agenda of site cleanup, with [PRPs] assured of only a brief opportunity to meet with agency personnel to discuss private implementation of the remedy." Anderson, *supra* note 24, at 298.

69. Performance of Risk Assessments in Remedial Investigation/Feasibility Studies (RI/FSs) Conducted by Potentially Responsible Parties (PRPs), OSWER Directive No. 9835.15, Aug. 1990. See *supra* notes 39-41 and accompanying text (discussing RI/FSs and their relative importance to the entire cleanup process).

70. The goal in negotiations is 100% of cleanup cost. Hazardous Waste Enforcement Policy, 50 Fed. Reg. 5034, 5036-37 (1985). But cf. *infra* notes 149-53 and accompanying text (discussing Global Consent Decrees' goal for recovery).

71. "One observer noted that CERCLA [the joint and several liability provision] simply 'make[s] it easier for government and victims to find somebody with money who can be sued.'" Keith W. Holman, Note, *Wickland Oil Terminals v. Asarco, Inc. and the 1986 Superfund Amendments: The Tide Turns on CERCLA's Private Right to Recover Hazardous Waste Response Costs*, 17 ENVTL. L. 307, 313 n.31 (1987) (citing Tom Alexander, *The Hazardous-Waste Nightmare*, FORTUNE, Apr. 21, 1980, at 54.).

72. 720 F. Supp. 1027 (D. Mass. 1989), *aff'd*, 899 F.2d 79 (1st Cir. 1990).

EPA initiated a suit against the non-settling defendants to recover the unpaid balance of the response costs it incurred at four related sites. The EPA also sought a declaratory injunction holding the non-settling defendants liable for any future costs as well. Some of the non-settling defendants in this case were considered *de minimis* defendants.⁷³ Regardless of their percentage of responsibility, the EPA sought to hold the *de minimis* defendants jointly and severally liable for the remaining balance along with the remaining non-settling primary generators.

The EPA's initial *de minimis* administrative settlement offer required each *de minimis* PRP to cover one hundred and sixty percent of their share of the cleanup costs plus administrative costs.⁷⁴ The EPA intended the sixty percent "premium" to cover any unexpected costs that might arise from unknown conditions that may be discovered in the future.⁷⁵ The premium would allow the settling PRPs a form of limited liability.⁷⁶ The EPA sent a cover letter along with the offer to the *de minimis* PRPs that stressed their interest in settling the case.⁷⁷

For those *de minimis* PRPs who rejected the initial settlement offer, the EPA issued another administrative *de minimis* settlement offer that required each PRP to pay two hundred and sixty percent of its share of the costs.⁷⁸ The EPA imposed an additional one hundred percent "surcharge" to encourage early settlement through setting precedent for future cases.⁷⁹ Those who did not accept this second settlement offer found themselves named as defendants in the eventual lawsuit, facing even greater liability. Thus, the negotiation history between the EPA and the *de minimis* defendants clearly exhibits EPA's unwillingness to negotiate and further demonstrates its propensity to dictate conditions and control the response process. The EPA's negotiations policy could more appropriately be referred to as a policy of coercion.

3. Significance

Under CERCLA, the EPA has two alternatives for site cleanup: Section 104⁸⁰ allows the EPA to undertake the response action, clean up the site itself, and then seek reimbursement from identifiable PRPs using section 107;⁸¹ or the EPA can compel either by administrative or judicial order the identifiable PRPs to undertake response action as allowed under section

73. *De minimis* is a term used to define a PRP who is volumetrically responsible for less than one percent of the total problem at a hazardous waste site. *Id.* at 1033. Since CERCLA provides for joint and several liability, courts can theoretically hold *de minimis* PRPs liable for one hundred percent of the total response cost.

74. *Id.* at 1033.

75. *Id.*

76. 42 U.S.C. § 9622(c)(1) (Supp. I 1989). This section allows PRPs who settle with the government to receive certain protections from future liability.

77. *Cannons*, 720 F. Supp. at 1033. The court classified this cover letter as a warning to PRPs that the EPA expected them to agree to the settlement.

78. *Id.* at 1034.

79. *Id.*

80. See *supra* note 19 (listing important provision of § 104).

81. See *infra* note 189 (discussing the provisions of § 104(b) and § 107(a)(4)(A)).

106.⁸² Few incentives exist for PRPs to voluntarily come forward and agree to work with the EPA. As indicated by the EPA's desire to control the RI/FS, there is little hope that PRPs who voluntarily involve themselves in a response action will be able to have a hand in shaping the selected response.⁸³ Furthermore, the statute itself states that PRPs should not derive any benefit from their participation in a response action.⁸⁴

Although Congress enacted CERCLA to encourage responsible parties to take responsibility for their part in the problem,⁸⁵ in reality, the statute, under its current implementation, discourages such voluntary participation and cooperation. In an attempt to strengthen the CERCLA statute, Congress enacted SARA, one of the goals of which was to empower the EPA. After reviewing the EPA's use of the newly granted power, one should question whether the EPA has become too powerful. Instead of promoting participation through cooperation, the EPA employs a policy of dictation and coercion in the response process, which is hardly conducive to encouraging voluntary participation.

B. PARTICIPATION IN RESPONSE ACTIONS

1. *Neither the Courts Nor Congress Require the EPA to Solicit Participation from PRPs*

PRPs are not given much voice in the response action other than to undertake the action and pay for it. Courts have held that the EPA's failure to consult the PRPs or allow them to participate in a response action is not a defense in a cost recovery action.⁸⁶ Courts have consistently rejected the argument that the EPA must give PRPs the opportunity to clean up a site at their own expense before the EPA takes any response action.

In *United States v. Mottolo*⁸⁷ the court, citing *United States v. Medley*,⁸⁸ held that CERCLA does not compel but, rather, encourages PRPs' participation in a cleanup.⁸⁹ After careful analysis of CERCLA's language in section 104, the court, in *United States v. Dickerson*,⁹⁰ concluded that the EPA did not have to give the PRPs an opportunity to begin the response measures before undertaking a cleanup action itself since public policy concerning the public welfare requires the courts to give broad and liberal interpretation to

82. See *supra* note 20 (listing the pertinent provisions of § 106).

83. See *supra* notes 63-65 and accompanying text (discussing the negative impressions of pre-SARA enforcement of CERCLA, where it was alleged that the EPA gave PRPs "sweet-heart" deals that compromised efficiency for the sake of lowering response costs, and the relevant SARA amendments); see also *infra* notes 105-07, 204 (discussing the limited opportunity for PRPs to challenge the EPA without exposing itself to potential liability for punitive damages).

84. See *supra* note 67 and accompanying text.

85. See generally *supra* note 2 and accompanying text.

86. See *United States v. Hardage*, 750 F. Supp. 1460 (W.D. Okla. 1990); *United States v. Mottolo*, 695 F. Supp. 615 (D.N.H. 1988) (both holding that government had no affirmative duty to consult with PRPs prior to undertaking a CERCLA response action).

87. 695 F. Supp. 615 (D.N.H. 1988).

88. ERC 1858 (D.S.C. 1986).

89. *Mottolo*, 695 F. Supp. at 628.

90. 640 F. Supp. 448 (D. Md. 1986).

the provisions of the statute.⁹¹ If the court had held that the defendant PRPs should be given an opportunity to respond first, it would have created a potential "out" for defendants in future lawsuits in which the government acted hastily. Thus, public policy considerations required the court to overrule this contention.⁹²

Furthermore, section 117 of CERCLA⁹³ provides that the EPA is not required to solicit or permit the participation of PRPs, other than under the general notice and comment provisions.⁹⁴ In addition, when Congress passed SARA, section 122 of CERCLA was amended to provide that the government could undertake cleanup by itself and then seek reimbursement from the PRPs.⁹⁵ The purpose of this amendment was to prevent PRPs from interfering with, and thus, hindering the cleanup process.⁹⁶ Since the EPA's policy is to maintain tight control over the design and cleanup process,⁹⁷ any PRP participation would be to little or no avail in cost control. Thus, if the EPA wants to undertake a response action without interference by PRPs, PRPs should be content to allow the EPA to do so.

2. Challenging the EPA's Decisions

In an effort to give CERCLA the "broad and liberal" interpretation intended by Congress, the courts are granting the EPA broad and sweeping powers.⁹⁸ The combination of judicial and congressional (statutory) empowerment has acted to give the EPA an authoritarian grant of power. Two

91. *Id.* at 452-53.

92. *See also* United States v. Ottati & Goss, Inc., 630 F. Supp. 1361 (D.D.C. 1985) (concluding that the EPA's failure to provide PRPs with notice or opportunity to conduct their own cleanup before the EPA conducted its response action pursuant to § 104 of CERCLA does not prevent the EPA from seeking recovery of response costs under § 107(a) of CERCLA since CERCLA's purpose is to have the EPA act quickly to remedy environmental problems posed by hazardous waste sites).

93. 42 U.S.C. § 9617 (Supp. I 1989).

94. *Id.*

95. 42 U.S.C. § 9622 (Supp. I 1989).

96. "In enacting the 1986 amendments of CERCLA [commonly referred to as SARA], Congress sought to expedite effective remedial actions and minimize litigation. 42 U.S.C. § 9622(a) (Supp. V 1987)." United States v. Hardage, 750 F. Supp. 1460, 1491 (W.D. Okla. 1990).

97. *See supra* notes 69-71 and accompanying text (discussing the EPA's general authoritarian policy).

98. "In CERCLA Congress enacted a broad remedial statute designed to enhance the authority of the EPA to respond effectively and promptly to toxic pollutant spills that threatened the environment and human health." B.F. Goodrich v. Murtha, 958 F.2d 1192, 1197 (2d Cir. 1992); *see also* United States v. Seymour Recycling Corp., 679 F. Supp. 859 (S.D. Ind. 1987). In *Seymour*, the court stated that

[t]he justification for empowering the executive agency to select remedies under both Section 104 and Section 106 is found in the subsequent provisions of Section 121, which require that cleanups meet stringent technical standards and that alternative remedies be assessed for economic and policy considerations. Such determinations are commonly and properly entrusted to agencies with the expertise to make such judgments.

Id. at 862. The reason Congress empowered the EPA through the provisions of CERCLA was because of its own lack of technical knowledge in that area. Even though both sides go to the courthouse with a battery of experts, the courts continue to empower the EPA under the pretext of deferring to Congressional intent. Can a bureaucracy, like the EPA always be right?

recent decisions, *United States v. Alcan Aluminum Corp.*⁹⁹ and *Apache Powder Co. v. United States*¹⁰⁰ exhibit the courts' willingness to defer to the EPA's decisions in the absence of contrary authority.¹⁰¹

In *Alcan Aluminum Corp.* the court concluded that the EPA's interpretation of CERCLA, which it is in charge of enforcing, "is entitled to considerable deference and must be adhered to where it is reasonable and consistent with the language of the statute."¹⁰² The court in *Apache Powder Co.* went even further and held that it must defer to the EPA's factual findings with regard to their preliminary assessment in the "absence of specific reasons" to the contrary.¹⁰³ By deferring to the EPA whenever an opposing argument

Should the courts automatically defer to the EPA's decisions, or is to do so an injustice in itself?

Understandably, there is a need for expediency with respect to cleanup projects at hazardous waste sites. "In order to avoid the conflict between the PRPs' interest in inexpensive cleanup and the public's interest in safe and rapid remedies, CERCLA empowers EPA to clean up waste sites itself, and to collect from PRPs after the cleanup has been completed." *Cabot Corp. v. EPA*, 677 F. Supp. 823, 828 (E.D. Pa. 1988). However, one needs to question whether resources are being sacrificed unnecessarily for the sake of expediency. *See infra* notes 120-29 and accompanying text (discussing a case where the court does not follow the standard procedure, goes beyond the administrative record in reviewing the chosen response action, realizes that the PRPs have developed a stronger and less expensive proposal, and rejects the EPA's proposal).

99. 964 F.2d 252 (3d Cir. 1992).

100. 968 F.2d 66 (D.C. Cir. 1992).

101. In general, whenever a dispute arises concerning the meaning of a statutory term or provision, and the statute is silent or ambiguous with respect to the specific issue, the court must defer to the administering agency's interpretation. *Mead Corp. v. Tilley*, 490 U.S. 714, 722 (1989). This is known as the Chevron Rule. *Id.* Since the President delegated his powers under CERCLA to the EPA (*see supra* note 18), the EPA is considered the administering agency for purposes of the Chevron Rule. *See Eagle-Picher Indus. v. EPA*, 759 F.2d 905, 909 n.9 (D.C. Cir. 1985) (deferring to the EPA because it "has been entrusted [by the President] with the administration of CERCLA").

102. *Alcan Aluminum Corp.*, 964 F.2d at 262-63.

103. *Apache Powder Co.*, 968 F.2d at 71. *Compare id. with* *National Gypsum Co. v. EPA*, 968 F.2d 40 (D.C. Cir. 1992) *and* *Kent County, Del. Levy Court v. EPA*, 963 F.2d 391 (D.C. Cir. 1992) *and* *Anne Arundel County, Md. v. EPA*, 963 F.2d 412 (D.C. Cir. 1992). In these cases the courts found sufficient grounds to rule for the defendant PRPs instead of deferring to the EPA's assessment. In *National Gypsum*, the court held that the EPA's decision was arbitrary and capricious because the EPA had failed to provide any scientific evidence to adequately support the basis for its decision. *National Gypsum Co.*, 968 F.2d at 43-44 (stating that "[t]he EPA's inferences, however, are nothing more than unsupported assumptions, and our previous decisions recognizing the necessarily cursory nature of the NPL listing process, do not entitle the EPA to base a listing decision on unsupported assumptions") (citations omitted). In *Kent County* and *Anne Arundel*, the D.C. Court of Appeals ruled that the EPA's decision was arbitrary and capricious. *Kent County*, 963 F.2d at 399; *Anne Arundel*, 963 F.2d at 417. The court decided these cases the same day. In both cases, the court overruled the EPA's decision to list the site on the NPL. *Kent County*, 963 F.2d at 399; *Anne Arundel*, 963 F.2d at 417. In *Kent County* documents were discovered that showed the EPA had failed to follow its required procedure for testing. While the EPA argued that these documents were outside the administrative record and therefore could not be considered by the court, the court broke with the standard of review and considered the documents which outlined the proper method for testing. On the basis of these documents, the court concluded that the EPA's decision was arbitrary and capricious. *Id.* The court then based its decision in *Anne Arundel* on its *Kent County* holding because both cases involved the same testing procedure and failure to follow the required procedure. *Id.* at 416. Notice that in cases involving a municipality or other local government entity, the courts have shown a greater willingness to go beyond the scope of the administrative record when making its decisions. *See infra* notes 127-28 and

lacks express authority to the contrary, the courts have significantly added to the EPA's empowerment under CERCLA.

Once PRPs commit to undertake a response action, various problems may arise. For instance, when the EPA designates the chosen response action, there is little opportunity for PRPs to challenge the EPA's Record of Decision (ROD).¹⁰⁴ Under section 107 of CERCLA,¹⁰⁵ the EPA may fine PRPs up to \$25,000 per day for non-compliance with an administrative order. Furthermore, if the EPA decides not to pursue an action in the courts, but instead undertakes the response action itself, then the EPA has the discretion to seek treble damages, as well as actual response costs, when it subsequently files suit for reimbursement pursuant to section 107.¹⁰⁶ Thus, the PRPs become liable for up to four times the actual response costs.¹⁰⁷

In *Solid State Circuits, Inc. v. United States*¹⁰⁸ the Eighth Circuit held that the district court "lacked subject matter jurisdiction to engage in pre-enforcement review of the merits of an order issued by the EPA pursuant to

accompanying text (discussing that the *Hardage* court went outside the administrative record in making a determination and that one of the considerations in doing so was the State of Oklahoma's opposition to the EPA's proposal).

104. The legislative history of SARA indicates that "several legislators emphasized that the timing-of-review provisions should be read broadly to preclude review of any action under CERCLA until the time at which review is specifically permitted under the appropriate subsection of § 9613(h)." *Cabot Corp. v. EPA*, 677 F. Supp. 823, 827 (E.D. Pa. 1988). Section 113(h) provides that federal courts do not have subject-matter jurisdiction for pre-enforcement reviews of any removal action taken by the EPA pursuant to § 104 of CERCLA:

No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 of the United States Code (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 121 of this Title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 104, or to review any order issued under section 106(a), in any action except one of the following:

- (1) An action under section 107 to recover response costs or damages or for contribution.
- (2) An action to enforce an order issued under section 106(a) or to recover a penalty for violation of such order.
- (3) An action for reimbursement under section 106(b)(2).
- (4) An action under section 310 (relating to citizens suits) alleging that the removal or remedial action taken under section 104 or secured under section 106 was in violation of any requirement of this Act. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.
- (5) An action under section 106 in which the United States has moved to compel a remedial action.

Superfund Amendments and Re-Authorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended at 42 U.S.C. § 9613(h) (Supp. I 1989)).

105. 42 U.S.C. § 9607(c)(3) (1989). A person who fails without sufficient cause to properly provide removal or remedial action as ordered by the EPA is subject to treble damages. *Id.*; see also *supra* notes 51-52 and accompanying text.

106. 42 U.S.C. § 9607(c)(3) (Supp. I 1989).

107. *United States v. Parsons*, 936 F.2d 526, 529 (11th Cir. 1991) (holding that under § 107(c)(3) of CERCLA the government could recover up to a total of four times response costs expended in cleaning up hazardous waste site).

108. 812 F.2d 383 (8th Cir. 1987); see *supra* note 104 and accompanying text (discussing SARA provision § 9613(h), which specifically precludes pre-enforcement review of an administrative order).

section 106 of CERCLA."¹⁰⁹ The court cannot exercise jurisdiction over a controversy that challenges the merits of an administrative order until the EPA has commenced an action seeking either compliance or recompense.¹¹⁰ While punitive damages will not be assessed if the PRPs can show "sufficient cause," it is a rather large gamble for PRPs to take, especially in light of the fact that courts are willing to defer to the EPA's interpretations of CERCLA and its decisions in the absence of contrary authority.¹¹¹ Thus, if a PRP disagrees with the response action chosen by the EPA in its ROD, the PRP cannot challenge the order without subjecting itself to liability for treble damages as well as the imposition of daily fines.

Nonetheless, the *Solid State Circuits* court upheld the constitutionality of this statutory scheme.¹¹² The court felt that the statutory allowance for "sufficient cause"¹¹³ provided the PRPs with adequate protection. The EPA argued that "[a]s a Federal agency, [it] must be presumed to act correctly."¹¹⁴ Thus, it contended that an "arbitrary and capricious standard" was the appropriate standard of review for its administrative order. The court interpreted this argument as advocating the use of an objective standard when determining whether "sufficient cause" existed for the challenge.¹¹⁵ The court accepted the EPA's argument and adopted an "objective standard" of review.¹¹⁶

109. *Solid State Circuits*, 812 F.2d at 386.

110. *Id.*

111. *See supra* notes 98-101 and accompanying text.

112. Plaintiffs challenged the statutory scheme, whereby the district courts are without jurisdiction to examine the merits of an EPA order in a pre-enforcement hearing, as a violation of their due process rights. They argued that "they found themselves stuck between a rock and a hard place." *Solid State Circuits*, 812 F.2d at 388. The court concluded that the apparent "Hobson's choice" was illusory since "sufficient cause" should be interpreted to mean "good faith," thereby affording PRPs with "adequate protection against imposition of the treble damage penalty." *Id.*; *see also* *Wagner Elec. Corp. v. Thomas*, 612 F. Supp. 736, 748 (D. Kan. 1985) (holding CERCLA's provision of "good faith" defense sufficiently answers any due process objections based on an assertion that the Act's penalty provision chills access to judicial review). *But cf.* *Aminoil, Inc. v. EPA*, 599 F. Supp. 69 (C.D. Cal. 1984). In *Aminoil*, the court conducted a three factor balancing test. The court set forth three factors for consideration when attempting to determine the probability of success on a due process challenge: (1) the private interest at stake, (2) the risk of erroneous deprivation through the present procedures, and (3) the government and public interest at stake. *Id.* at 74 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). The *Aminoil* court stated "[a]lthough the government's interest in handling emergency waste situations in an efficacious manner is significant, this Court is not convinced that this interest could not be addressed through a scheme that nevertheless provides the most rudimentary elements necessary to satisfy due process." *Id.* While the *Aminoil* court concluded that the plaintiffs had a viable due process challenge based on their evaluation of the three factor test, courts are currently in disagreement with that proposition. *Id.* at 76. Given Congress's primary goal for CERCLA, courts have given the government's interest in expedient cleanup procedures more weight than any of the other interests in the *Mathews* three factor test. Therefore, courts currently uphold the constitutionality of the statute's penalty provision.

113. 42 U.S.C. § 9607(c)(3) (Supp. I 1989).

114. *Solid State Circuits*, 812 F.2d at 390.

115. *Id.*

116. *Id.* at 391. Since the court failed to use the terminology "arbitrary and capricious" in its final holding, its decision is ambiguous regarding how much of the EPA's argument it adopted when it promulgated the "objective standard."

In *United States v. Seymour Recycling Corp.*,¹¹⁷ however, the court recognized that "section 113(j) of CERCLA, as amended by SARA, requires the conclusion that judicial review of the EPA's remedy decision in CERCLA cases must be based on the administrative record, applying the arbitrary and capricious standard."¹¹⁸ When a court limits its review to the administrative record, the ROD, the opportunity for a meaningful challenge is reduced. Moreover, the arbitrary and capricious standard, which gives the EPA significant latitude in its decision-making capacity, reduces further the possibility of a substantive challenge. Therefore, given the timing and standard of review, any challenges brought by the PRPs to the EPA's response action must necessarily be raised as counterclaims against excessive cost recovery under section 107 of CERCLA.¹¹⁹

*United States v. Hardage*¹²⁰ exemplifies a rarity among CERCLA cases. In *Hardage* the trial court sought to select a remedy for the cleanup of a closed industrial waste disposal site. This case represents the rare occasion where a successful challenge was mounted against an EPA-designated response action prior to its implementation. The United States advanced the argument that judicial review of the EPA's selected remedy should be limited to a review of the administrative record using the "arbitrary and capricious" standard.¹²¹ The court refused to follow this customary course of review, however, and instead, conducted a *de novo* review.¹²²

117. 679 F. Supp. 859 (S.D. Ind. 1987).

118. *Id.* at 861. Sections 113(j)(1) and (2) provide:

(1) Limitation — In any judicial action under this Act, judicial review of any issues concerning the adequacy of any response action taken or ordered by the President shall be *limited to the administrative record*. Otherwise applicable principles of administrative law shall govern whether any supplemental materials may be considered by the court.

(2) Standard — In considering objections raised in any judicial action under this Act, the court shall uphold the President's decision in selecting the response action unless the objecting party can *demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with the law*.

42 U.S.C. § 113(j)(1)-(2) (Supp. I 1989), as added by SARA, Pub. L. No. 99-499, § 113(c)(2), 100 Stat. 1613, 1650 (1986) (emphasis added).

119. *Cabot Corp. v. EPA*, 677 F. Supp. 823, 828 (E.D. Pa. 1988).

120. 750 F. Supp. 1460 (W.D. Okla. 1990).

121. *Id.* at 1470.

122. *Id.* at 1471. The United States' original complaint alleged violations of § 7004 of the Resources Conservation and Recovery Act (RCRA) (42 U.S.C. § 6973), as well as violations of § 106(a) and § 107 of CERCLA. *Id.* at 1469. In its earlier motion to restrict review to the administrative record, the court denied the motion because "SARA record review provisions were not applicable to the United States' claim for injunctive relief under section 7003 of RCRA." *Id.* at 1470. Subsequently, the United States certified the administrative record, which supported the EPA's ROD, moved again to restrict judicial review to the EPA's administrative record, and also moved to dismiss its claims based on § 7003 of RCRA. *Id.* The court granted the dismissal of the RCRA claims; however, it denied the motion for an administrative record review. *Id.* at 1471. In an accompanying memorandum decision, the court stated that a "reversal of the Court's earlier rulings concerning the scope of review was not warranted by the United States' withdrawal of the claim based on section 7003 of RCRA or by the United States' filing of the administrative record." *Id.* Thus, *de novo* review of the United States' proposed remedy occurred solely as a result of legal gymnastics of a kind never seen before or since. See *infra* note 131 and accompanying text (discussing the subsequent cases that lambasted this decision as contrary to the statutory scheme).

The EPA proposed an "excavation" and "soil vapor extraction" remedy.¹²³ Excavation is a process through which a substantial portion, but not all, of the hazardous wastes is removed from the site. Soil vapor extraction removes highly toxic and mobile compounds from the surface. The EPA estimated this type of response action would cost approximately \$70 million. The defendants,¹²⁴ however, countered that such a remedy would more likely cost \$150 million due to inevitable "major repair contingencies, operation, and maintenance."¹²⁵

The defendants proposed a "containment" remedy, which is designed to pump large quantities of the hazardous wastes from the site, while containing the remaining hazardous wastes. The defendants and the EPA agreed that this remedy would cost approximately \$54 million.¹²⁶ The EPA stated, however, that the containment portion of the defendants' remedy was guaranteed to fail and that the only remaining question was when.

The court evaluated all of the evidence *de novo*. It then rejected the EPA's proposed remedy and ordered the defendants' "containment" remedy, after minor court-instituted modifications, to be implemented.¹²⁷ The court cited many reasons for its decision to reject the EPA's proposal.¹²⁸ After a complete evaluation of all the evidence offered, however, the court concluded "[t]he legitimate safety concerns with respect to excavation at the Hardage Site, coupled with the marginal utility of excavation given the evidence regarding the number of ruptured drums, persuades the Court that excavation is not appropriate."¹²⁹ Thus, the court was not convinced that the EPA's plan would be safe or effective.

Even though the result reached by the *Hardage* court is beneficial because it selected the better remedy, several courts have criticized the legal gymnas-

123. *Hardage*, 750 F. Supp. at 1462.

124. The EPA named 32 generators and 3 transporters as defendants to its suit for injunctive relief under "section 106(a) of CERCLA to require the defendants to clean up the site, and to recover costs incurred by the United States under section 107 of CERCLA." *Id.* at 1469. Several of these defendants bonded themselves together to form the Hardage Steering Committee (HSC). This group was the driving force behind the defendants' successful bid against the EPA. As a group, the PRPs formed a much stronger legal force than anyone could have established alone. Even the court noted that the trial moved rapidly due in part to the "extremely high caliber of legal representation on both sides of the lawsuit." *Id.* at 1463.

125. *Id.* at 1462.

126. *Id.*

127. *Id.* at 1523.

128. One main reason why the court rejected the EPA's proposal was its "vacillating nature." *Id.* at 1475. "The government's proposed remedy changed so many times during the course of this litigation, and in such drastic measures, that the Court lost confidence in the deliberative process underlying the government's final proposal." *Id.* The court further cited the following reasons as other considerations weighing in favor of the defendants' proposal: The "[S]tate of Oklahoma's opposition to the government's excavation proposal, the lack of due consideration given to the views of state authorities, the ambiguity of the excavation proposals presented in the government's case, and the unreliability of the government's estimates concerning the number of intact drums in the main pit and barrel mound areas." *Id.* at 1474. Notice that the court listed the State's concerns before it listed the actual considerations it subsequently lists as the determinative reasons.

129. *Id.* at 1477.

tics used to reach it. In *United States v. Bell Petroleum Services, Inc.*¹³⁰ the court described the *Hardage* court's approach as "hypertechnical and inconsistent with the plain meaning of the statutory language."¹³¹ The *Hardage* court may have manipulated the law. It did so, however, to produce a better solution to the problem.¹³²

Public policy should promote the most effective and efficient response action possible. As the decision in *Hardage* indicates, the EPA does not always develop the best alternative. Yet, without the legal gymnastics accomplished by the *Hardage* court, the court's decision to choose the PRPs' remedy because it was more effective and more efficient, could never have been reached.¹³³

Courts consistently justify limiting the review of the merits to the administrative record based on the construction and the intent of CERCLA.¹³⁴ In *United States v. Akzo Coatings of America, Inc.*¹³⁵ the court stated in direct criticism of the *Hardage* decision that:

[w]e believe section 9613(j) reflects Congress'[s] intent that in this highly technical area, decisions concerning the selection of remedies should be left to EPA, and those decisions should be accepted or rejected — not modified — by the district court under an arbitrary and capricious standard. . . . A reviewing court should not attempt to substitute its judgment for the expertise of EPA officials. Ours is the task of searching for errors of procedure, and serious omissions of substantive evidence, not the job of reformulating a scientific clean-up program

130. 718 F. Supp. 588 (W.D. Tex. 1989).

131. *Id.* at 591; see also *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1409 (6th Cir. 1991) (stating that "we believe that court [*Hardage*] misinterpreted the plain language of CERCLA and the congressional intent behind the statute"); *In re Acushnet River & New Bedford Harbor*, 722 F. Supp. 888, 892 (D. Mass. 1989) (stating that "[i]f the *Hardage* court's interpretation of the statute is correct [regarding *de novo* review], Congress has enacted an unusual statutory scheme . . .").

132. See generally Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (discussing the role of "how I want it to come out" in judicial decision-making).

133. *De novo* review allowed the PRPs to present evidence that its proposal was better. Under a review of the merits limited to the administrative record, the PRPs would have been limited to proving that the EPA's decision was "arbitrary and capricious." Thus, a *de novo* review allowed the court to conduct a balancing test with the two proposed remedies and choose the best. In contrast, under administrative record review, the PRPs would have had the additional burden of disproving the EPA's proposal by showing that it was made arbitrarily and capriciously.

In *United States v. Cannons Eng'g Corp.*, 899 F.2d 79 (1st Cir. 1990), the court stated "[w]hile the district court should not mechanically rubberstamp the agency's suggestions, neither should it approach the merits of the contemplated settlement *de novo*." *Id.* at 84. However, unless a court conducts a *de novo* review, it is tremendously difficult not to just rubberstamp the agency's decision especially since the Chevron rule requires the courts to defer to the EPA's judgment absent authority to the contrary. This proposition is further evidenced by the fact that *Hardage*, which was reviewed *de novo*, is a rarity among CERCLA cases where the PRPs' proposal actually triumphed over the EPA's.

134. See *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1424 (6th Cir. 1991) (stating that the *Hardage* decision contradicts the wording and intent of the statute); see also *supra* notes 115-16 and accompanying text (discussing the "arbitrary and capricious" standard).

135. 949 F.2d at 1409.

developed over the course of months or years.¹³⁶

Thus, the major criticisms of allowing *de novo* review are the courts' lack of expertise and interest in expediency.

Lack of expertise should not be an issue, however, since both sides will present certified experts in the field. The fact finder should then base its decision on the credibility and findings of the witnesses presented. Furthermore, the challenge of remedy selection should be allowed at the conclusion of investigations when both sides have already conducted their findings of fact. The criticism that to allow such challenges would "handcuff the Environmental Protection Agency (EPA) by delaying effective responses to emergency situations,"¹³⁷ can be countered by the fact that the *Hardage* court concluded its "remedy selection phase" of the trial in just eleven days.¹³⁸

While *Hardage* represents an anomaly in CERCLA cases, some important points can be gleaned from it. The remedy selected by the EPA is not always the best alternative. Therefore, the public should be leery that the courts give the EPA's decisions an automatic presumption of validity. When a PRP has voluntarily come forward to participate in the response action, there can be no doubt that a major motivating factor is the desire of the PRP to control response costs. Under the current implementation of CERCLA, this is most likely a fallacy.¹³⁹ As seen in *Hardage*, however, it may be possible to provide cost efficiency for the PRPs and still be able to provide a safe and effective remedy for the public.

Unfortunately, the *Hardage* approach has not been accepted, and courts continue to give a great deal of deference to the EPA's decisions.¹⁴⁰ As the courts continue to empower the EPA, the methods for employing CERCLA become less negotiable and more authoritarian in nature. Given the EPA's current dictatorial negotiation policy,¹⁴¹ it is counterproductive for PRPs to voluntarily subject themselves to the conflicts that inevitably arise during the course of a response action with the EPA.¹⁴² The EPA's stance on negotiation, coupled with the courts' willingness to defer to the EPA's judgment in most controversies, should diminish any inclination on behalf of PRPs to participate in a cleanup effort unless compelled to do so.

136. *Id.* at 1425.

137. *Aminoil, Inc. v. EPA*, 599 F. Supp. 69, 71 (C.D. Cal. 1984).

138. *United States v. Hardage*, 750 F. Supp. 1460, 1463 (W.D. Okla. 1990).

139. *See supra* notes 66-68 and accompanying text (discussing the unlikely possibility that PRPs will realize savings through cost control under the current implementation of CERCLA).

140. *See supra* notes 98-99 and accompanying text. (Does the interest of a local government play an important role in determining how much deference a court will give the EPA?).

141. *See supra* part II.A. and note 71 and accompanying text. *See generally* Anderson, *supra* note 24.

142. The EPA requires tight control over the entire cleanup process. A safe assumption is that the EPA is looking for a party, a PRP, who will foot the bill for its cleanup plan. *See supra* note 71 and accompanying text (discussing the view that the EPA is just looking for someone to sue).

3. Pre-Litigation Interest

Unless PRPs have an opportunity to contribute in a meaningful way to the design and implementation of a response action, the PRPs may find it more beneficial to let the EPA clean the site up itself and seek reimbursement for the costs later, thereby saving the PRPs the time, energy, and cost of undertaking a response action in conjunction with or under the guidance of the EPA.¹⁴³ According to section 107(a) of CERCLA, pre-judgment interest is not obtainable unless the EPA has demanded payment prior to its own expenditure of funds.¹⁴⁴ Since PRPs have relatively little control over the expenditures of a response action, the time value of money is an important factor to consider when deciding whether or not to become voluntarily involved in a response action.

The average total cost of a remedial site cleanup is \$27.8 million.¹⁴⁵ The average time commitment for a remedial site cleanup is between eight and one half years and ten years from the sites listed on the NPL.¹⁴⁶ Since the riskless rate is currently 3.4% on short-term investments,¹⁴⁷ a PRP would only have to invest \$1.2 million at the riskless rate to get the \$1.3 million to repay the government for the RI/FS once it was completed.¹⁴⁸

The amount of time that passes before the EPA seeks to establish liability, compliance, or recovery of costs from PRPs varies from region to region and from case to case. Any time that passes before the EPA seeks any of those above requests, however, is "free time" for non-complying PRPs. If PRPs voluntarily undertook a response action, they would not benefit from this free time. Furthermore, uncertainty as to whether and when a PRP would

143. Courts have interpreted CERCLA as allowing the EPA to do the cleanup itself without the hassle of the PRPs' participation. See *generally supra* notes 87-94 and accompanying text. Thus, PRPs should happily defer given that the EPA is almost omnipotent with regard to decisionmaking under CERCLA. But most important is the time value of money saved while sitting back and waiting for the EPA to come knocking.

144. "The amounts recoverable in an action under this section [42 U.S.C. § 9607(a)] shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned." 42 U.S.C. § 9607(a) (Supp. I 1989) (emphasis added).

145. The average total cost of RI/FS per site is \$1.3 million. The average total cost of the remedial action design is \$1.5 million. The average total cost of the actual remedial action is \$25 million. Thus, the average total cost of a remedial site cleanup is \$27.8 million. 40 C.F.R. pt. 300 (1992).

146. The average time commitment for a RI/FS per site runs between 18 and 30 months. The average time commitment for a remedial action design runs from between a year to a year and a half. The average time commitment for the actual remedial action is estimated at six years. Thus, the average time commitment for a remedial site cleanup is between eight and a half and ten years. "Superfund Progress as of June 1992 — Aficionado's version," OSWER Directive No. EPA 9200.1-12B, Aug. 1992.

147. *United States Treasury Securities*, WALL ST. J., Feb. 22, 1993, at C10.

148. Since it is the EPA's policy to perform the RI/FS itself, if the EPA does not seek compliance and/or reimbursement until this process is completed, then the PRP will have already saved approximately \$64,000 that it could get by investing the costs pending completion of the process. (Present Value = total cost of RI/FS divided by the riskless rate raised to the time period before realization, in our case before the EPA seeks recompense.) Also, one could safely assume that corporate PRPs can achieve a better investment rate than the riskless rate.

be named by the EPA, or other PRPs, the possibility of punitive damages, and the relatively small chance that participation would lead to cost efficient measures or savings are all factors that need to be considered before PRPs voluntarily undertake a response action in conjunction with or under the guidance of the EPA since each has a direct bearing on the overall cost of response, which is probably the primary concern of PRPs.

C. COST RECOVERY

1. Government-Instituted Actions

When the government seeks cost recovery pursuant to section 107 of CERCLA, the EPA shoots for "global consent decrees."¹⁴⁹ These decrees are settlement agreements reached prior to trial that address all known PRPs. David Moore, an attorney for the EPA, cited two major reasons why a global consent decree usually cannot be reached: (1) Either the EPA does not have complete information regarding all potentially responsible parties;¹⁵⁰ or (2) In its attempt to reach a global consent decree, the PRPs form a steering committee, negotiations breakdown, and no settlement can be reached.¹⁵¹ Under global consent decrees, the EPA seeks to recover eighty-five percent of its response costs.¹⁵² Basically, the EPA supplements fifteen percent of the costs to compensate for those PRPs who are either out of business or have remained unidentified. Since the average cost of a response action runs \$27.8 million,¹⁵³ one can estimate the average supplement at approximately \$4.25 million. Thus, the savings realized by the settling PRPs are quite substantial.

2. PRP-Instituted Actions

PRPs who undertake a response action under section 106 of CERCLA, however, are expected to arrange and pay for the EPA-designated action. While section 113(f) provides that a PRP may seek contribution from other PRPs, the response a PRP must undertake in identifying all other PRPs from which it can seek contribution¹⁵⁴ and then attempt to recover its costs of response from them. Under PRP-initiated section 106 actions, the government's supplement given to settling defendants in a government-insti-

149. Telephone Interview with David Moore, an attorney, the EPA — Washington, D.C. (Feb. 9, 1993); see *supra* notes 73-79 and accompanying text (exemplifying treatment of non-settling defendants).

150. Moore noted, however, that when the EPA does not have complete information, the other identified PRPs are usually more than willing to come forward with any information they have regarding other potential PRPs. Moore, *supra* note 149. This probably reflects the power of the joint and several liability provision in CERCLA more than a showing of cooperation by the PRPs.

151. *Id.*

152. *Id.*

153. See *supra* note 145 and accompanying text.

154. Any information that the EPA has on other identified PRPs is discoverable through the Freedom of Information Act. 5 U.S.C. § 552 (Supp. I 1989). According to Moore, whether the EPA continues to search for identifiable PRPs once it has a PRP voluntarily participating in the response action varies from region to region. See Moore, *supra* note 149.

tuted action is not available to the PRPs who have voluntarily consented to participate in the cleanup process.¹⁵⁵ Also, the government can collect its indirect costs associated with and incurred as a result of undertaking the response action.¹⁵⁶ Furthermore, a majority of the courts have refused to allow PRPs to recover attorney's fees for their cost recovery actions.¹⁵⁷ Thus, the PRPs who voluntarily undertake a response action will invariably incur greater response costs.

a. Standards of Recovery

After the PRPs identify other PRPs from which they can seek contribution, they will most likely have to file suit to recover their costs since they lack the power that the EPA possesses to compel settlements. When seeking cost recovery under section 107, PRPs must establish the prima facie elements of the cause of action as established by that section of CERCLA. The elements are as follows: 1) The site fits within the "facility" category; 2) There was a release or threatened release of a hazardous substance at the facility; 3) The release or threatened release caused the plaintiff to incur response costs; 4) The defendant falls within one of the four classes of "covered persons" defined in section 9607(a); and 5) Costs are consistent with the NCP.¹⁵⁸ Given that courts award the EPA considerable deference and that the EPA ordinarily ordered the response,¹⁵⁹ the first four elements are fairly easy to establish. With regard to the fifth and final element, however, the courts have construed the statute to apply different burdens of proof for different plaintiffs.

The statutory language of CERCLA "indicates that Congress intended that a different standard apply to parties other than the federal government seeking response costs. Furthermore, these parties must affirmatively prove that their actions are necessary and consistent with the NCP."¹⁶⁰ Section 107(a)(4)(A) of CERCLA provides that "all costs of removal or remedial action incurred by the United States Government or a State . . . *not inconsistent* with the national contingency plan" are recoverable.¹⁶¹ In contrast, section 107(a)(4)(B) states that "any other necessary costs of response incurred by any other person *consistent* with the national contingency plan" are re-

155. See Moore, *supra* note 149. The EPA prefers to settle the suit with global consent decrees. *Id.*

156. See *infra* notes 177-88 and accompanying text (discussing the recovery of indirect and non-attributable costs).

157. See *infra* notes 189-99 and accompanying text (discussing the division among the courts on whether attorney's fees are recoverable by private litigants).

158. See *supra* note 49.

159. "[S]ome commentators have suggested that private parties who do not mirror the cleanup procedures employed by EPA may face a high risk of not recovering their response costs." Jones & McSarrow, *supra* note 2, at 10,451 (discussing Martin et al., *Private Cost-Recovery Actions under CERCLA § 107*, 1 ENVTL. CLAIMS J. 377 (1989)); cf. Pinole Point Properties, Inc. v. Bethlehem Steel Corp., 596 F. Supp. 283, 390 (N.D. Cal. 1984) (holding that a prima facie case does not require government approval of response costs).

160. United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 747 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

161. 42 U.S.C. § 9607(a)(4)(A) (Supp. I 1989).

coverable.¹⁶² Thus, the government enjoys a rebuttable presumption of consistency with the NCP, whereas private parties bear an affirmative burden of proof.¹⁶³

It is conceivable that the rationale for having different burdens of proof has its origin in the congressional and judicial intent to empower the EPA. The fact remains, however, that PRPs who seek contribution from other PRPs have a tougher battle to fight. In *Versatile Metals, Inc. v. Union Corp.*¹⁶⁴ the court outlined the standards for consistency.¹⁶⁵ These standards basically reflect the criteria used by the EPA in selecting and designing a response action. Thus, PRPs or private parties seeking cost recovery must prove that their response action complied with each of the standards.

When the EPA chooses the response action, the PRPs end up defending the EPA's selection and design of the response action. The PRPs may or may not have judicial deference in their favor given that the EPA selected the designated response action. Furthermore, PRPs do not enjoy the sovereign immunity that the EPA may enjoy.¹⁶⁶ When PRPs seek contribution from other PRPs, they must surmount each of these obstacles — prove they complied with each standard — before a court could find that the PRPs'

162. *Id.* § 9607(a)(4)(B).

163. When the plaintiff is the government, the burden of proof lies with the defendant to show that response action was inconsistent with the NCP. *Id.*

164. 693 F. Supp. 1563 (E.D. Pa. 1988).

165. The court stated:

Section 300.71 of the 1985 NCP provides:

...
(a)(1) Any person may undertake a response action to reduce or eliminate the release or threat of release of hazardous substances, or pollutants or contaminants. Section 107 of CERCLA authorizes persons to recover certain response costs consistent with this Plan from responsible parties.

(a)(2) For purposes of cost recovery under § 107 of CERCLA, except for actions taken pursuant to § 106 of CERCLA or pursuant to pre-authorization under § 300.25 of this Plan, a response action will be consistent with the NCP (or for a State or Federal government response, not inconsistent with the NCP), if the person taking the response action:

(i) Where the action is a removal action, acts in circumstances warranting removal and implements removal action consistent with § 300.65.

(ii) Where the action is a remedial action:

(A) Provides for appropriate site investigation and analysis of remedial alternatives as required under § 300.68;

(B) Complies with the provisions of paragraphs (e) through (i) of § 300.68 [defining format for remedial investigations];

(C) Selects a cost-effective response; and

(D) Provides an opportunity for appropriate public comment concerning the selection of a remedial action consistent with paragraph (d) of § 300.67 unless compliance with the legally applicable or relevant and appropriate State and local requirements identified under paragraph (4) of this section provides a substantially equivalent opportunity for public involvement in the choice of a remedy.

Id. at 1575.

166. The government is assumed to have waived sovereign immunity as to compulsory counterclaims once it institutes a cost recovery action pursuant to § 107 of CERCLA. See *supra* notes 58-60 and accompanying text (discussing waiver of sovereign immunity when government institutes cost-recovery action, theories behind waiver, and the split of authority on the issue).

actions were consistent with the NCP. If the plaintiff is the government, however, the burden shifts to the defending PRP to prove that the EPA did not comply with one of the standards. Thus, the government has a substantially easier task in establishing this element of its case.

In *Wickland Oil Terminals v. Asarco, Inc.*¹⁶⁷ the court interpreted the compliance standard for private parties as substantial, as opposed to strict.¹⁶⁸ The *Wickland* court found that there had been compliance with the NCP since the plaintiff's actions were "consistent with CERCLA's broad remedial purpose."¹⁶⁹ SARA also contained provisions affecting private response recoveries.¹⁷⁰ While "the SARA provisions buttress the liberal view on private response cost recovery actions that the Ninth Circuit adopted in *Wickland*,"¹⁷¹ the meaning of the term "substantial" has yet to be clearly defined by the courts.¹⁷²

b. Differences in Allowable Costs Recovered — EPA v. PRPs (or Private Parties)

According to section 107 of CERCLA, the government may recover "all costs" it incurs during a response action.¹⁷³ But, all other persons or parties may only recover "necessary costs."¹⁷⁴ Though the term "necessary costs" is not statutorily defined, courts have construed the term to mean those costs incurred while performing response actions.¹⁷⁵ Even though courts define necessary costs broadly,¹⁷⁶ there are significant differences among recoverable costs depending on who the plaintiff is — the government or a PRP.

167. 792 F.2d 887 (9th Cir. 1986).

168. *Id.* at 891. "[S]ection 107(a) does not require strict compliance with the national contingency plan; rather, response costs incurred by a private party may be 'consistent with the national contingency plan' so long as the response measures promote the broader purposes of the plan." *Id.*; see also *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 899 (9th Cir. 1986) (plaintiff could satisfy consistency element without showing strict compliance with NCP).

169. *Wickland Oil*, 792 F.2d at 892.

170. See SARA, 42 U.S.C. § 9613(f), (g)(3) (Supp. I 1989). The most significant change made by Congress under SARA was to section 113(f), which now allows a PRP to seek its costs from other PRPs independently of any government suit against those PRPs. See *Holman*, *supra* note 71, at 320.

171. *Holman*, *supra* note 71, at 321.

172. See *Amland Properties Corp. v. Aluminum Co. of Am.*, 711 F. Supp. 784 (D.N.J. 1989) (holding that response costs could not be recovered because plaintiff had failed to comply with NCP. Plaintiff selected cleanup plan without developing sufficient alternatives, without an opportunity for public comment and, perhaps more importantly, without referring to the EPA); *Artesian Water Co. v. New Castle County*, 659 F. Supp. 1269, 1295-996 (D. Del. 1987) (holding response actions inconsistent because plaintiffs had failed to properly evaluate other alternatives).

173. 42 U.S.C. § 9607(a)(4)(A) (Supp. I 1989).

174. *Id.* § 107(a)(4)(B).

175. *Jones & McSarrow*, *supra* note 2, at 10,448. The court in *T & E Indus. v. Safety Light Corp.*, 680 F. Supp. 696 (D.N.J. 1988), accommodated "the omission of a definition for response costs by reciting the definitions of removal and remedial actions and allowing the costs incurred for those actions." *Jones & McSarrow*, *supra* note 2, at 10,430 n.292; see also *Daigle v. Shell Oil Co.*, 972 F.2d 1527 (10th Cir. 1992). Since CERCLA failed to define "necessary costs" of response, the court concluded that a necessary cost of response must be a cost necessary to the containment and cleanup of hazardous releases because of the definitions of removal and remedy. *Id.* at 1533.

176. See *supra* note 15 and accompanying text.

3. Recovering Indirect/Non-Attributable Costs

The difference in recoverable response costs is contingent on whether the plaintiff is a governmental entity seeking reimbursement from PRPs or a PRP seeking contribution from other PRPs. According to CERCLA, the government can recover "all costs" incurred in a response action.¹⁷⁷ Some courts have liberally construed this terminology to include even unidentifiable costs. While there is limited case law on this issue, of the few courts that have addressed it, a majority now allow the government to recover a type of overhead expense incurred in connection with its response action.

In *United States v. Northernair Plating Co.*¹⁷⁸ the EPA requested reimbursement for indirect costs. The court defined indirect costs as those costs that "are necessary to the operation of the program and support of site cleanup efforts, but which cannot be directly identified to the efforts of any one site."¹⁷⁹ The defendant PRP likened these costs to overhead costs¹⁸⁰ and argued that, as such, they were not recoverable as response costs. The court concluded, however, that the statutory language, "all costs," meant indirect as well as direct costs.¹⁸¹

On appeal, the court stated that indirect costs are recoverable because they are attributable to response efforts.¹⁸² Even though indirect costs cannot be linked directly to a specific Superfund site, that does not mean that the costs did not contribute to the response action taken at a given site. The court reasoned that these indirect costs are necessary for the existence of a Superfund program and, therefore, are needed to support the government's direct response activities.¹⁸³ Apparently, the EPA is now entitled to recover a percentage of its indirect expenses, which is in proportion with the specific case's requirements of the EPA's overall Superfund budget, in a cost recovery action.¹⁸⁴

The *Northernair Plating Co.* court also allowed the Department of Justice (DOJ) to recover non-attributable costs. The DOJ had not itemized its costs. The money requested by DOJ was not classified as indirect costs, however, since it was related to the labor costs incurred by the DOJ during its prosecution of the case. The DOJ established its labor costs for the case by figuring out, on an annual basis, what percentage of their budget was allocated to the case. The court concluded that the DOJ need not have an

177. 42 U.S.C. § 9607(a)(4)(A) (Supp. I 1989).

178. 685 F. Supp. 1410 (W.D. Mich. 1988), *aff'd sub nom.* *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057 (1990).

179. *Id.* at 1418.

180. *See United States v. Hardage*, 733 F. Supp. 1424 (W.D. Okla. 1989), *aff'd in part and rev'd in part on other grounds*, 982 F.2d 1436 (10th Cir. 1992). Indirect costs include labor costs, compensated absences (i.e., holidays, vacations, and sick time), fringe benefits, and training. *Id.* at 1437.

181. *Northernair Plating Co.*, 685 F. Supp. at 1419-20. *But cf.* *United States v. Ottati & Goss*, 694 F. Supp. 977, 1004 (D.N.H. 1988) (holding that the indirect costs of the EPA were not recoverable).

182. *Meyer*, 889 F.2d at 1503.

183. *Id.*

184. *See also Hardage*, 733 F. Supp. at 1438 (concluding that the term "all costs" includes indirect costs despite the meager case law on this issue and authority for both sides).

itemized cost sheet when recovering its costs. The court did refuse to determine specifically whether the DOJ would also be entitled to recover indirect costs in cost recovery actions.¹⁸⁵

Indirect and non-attributable costs, however, are not covered by the statutory terminology necessary costs. Even though the term "necessary costs" is defined liberally by the courts, it is limited to the specified costs of response. Therefore, PRPs or private parties cannot recover these costs.¹⁸⁶

Furthermore, PRPs may also be prohibited from recovering direct costs. The Tenth Circuit in *Hardage* held that direct costs attributable to developing a remedial response action would not be recoverable if the PRPs incurred the response costs in an effort to develop their own remedy for use in defending against a government injunction action.¹⁸⁷ The court reasoned that since the defendant PRPs had instigated their own remedial investigation after the EPA had already done so, the PRPs investigation was unnecessary. The court classified these costs as costs borne in anticipation of litigation.¹⁸⁸ Therefore, since these direct costs were considered litigation expenses, they were not recoverable by PRPs or private parties.

4. Recovering Attorney's Fees and Other Litigation Costs

Section 104(b) of CERCLA clearly allows governmental entities to recover attorney's fees and court costs.¹⁸⁹ The courts are split, however, as to whether private parties, including PRPs seeking contribution, are entitled to recoup those costs. In *T & E Industries, Inc. v. Safety Light Corp.*¹⁹⁰ the court held that "[u]pon careful review of the CERCLA statute, [it] finds no indication that attorney fees and costs of litigation are recoverable by a private litigant."¹⁹¹ The court stated that while private parties "may bring an action for recovery of response costs, they may not bring an action to enforce

185. *Northernair Plating Co.*, 685 F. Supp. at 1418.

186. See *Daigle*, 972 F.2d at 1533-34 (discussing the meaning of the term "necessary cost").

187. *Hardage*, 982 F.2d at 1448.

188. Even though the PRP's suggested remedy was adopted over the EPA's flawed plan, this factor could not validate the PRP's expense of remedial investigation. The court reasoned that it could have rejected the EPA's plan and ordered it to submit a new plan without the aid or intervention of the PRPs; therefore, the PRPs' costs were still unnecessary. *Id.*

189. 42 U.S.C. § 9604(b)(1) provides: "[T]he President may undertake such planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations as he may deem necessary or appropriate to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this Chapter." *Id.* (emphasis added); see also *United States v. Northernair Plating Co.*, 685 F. Supp. 1410, 1417 (W.D. Mich 1988), *aff'd sub nom. United States v. R.W. Meyer, Inc.*, 889 F.2d 1497 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057 (1990) (holding that under § 107(a)(4)(A) of CERCLA, "all costs" included attorney's fees and costs incurred by the Department of Justice); *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823, 851 (W.D. Mo. 1984) (holding that language of § 107(a)(4)(A) of CERCLA entitled government to attorney's fees and litigation costs).

190. 680 F. Supp. 696 (D.N.J. 1988).

191. *Id.* at 707; see also *Idaho v. Hanna Mining Co.*, 882 F.2d 392, 396 (9th Cir. 1989) (stating that "[t]he prevailing rule is that attorney's fees are not recoverable as response costs in actions under § 107 of CERCLA brought by private litigants"); *New York v. SCA Serv., Inc.*, 754 F. Supp. 995, 1000 (S.D.N.Y. 1991) (same); *Mesiti v. Microdot, Inc.*, 739 F. Supp. 57, 62-63 (D.N.H. 1990) (same).

CERCLA's clean-up provisions against another private entity. Thus, private parties do not incur 'enforcement costs' as contemplated by CERCLA.¹⁹² Furthermore, in concluding that CERCLA did not provide private litigants with the opportunity to recoup these expenses, the *T & E Industries* court relied on the interpretation of CERCLA's provisions in *United States v. Northeastern Pharmaceutical & Chemical Co. (NEPACCO)*.¹⁹³ In *NEPACCO* the court held that since section 104(b) specifically provides for the government to be reimbursed for legal costs, if Congress had intended for private parties to enjoy the same award, then Congress would surely have included a similar provision to do so.¹⁹⁴

Yet, some courts have held that attorney's fees and litigation costs are recoverable by private litigants.¹⁹⁵ In *General Electric Co. v. Litton Industrial Automation Systems, Inc.* the court of appeals detailed the exact problems noted in this Comment: If private litigants are not allowed to recover attorney's fees, the prohibition acts as a disincentive for PRPs to participate voluntarily in cleanup efforts at hazardous waste sites. The court stated:

Attorney fees and expenses necessarily are incurred in this kind of enforcement activity and it would strain the statutory language to the breaking point to read them out of the "necessary costs" that section 9607(a)(4)(B) allows private parties to recover. We therefore conclude that CERCLA authorizes, with a sufficient degree of explicitness, the recovery by private parties of attorney fees and expenses. This conclusion based on the statutory language is consistent with two of the main purposes of CERCLA — prompt cleanup of hazardous waste sites and imposition of *all* cleanup costs on the responsible party. These purposes would be undermined . . . [since] [t]he litigation costs could easily approach or even exceed the response costs, thereby serving as a *disincentive* to clean the site.¹⁹⁶

While this may appear to be persuasive reasoning, most courts refuse to recognize the need to allow private litigants the opportunity to recover these costs. Private parties cannot be assured that a court in their jurisdiction will permit recovery of attorney's fees and other litigation costs.¹⁹⁷

If private litigants were allowed to recover attorney's fees and litigation costs, a possible problem could develop for the courts in implementing such

192. *T & E Indus., Inc.*, 680 F. Supp. at 708 n.13.

193. 579 F. Supp. 823 (W.D. Mo. 1984); *see supra* note 186.

194. *NEPACCO*, 579 F. Supp. at 851.

195. *See, e.g.*, *General Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415 (8th Cir. 1990); *Key Tronic Corp. v. United States*, 766 F. Supp. 865 (E.D. Wash. 1991); *Bolin v. Cessna Aircraft Co.*, 759 F. Supp. 692 (D. Kan. 1991); *Shapiro v. Alexanderson*, 741 F. Supp. 472 (S.D.N.Y. 1990); *Pease & Curren Ref., Inc. v. Spectrolab, Inc.*, 744 F. Supp. 945, 951 (C.D. Cal. 1990) (holding the "plain meaning" of enforcement activities included attorney's fees and litigating costs).

196. *General Elec. Co.*, 920 F.2d at 1422 (emphasis added).

197. *Compare* *New York v. SCA Serv., Inc.*, 754 F. Supp. 995, 1000 (S.D.N.Y. 1991) *with Shapiro*, 741 F. Supp. at 480. In the *SCA Serv.* case, the court stated that "the prevailing rule" clearly stated that attorney's fees and litigation costs were not recoverable, whereas in the previous year in the same district, the *Alexanderson* court had ruled that since all cost-related to response actions were recoverable, these costs were recoverable.

a rule. The problem would be that private litigants would then be able to recover these costs from the government. While the court in *Key Tronic Corp. v. United States*¹⁹⁸ allowed a plaintiff to recover attorney's fees and litigation costs from the government,¹⁹⁹ the case involved a plaintiff who was a private party seeking contribution from the United States as a PRP. If private litigants are allowed to recover these costs, however, the courts must also be willing to grant them in cases where the private party is a defendant PRP with a successful counterclaim against the government.

5. Counterclaims — Reducing Cost Recovery

In government-instituted cost recovery actions, counterclaims provide PRPs with a mechanism to reduce the final judgement awarded to the EPA.²⁰⁰ On average, the government recovers ninety to ninety-five percent of its recovery costs from non-settling PRPs at trial.²⁰¹ PRPs who have undertaken a response action in conjunction with or under the direction of the EPA are not really afforded the opportunity to challenge a response action, and if they are financially able, they will be required to pay for the entire action. PRPs would find it hard to complain in court, after they had conducted the proposed cleanup plan, that the EPA designed a response action that cleaned up the site too well (i.e., that it was not the most cost-effective method) or that the EPA's plan was inconsistent with the NCP since the plan will also be identified with the PRPs who undertook the plan in conjunction with the EPA. In contrast, PRPs being sued by the EPA in a cost recovery action have the opportunity to claim that the EPA's actions in cleaning up the property caused or would cause the PRPs to incur "unnecessary and wasteful" response costs.²⁰²

As discussed previously, the "arbitrary and capricious" standard, combined with the prohibition of pre-enforcement review, overwhelmingly benefits the EPA. Thus, PRPs who voluntarily participate in a response action may very well find themselves facing a "Hobson's Choice."²⁰³ In reality, the PRPs cannot challenge the EPA's designated response action after they have conducted the cleanup just as they are prohibited from bringing a challenge prior to an enforcement action. If the PRPs challenge a designated response action and the EPA brings an enforcement action, the EPA has the discretion to penalize the PRPs for non-compliance by imposing fines and treble

198. 766 F. Supp. 865 (E.D. Wash. 1991).

199. *Id.* at 871-72 (holding costs recoverable in order that the overall objectives of CERCLA were achieved). The government contended that recovery for these costs should not be allowed since only the EPA could bring an *enforcement* action. "The United States may bring such an action under § 104 or § 106 . . . but private parties may only bring contribution actions under § 113 or cost recovery claims under § 107." *Id.* at 870. The court refused to accept the government's argument because it frustrated the overall purposes of the statute. *Id.*

200. *See supra* note 60 and accompanying text.

201. Telephone Interview with Frank Biros, chief accountant, EPA's Cost Recovery Department, Feb. 22, 1993.

202. *United States v. Nicolet*, 17 *Envtl. L. Rep.* (Envtl. L. Inst.) 21,085 (E.D. Pa. Dec. 31, 1986).

203. *See supra* note 112 and accompanying text.

damages.²⁰⁴ Yet, in practical terms, voluntarily compliant PRPs would also be hard pressed to challenge the designated response action that they helped implement.

As defending PRPs, the possibility exists, however, that they can escape a certain amount of liability because the response action did not substantially comply with the NCP's standards.²⁰⁵ On the other hand, some courts have interpreted compliance issues strictly and liberally in favor of the EPA in an effort to effectuate the broad purpose of CERCLA.²⁰⁶ Even so, non-complying defendant PRPs incur less costs than do voluntary PRPs.

IV. CONCLUSION

A. SUMMARY

It is costly for PRPs to comply voluntarily with the EPA from the inception of an action. The statute specifically states that PRPs shall incur no benefit as a result of their voluntary compliance. Thus, the PRPs who voluntarily comply will not receive any cost savings under the current structure of CERCLA.

Furthermore, PRPs may actually incur costs in excess of those they would have incurred if they had waited to be sued by the EPA in a cost recovery action. These excess costs are not recoverable as necessary costs in contribution actions. The greatest potential excess cost is the time value of the PRP's money. Substantial savings can be realized under the current provision regarding pre-judgment interest.²⁰⁷

Another cost that PRPs will have to bear is indirect costs. While PRPs may be able to recover actual labor costs,²⁰⁸ they cannot recover their unassociated, indirect costs such as vacation time, fringe benefits, and sick time.²⁰⁹ These expenses have to be paid regardless of what type of work the employees are doing. And even though the government is allowed to recoup these costs, the total cost is divided among all PRPs.²¹⁰ Thus, if PRPs wait to be sued by the EPA, they will only expend a portion of these costs, whereas if they had undertaken the response action, they would absorb the entire cost since the cost cannot be recovered in a contribution action.²¹¹

204. See *supra* notes 52-55 and accompanying text (discussing the ability of the EPA to impose punitive damages on non-complying PRPs).

205. See *supra* text accompanying notes 117, 158-63.

206. *United States v. Hardage*, 982 F.2d 1436, 1436 (10th Cir. 1992). While extensive evidence existed to establish that the government's remediation costs were excessive and unreasonable and that the government's response plan was defective (see *supra* text accompanying notes 120-29, discussing the *Hardage* opinion where the court selected the PRP's proposed remedy with minor modifications over the EPA's), the court still held that defendant PRPs had failed to show inconsistency with the NCP. *Id.* The court concluded that "costs, by themselves, cannot be inconsistent with the NCP." *Id.*

207. See *supra* notes 143-48 and accompanying text (discussing the problems of the pre-judgment interest provision of CERCLA).

208. See *T & E Indus. v. Safety Light Corp.*, 680 F. Supp. 696, 706-07 (D.N.J. 1988).

209. See *supra* note 180 and accompanying text.

210. See *supra* note 177 and accompanying text.

211. See *supra* note 181 and accompanying text.

Other costs that are not recoverable in contribution actions are attorney's fees and other litigation costs. Once again, voluntarily compliant PRPs would spend more money than their counterparts who wait to be sued.

Finally, when the government seeks a global consent decree from all identifiable PRPs, it agrees to supplement fifteen percent of the costs.²¹² Or, if the PRPs do not settle, the possibility exists that they will be able to successfully counterclaim against the government to reduce the amount of money the government recovers from them.²¹³ Cost recovery actions usually recover between ninety to ninety-five percent of the actual response costs.²¹⁴ Realizing savings ranging between five and fifteen percent where the average response cost is \$27.8 million, not to mention any pre-judgment interest savings, is a powerful incentive not to become involved until the EPA seeks some form of recovery.

B. SUGGESTIONS FOR IMPROVEMENT OF CERCLA

The current structure of CERCLA acts as a disincentive because PRPs who voluntarily step into the process bear more of the burdens and costs than PRPs who wait to be sued. The government thus needs to create *positive* incentives for PRPs to come forward early on and work in the process so that the PRPs have to fund very little of the process and so that they do not tie up or waste valuable resources on endless litigation. Initial reform should focus on the evaluation and design of the process. In order to create an optimal solution, many interests must be considered.

Currently, challenges to the EPA-dominated evaluation and design process, previously referred to as "the EPA-designated response action," have been limited. PRPs who have agreed to undertake a response action cannot challenge an EPA-designated response action without subjecting themselves to punitive damages. Punitive damages are not assessable, however, against PRPs who are not currently obligated to comply.

While CERCLA requires that any review conducted be limited to the ROD under the "arbitrary and capricious" standard, the *Hardage* case exemplifies the folly of this mandate. Even though the general public has significant interests in ensuring expeditious and effective cleanup actions, the courts and Congress should not overlook the efficiency consideration in their haste. As *Hardage* indicated, the EPA does not always develop the most efficient or effective solutions. Also, considering that the EPA is a bureaucracy, a fair assumption would be that it rarely achieves efficiency. Before critics balk at the suggestion of giving economic considerations greater weight, they should consider the current state of the economy. Response costs are huge (\$28.7 million on average). There can be no doubt that these costs have a great impact on the PRPs upon which they are assessed. Therefore, cost needs to play a more important role in the final determinations.

An ideal solution would require that both sides work together to produce

212. See *supra* note 152 and accompanying text.

213. See *supra* part III.C.5.

214. See *supra* note 201 and accompanying text.

the optimal result. All considerations need to factor into a final decision. Since the EPA is mainly an advocate of the public health and environmental welfare and since the PRPs can be relied on to monitor costs diligently, the solution must utilize both viewpoints. This cannot be achieved now, however, because the EPA has an authoritarian grant of power. Therefore, no real negotiation takes place. If voluntary compliance allowed PRPs a chance at real participation, rather than mandated orders, more PRPs would be willing to comply. A knowledgeable and neutral arbitrator who could arbitrate disputes as they arose during the design process might be able to foster optimal solutions that reflect all needs. Obviously, general guiding principles would still have to be met. But, the solutions would promote all interests and, in the spirit of true negotiations, would require compromise and cooperation among the parties.

Other helpful changes may center on equalizing and clarifying the provisions of CERCLA. For example, the statute could allow PRPs to recover attorney's fees and other litigation costs.²¹⁵ Congress could better define or imply its intent regarding the term "necessary costs" and "substantial compliance." Congress could make the burden of proof a rebuttable presumption for all parties seeking cost recovery, thereby placing the burden on the non-compliant, non-settling PRPs with whom the burden rightfully belongs. There are many ways in which Congress could shift the burden from compliant PRPs to non-compliant PRPs.

Regardless of how Congress chooses to address the current inconsistencies of CERCLA, it must do so. As it stands currently, CERCLA is a cumbersome statute that defeats its own purpose by discouraging PRP participation. Since CERCLA periodically comes up for re-authorization, these are some considerations for Congress to keep in mind.

215. See *supra* note 196 and accompanying text.

Articles

