

ATTORNEY FEE RECOVERY PURSUANT TO CERCLA SECTION 107(a)(4)(B)

Since Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA),¹ the extent of private party liability has caused great confusion.² Section 107(a) defines the scope of CERCLA liability and creates a cause of action against "potentially responsible parties" (PRPs)³ for hazardous substance⁴ response⁵ cost recovery. Section 107(a)(4)(B) specifically

1. Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (1988)).

2. See, e.g., Paul W. Heiring, Note, *Private Cost Recovery Actions Under CERCLA*, 69 MINN. L. REV. 1135, 1141 (1985) (explaining that "[a]lthough courts agree that CERCLA authorizes private cost recovery actions, they do not agree on the circumstances in which such actions are permissible"); Keith W. Holman, Note, *Wickland Oil Terminals v. Asarco and the 1986 Superfund Amendments: The Tide Turns on CERCLA's Private Right to Recover Hazardous Waste Response Costs*, 17 ENVTL. L. 307, 307 (1987) (noting that "courts have struggled to interpret CERCLA's section 107(a), which allows private parties to recover their hazardous site cleanup costs").

3. See *infra* note 44 and accompanying text for an explanation of PRPs.

4. A hazardous substance is

(A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C.A. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C.A. § 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C.A. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

provides a private cause of action to recover response costs.⁶ Under section 107(a)(4)(B), PRPs are liable for the "necessary costs of response incurred by any other person consistent with the national contingency plan"⁷ (NCP).⁸ A recent issue facing courts with respect to CERCLA response costs is whether attorney's fees are recoverable under section 107(a)(4)(B).⁹

Section 107(a)(4)(B) does not specifically address which costs are consistent with the NCP.¹⁰ Similarly, the Environmental Protection Agency's (EPA) regulations within the NCP fail to clearly *define* the scope of NCP consistency and do not discuss whether attorney's fees are costs consistent with the NCP. Because neither Congress nor the EPA has explicitly defined "consistent with the NCP,"¹¹ courts have discretion to decide on a case by case basis which response costs a private party may recover.¹² Courts disagree on whether to allow a private party recovery of attorney fees pursuant to section 107(a)(4)(B).¹³ Several courts have taken a liberal approach to CERCLA section

CERCLA § 101(14), 42 U.S.C. § 9601(14) (1988).

5. See *infra* note 107 and accompanying text for the CERCLA definition of "response."

6. See *infra* note 43 for an exhaustive list of cases holding that CERCLA section 107(a)(4)(B) creates a private cause of action for response cost recovery.

7. 42 U.S.C. § 9607(a)(4)(B) (1988). This section states in pertinent part:

(4) any person . . . from which there is a release . . . of a hazardous substance, shall be liable for —

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan.

Id.

8. See *infra* note 47 for an explanation of the NCP.

9. See *infra* notes 97-101 and accompanying text for an elaboration on courts' analyses and holdings concerning attorney's fees as recoverable response costs under section 107(a)(4)(B).

10. See *infra* notes 45-48 and accompanying text for the CERCLA definition of "costs."

11. See 55 Fed. Reg. 8858 (1990) (to be codified at 40 C.F.R. § 300.700(c)(3)(i)) (defining "consistent with the NCP" merely as an "action, when evaluated as a whole, [that] is in substantial compliance with the applicable requirements . . . of this section, and results in a CERCLA-quality clean-up").

12. See 55 Fed. Reg. 8794 (1990) (stating that the EPA's list of NCP consistencies does not eliminate the courts' role in choosing which costs should be awarded to private parties engaging in cleanup). See *infra* note 61.

13. See *infra* note 98 for a list of cases in which courts allowed private party attorney fee recovery pursuant to CERCLA section 107(a)(4)(B) and note 100 for a list of cases in which courts refused to award private party attorney fee recovery pursuant to CERCLA section 107(a)(4)(B).

107(a)(4)(B), relying on the spirit and objectives of CERCLA to hold that attorney's fees are recoverable.¹⁴ These courts rely on the plain language of 107(a)(4)(B) to justify attorney's fees awards.¹⁵ Courts refusing to allow attorney's fees under this section, however, abide by the American Rule which generally denies attorney fee awards absent an enforceable contract or statute.¹⁶

This Note argues in favor of awarding attorney's fees in private causes of action under CERCLA section 107(a)(4)(B). Part I examines CERCLA's history, purposes, and interpretation. Part II outlines the various causes of action under CERCLA, with particular focus on the private cause of action. Part III discusses the development and historical policies of fee shifting. Part IV analyzes cases addressing attorney fee awards under CERCLA section 107(a)(4)(B). Part V concludes that awarding attorney's fees pursuant to section 107(a)(4)(B) is consistent with both the American Rule and the purposes underlying CERCLA.

I. CERCLA: ITS HISTORY, PURPOSES, AND INTERPRETATION

At the close of its ninety-sixth session,¹⁷ Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act

14. See *infra* note 111 and accompanying text for a discussion of how the awarding of private party attorney's fees is consistent with the purposes underlying CERCLA.

15. See *infra* notes 108-12 and accompanying text for a discussion of the Eighth Circuit Court of Appeals' view that the plain language of section 107(a)(4)(B) allows for private party attorney's fee recovery.

16. See *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 257, 270 (1975) (defining the American Rule, but refusing to assess its value). See *infra* notes 78-81 and accompanying text for a brief discussion of decisions rejecting private party attorney's fees due to the impact of the American Rule.

17. See *Bulk Distrib. Ctrs., Inc. v. Monsanto Co.*, 589 F. Supp. 1437, 1441 (S.D. Fla. 1984) (detailing the promulgation and evolution of CERCLA during the 96th session); Michael Dore, *The Standard of Civil Liability for Hazardous Waste Disposal Activity: Some Quirks of Superfund*, 57 NOTRE DAME LAW. 260, 267-68 (1981) (same); Jeffrey M. Gaba, *Recovering Hazardous Waste Cleanup Costs: The Private Cause of Action Under CERCLA*, 13 ECOLOGY L.Q. 181, 184 n.6 (1986) (discussing the 96th Congress' attempt to pass a hazardous substance management regulation prior to the Reagan administration). See generally Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982) (elaborating on CERCLA's legislative history); Robert C. Eckhardt, *The Unfinished Business of Hazardous Waste Control*, 33 BAYLOR L. REV. 253 (1981) (same).

of 1980 (CERCLA).¹⁸ After the Love Canal disaster, Congress was well aware of the severe dangers arising from hazardous substances.¹⁹ Consequently, a sense of urgency surrounded the congressional debate regarding CERCLA.²⁰ CERCLA's legislative history is unclear, most likely as a result of its quick passage and unexplained political compromises.²¹ The available legislative history indicates that CERCLA was necessary because its predecessor, the Resource Conservation Recovery Act of 1976 (RCRA),²² failed to adequately respond to inactive and abandoned hazardous substance sites.²³ RCRA's major flaw was

18. Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (1988)).

19. See, e.g., *Bulk Distrib. Ctrs., Inc. v. Monsanto Co.*, 589 F. Supp. 1437, 1441 (S.D. Fla. 1984) (explaining that the Love Canal disaster prompted Congress to pass CERCLA as the end of the ninety-sixth session drew near); *United States v. Northeastern Pharm. & Chem. Co.*, 579 F. Supp. 823, 835 (W.D. Mo. 1984) (highlighting Congress' awareness of Love Canal and other inactive hazardous waste sights prior to CERCLA's enactment), *rev'd in part*, 810 F. 2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); *Homart Dev. Co. v. Bethlehem Steel Corp.*, 22 Env't Rep. Cas. (BNA) 1357, 1367 (N.D. Cal. 1984) (stating that Congress enacted CERCLA "to respond to an immediate and serious national concern which [was] epitomized by the Love Canal episode"). For an in-depth discussion of the Love Canal tragedy, see ADELIN LEVINE, *LOVE CANAL: SCIENCE, POLITICS, AND PEOPLE* (1982).

20. See, e.g., 126 CONG. REC. S30945 (daily ed. Nov. 24, 1980) (statement of Sen. Danforth) "[W]e have no time to lose. Hazardous wastes are produced daily; we cannot put them on hold while we daily through deliberations." In addition, Senator Dole stated that "[t]here can be no question about the urgent need to deal with hazardous waste sites. . . . Federal action is needed to protect present and future generations from the dangers to health and safety that Love Canal has come to typify for many Americans." *Id.* at 30950.

21. *Bulk*, 589 F. Supp. at 1441 (stating that "CERCLA's legislative history is riddled with uncertainty because lawmakers hastily drafted the bill, and because last minute compromises forced changes that went largely unexplained"). See also *Walls v. Waste Resource Corp.*, 761 F.2d 311, 318 (6th Cir. 1985) (pointing out that "the legislative history of CERCLA is vague, reflecting the compromise nature of the legislation eventually enacted"); *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1142 (E.D. Pa. 1982) (explaining that Congress passed "a severely diminished piece of compromise legislation from which a number of significant features were deleted"). For a comprehensive discussion of CERCLA's legislative history, see generally Grad, *supra* note 17, at 1 (detailing CERCLA's legislative history).

22. Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended at 42 U.S.C. §§ 6901-6992 (1988)).

23. *United States v. Northeastern Pharm. & Chem. Co.*, 579 F. Supp. 823, 839 (W.D. Mo. 1984) (explaining RCRA's inadequacies with respect to inactive sites), *rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987). See also Dore, *supra* note 17, at 264-67 (discussing RCRA's monitoring and enforcement gaps which helped initiate CERCLA's enactment). For a further discussion of RCRA, see generally RICHARD C. FORTUNA & DAVID J. LENNETT, *HAZARDOUS WASTE REGULATION*

that it only regulated on-going disposal sites²⁴ and failed to fully regulate all sites which were no longer in operation.²⁵ RCRA's deficiency²⁶ prompted Congress to enact a comprehensive regulatory policy managing hazardous substances²⁷ and to provide a means for quick cleanup of existing inactive hazardous substance sites.²⁸

CERCLA's enactment effectuated the need to clean up dormant sites and provided financing to recover hazardous substance cleanup costs.²⁹ "Superfund" established a \$1.6 billion fund to grant financial assistance for governmental and private cleanups.³⁰ The governmental and private response options enabled CERCLA to become an effective

THE NEW ERA: AN ANALYSIS AND GUIDE TO RCRA AND THE 1984 AMENDMENTS (1987) (comprehensively analyzing RCRA's scope).

24. See Dore, *supra* note 17, at 264-65 (explaining that RCRA provisions cover "safe handling of hazardous wastes from generation to disposal").

25. *Id.* at 266-67. The author explains that although some of RCRA's requirements may apply to abandoned hazardous substance disposal situations, RCRA's important requirements do not apply in those situations. RCRA's "permit and notification requirements" did not apply to abandoned hazardous substance sites "and discovery of the source of environmental problems remain[ed] just as difficult as it [had been] prior to RCRA's enactment." *Id.*

26. The failure of RCRA to address inactive hazardous waste sites is primarily due to its purpose as a "cradle-to-grave" regulatory scheme controlling the movement of hazardous substance from initial production to disposal. *Id.* at 264 & n.35. RCRA regulates parties engaged in ongoing activities relating to the disposal of active hazardous waste. *Id.* at 264-65. Parties leaving inactive abandoned hazardous waste, however, are not engaged in on-going activity and, therefore, are not subject to RCRA's permit and notification requirements. *Id.* at 266-67. See also Joseph K. Brenner, Note, *Liability for Generators of Hazardous Waste: The Failure of Existing Enforcement Mechanisms*, 69 GEO. L.J. 1047, 1051-58 (outlining and criticizing RCRA's cradle-to-grave management scheme).

27. Dore, *supra* note 17, at 267. The author points out that "Superfund was a multi-faceted regulatory scheme designed to provide an independent basis for environmental claims by both government and private parties." *Id.*

28. See, e.g., *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1142-43 (E.D. Pa. 1982) (pointing out that CERCLA "is designed to achieve one key objective — to facilitate the prompt cleanup of hazardous dumpsites"); *Bulk Distrib. Ctrs., Inc. v. Monsanto Co.*, 589 F. Supp. 1437, 1443 (S.D. Fla. 1984) (same); CONG. REC. S30945 (daily ed. Nov. 24, 1980) (statement of Sen. Danforth) (imploing that "[W]e must clean up abandoned hazardous waste sites as soon as possible"). See also *supra* note 20 discussing additional commentary on the urgent need to cleanup abandoned hazardous waste sites.

29. See Brenner, *supra* note 26, at 1056 (acknowledging that CERCLA was enacted to solve unaddressed hazardous waste problems and to finance cleanups).

30. *Id.* See *Stepan*, 544 F. Supp. at 1143 (stating that CERCLA was enacted to finance governmental and private cleanups); *Bulk Distrib. Ctrs., Inc. v. Monsanto Co.*, 589 F. Supp. at 1442 (explaining that Superfund is financed through an excise tax on the

means for combatting abandoned and inactive hazardous substances.³¹

Although Congress professed lofty objectives when enacting CERCLA, its written form is not a model of clarity.³² Because of its ambiguities, courts have read CERCLA liberally to effectuate its general purposes.³³ As CERCLA has matured, courts have been mindful of the congressional intent to give the federal government an effective means of combatting hazardous substance disposal problems promptly and efficiently.³⁴ Furthermore, Congress clearly intended that the fi-

petroleum and chemical industries and the rest is financed through other general revenues).

31. At least one commentator criticizes CERCLA arguing that it is a modified compromise bill which fails to provide for adequate private party relief and to direct a proper standard of liability among PRPs. Brenner, *supra* note 26, at 1056-58. Courts, Congress, and the EPA have answered many of this author's criticisms concerning CERCLA's standard of liability. See *infra* note 35 for cases which place responsibility on those private parties which acted in violation of CERCLA's mandate.

32. See, e.g., *Artesian Water Co. v. Gov't of New Castle County*, 851 F.2d 643, 648 (3d Cir. 1988) (stating that "CERCLA is not a paradigm of clarity or precision. . . . Problems of interpretation have arisen from the Act's use of inadequately defined terms, a difficulty particularly apparent in the response cost area"); *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1142 (E.D. Pa. 1982) (explaining CERCLA's vagueness, lack of clarity, and compromising nature).

33. See, e.g., *Walls v. Waste Resource Corp.*, 823 F.2d 977, 981 (6th Cir. 1987) (taking a liberal approach to CERCLA notification requirements); *Wickland Oil Terminals v. Asarco Inc.*, 792 F.2d 887, 892 (9th Cir. 1986) (liberally interpreting CERCLA § 107(a)(4)(B) to allow private party cleanups without previous government authorization or involvement); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1045 (2d Cir. 1985) (refusing "to interpret section 9607(a) in any way that frustrates [CERCLA's] goals, in the absence of a specific congressional intention otherwise"); *Key Tronic Corp. v. United States*, 766 F. Supp. 865, 871 (E.D. Wash. 1991) (reading CERCLA liberally to avoid frustrating its remedial purposes); *United States v. Northernair Plating Co.*, 685 F. Supp. 1410, 1419 (W.D. Mich. 1988) (taking a liberal approach to governmental "indirect" cost recovery), *aff'd*, 889 F.2d 1497 (6th Cir. 1989); *Mayor and Bd. of Alderman v. Drew Chem. Corp.*, 621 F. Supp. 663, 668 (D.N.J. 1985) (finding that a liberal construction of CERCLA is consistent with its purpose of waste cleanup); *United States v. Reilly Tar & Chem. Co.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982) (noting that "CERCLA should be given a broad and liberal construction"). But see *United States v. Ottati & Goss*, 694 F. Supp. 977, 995, 997 (D. N.H. 1988) (taking an opposing view of *Northernair* and disallowing government "indirect" cost recovery because that recovery is contrary to the plain language of CERCLA); *Bulk Distrib. Ctrs., Inc. v. Monsanto Co.*, 589 F. Supp. 1437, 1446 (S.D. Fla. 1984) (taking the opposite view of *Wickland* and requiring governmental approval of a cleanup plan despite CERCLA's purpose to clean up hazardous waste sites *quickly* as well as effectively). See *infra* note 41 for a discussion concerning government cost recovery under CERCLA.

34. See *Walls*, 823 F.2d at 980 (noting that "Congress intended that the federal government be immediately given the tools necessary for a prompt and efficient re-

nancial burden fall on the parties responsible for causing dangers related to hazardous substance disposal.³⁵ Courts should continue to follow congressional guidelines when deciding evolving issues under CERCLA.

II. CERCLA CAUSES OF ACTION

A. Government Hazardous Substance Site Cleanup

CERCLA Section 104 allows governmental authorities to clean up

sponse" to hazardous substance disposal problems (quoting *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982)); *Jones v. Inmont Corp.*, 584 F. Supp. 1425, 1428 (S.D. Ohio 1984) (recognizing CERCLA's key objective to assist the federal government in promptly cleaning up hazardous waste sites); *Reilly Tar*, 546 F. Supp. at 1112 (same as *Walls*); *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1335, 1142-43 (E.D. Pa. 1982) (same).

35. See, e.g., *Artesian Water Co. v. Gov't of New Castle County*, 659 F. Supp. 1269, 1276 (D. Del. 1987) (explaining that wherever possible "CERCLA places the ultimate financial burden of toxic waste cleanup on those responsible for creating the harmful conditions"), *aff'd* 851 F.2d 643 (3d Cir. 1988); *Bulk Distrib. Ctrs., Inc. v. Monsanto Co.*, 589 F. Supp. 1437, 1443 (S.D. Fla. 1984) (finding that payment by responsible third parties is important in achieving CERCLA's goals); *United States v. Northeastern Pharm. & Chem. Co.*, 579 F. Supp. 823, 848 (W.D. Mo. 1984) (explaining that "the persons who bore the fruits of hazardous waste disposal also bear the costs of cleaning it up"), *rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

Once liability has been established courts have uniformly held responsible parties to a strict liability standard. See, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985) (explaining that Congress intended responsible parties to be strictly liable under CERCLA); *Northeastern Pharm.*, 579 F. Supp. at 844 (same); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 810 (S.D. Ohio 1983) (holding that although CERCLA does not include a liability provision, when two or more parties combine to create a single indivisible harm, those parties are jointly and severally liable for the entire harm). See also H.R. 253, 99th Cong., 2d Sess. 74 (1986), *reprinted in* 1986 U.S.C.A.A.N. 2835, 2856 (citing the *Chem-Dyne* rule with approval).

For an in-depth analysis of CERCLA liability, see Grad, *supra* note 17, *passim* (discussing strict and joint and several liability in CERCLA); Note, *Joint and Several Liability For Hazardous Waste Releases Under Superfund*, 68 VA. L. REV. 1157 *passim* (1982) (discussing the development of federal common law of joint and several liability as applied in Superfund cases); *Reilly Tar*, 546 F. Supp. at 1112 (noting that "Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created"); *Stepan Chemical*, 544 F. Supp. at 1143 (holding that CERCLA places the ultimate financial burden on the party responsible for creating the dangerous conditions). See also H.R. No. 1016, 96th Cong. 2d Sess. 1 (1986), *reprinted in* 1980 U.S.C.A.A.N. 6119, 6119 (stating that CERCLA was enacted "to provide for liability of persons responsible for releases of hazardous waste").

hazardous substance sites.³⁶ Whenever a hazardous substance release or a "substantial threat" of a release occurs, the government may clean up the site.³⁷ After conducting a cleanup under section 104, the government may receive cleanup response³⁸ cost payment from the Superfund.³⁹ The government then recompensates the Superfund through an action pursuant to section 107(a)(4)(A) against the party responsible for the hazardous substance site.⁴⁰ Courts have held that costs such as Justice Department attorney's fees and related costs are recoverable under section 107(a)(4)(A) after a section 104 cleanup response.⁴¹

36. CERCLA § 104, 42 U.S.C. § 9604 (1988).

37. CERCLA § 104(a)(1)(A), 42 U.S.C. § 9604(a)(1)(A) (1988). *See also* Gaba, *supra* note 17, at 186-88 (explaining CERCLA's governmental cleanup options).

38. *See infra* notes 106-07 and accompanying text for the CERCLA definition of "response."

39. CERCLA 111(a)(1), 42 U.S.C. § 9611(a)(1) (1988). *See also* Gaba, *supra* note 17, at 187-88 & n.14 (explaining governmental recovery of response costs from Superfund).

40. CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A) (1988). This provision makes the party responsible for a hazardous substance site liable for:

all costs of removal or remedial action incurred by the United States Government or a State or Indian tribe not inconsistent with the national contingency plan.

Id.

For a definition of "not inconsistent with the national contingency plan," see 55 Fed. Reg. 8794 (1990) (to be codified at 40 C.F.R. 300.700(c)). *See also* Gaba, *supra* note 17, at 187 (explaining government recompensation of Superfund through section 107(a)(4)(A) actions).

41. *See, e.g.,* United States v. Northernair Plating Co., 685 F. Supp. 1410, 1417, 1420 (W.D. Mich. 1988) (holding that plaintiffs could recover attorney's fees and other "indirect costs" such as administrative Superfund costs incurred by the Department of Justice and EPA), *aff'd*, 889 F.2d 1497 (6th Cir. 1989); United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823, 851 (W.D. Mo. 1984) (finding that "since the plaintiff acted pursuant to section 104(a), the Court finds that under CERCLA, the defendants are jointly and severally liable for, and the plaintiff is entitled to recover, all litigation costs, including attorney's fees, incurred by plaintiff"), *rev'd on other grounds*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987). *But see* United States v. Ottati & Goss, 694 F. Supp. 977, 995 (D.N.H. 1988) (holding that "indirect costs necessary to operate the Superfund program cannot be attributed directly to [the defendants'] sites, and are therefore disallowed"). After an appeal, the First Circuit Court of Appeals remanded *Ottati & Goss* for an explanation of why the district court denied EPA "indirect costs." *See* United States v. Ottati & Goss, Inc., 900 F.2d 429, 443-45 (1st Cir. 1990).

Courts may award attorney's fees pursuant to a section 104 cleanup responses because of the language in section 104(b) allowing the government to undertake any *legal* planning and recover any such enforcement costs. *See* CERCLA § 104(b)(1), 42 U.S.C. § 9604(b)(1) (1988) which provides in pertinent part:

In addition, the President may undertake such planning, legal, fiscal, economic,

B. *Private Cause of Action*

Initially, courts were skeptical and refused to recognize a private cause of action for cleanup cost recovery under section 107(a)(4)(B).⁴² Presently, courts consistently hold that section 107(a)(4)(B) creates a private cause of action to recover cleanup costs.⁴³ Section 107(a) limits

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.

42. See, e.g., *Walls v. Waste Resources Corp.*, 22 Env't Rep. Cas. (BNA) 1039, 1042 (E.D. Tenn. 1984) (finding that "Congress did not intend to create a private right of action under CERCLA"). The Sixth Circuit later reversed this holding in *Walls v. Waste Resource Corp.*, 761 F.2d 311 (6th Cir. 1985) (*Walls II*). The court in *Walls II* stated that the district court erred in dismissing plaintiffs' CERCLA claim because CERCLA does create a private right of action. *Id.* at 318.

43. See, e.g., *Cadillac Fairview/California v. Dow Chem. Co.*, 840 F.2d 691, 693 (9th Cir. 1988) (finding that section 107(a)(4)(B) empowers private parties to seek response cost recovery); *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 890 (9th Cir. 1986) (holding that "[s]ection 107(a)(2)(B) expressly creates a private cause of action for damages"); *NL Indus. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986) (same); *Walls II*, 761 F.2d at 318 (holding that "[a]llowing a private action to recover response costs from responsible parties under section [107(a)(4)(B)] is . . . consistent with both the language of section [107(a)(4)(B)] and with the congressional purpose underlying CERCLA"); *Artesian Water Co. v. Gov't of New Castle County*, 605 F. Supp. 1348, 1356 (D. Del. 1985) (same as *Cadillac/Fairview*); *Bulk Distrib. Ctrs., Inc. v. Monsanto Co.*, 589 F. Supp. 1437, 1443 (S.D. Fla. 1984) (same as *Cadillac/Fairview*); *Jones v. Inmont Corp.*, 584 F. Supp. 1425, 1428 (S.D. Ohio 1984) (observing that private parties "have the right to sue under CERCLA's liability provision"); *Homart Dev. Co. v. Bethlehem Steel Corp.*, 22 Env't Rep. Cas. (BNA) 1357, 1367 (N.D. Cal. 1984) (finding that there can be no question that section 9607(a) or (b) creates a private cause of action to recover the cost of response incurred by any private party); *Pinole Point Properties v. Bethlehem Steel Corp.*, 596 F. Supp. 283, 289 (N.D. Cal. 1984) (determining that section 107 provides for a private party cause of action); *Velsicol Chem. Corp. v. Reilly Tar & Chem. Corp.*, 21 Env't Rep. Cas. (BNA) 2118, 2121 (E.D. Tenn. 1984) (ruling that section 107(a)'s plain language allows for a private cause of action for response cost recovery); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 588 F. Supp. 515, 517 (D. Mass. 1983) (allowing private parties to recover response costs from those responsible for the danger under section 107(a)); *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1143 (E.D. Pa. 1982) (holding that 107(a)(4)(B) allows private parties to recover response costs from third parties responsible for the danger).

A private party desiring repayment for a hazardous substance cleanup has several choices. First, he or she can seek cleanup cost reimbursement from the Superfund. CERCLA § 111(a)(2), 42 U.S.C. § 9611(a)(2) (1988). This section may be used to recover cleanup costs so long as the responsible federal official approved and certified the cleanup costs. *Id.* The costs must also result in effectuating the NCP. *Id.* See *infra* notes 57-58 and accompanying text. See also *Gaba, supra* note 17, at 195-96 (explaining the requirements for private party recovery from Superfund). After a party receives compensation pursuant to CERCLA section 111(a)(2), the government can seek to re-

the group of persons responsible for cleanup costs to PRPs who may be liable for either governmental or private party cleanup costs.⁴⁴

plenish the Superfund through a section 107(a)(4)(A) action. *See supra* note 40 and accompanying text for an explanation of the government's power to recoup expenses financed through Superfund. A private party may also choose to move directly against the party responsible for the danger of any cleanup costs through a CERCLA section 107(a)(4)(B) action. CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B) (1988). *See also* Heiring, *supra* note 2, at 1140-41 (explaining different methods of private party recovery under CERCLA).

44. CERCLA §§ 107(a)(4)(A),(B), 42 U.S.C. §§ 9607(a)(4)(A),(B) (1988).

Section 107(a) defines those persons covered and provides:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

- (1) the owner and operator of a vessel or a facility
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
- (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

CERCLA § 107(a), 42 U.S.C. § 9607(a)(1988).

See also Gaba, *supra* note 17, at 188. The author explains that “[s]ection 107 of CERCLA defines the group of people who are potentially liable for government and private party cleanup costs.” Available PRP defenses are listed in CERCLA section 107(b)(1)-(4), 42 U.S.C. § 9607(b)(1)-(4) (1988). These defenses include an act of God and an act of war, as well as a limited third party defense. The proponent of the defense must establish the defense by a preponderance of evidence. *Id.* For a detailed analysis of private party liability and defenses under CERCLA, see generally, Cynthia S. Korhonen & Mark W. Smith, Note, *CERCLA Defendants: The Problem of Expanding Liability and Diminishing Defenses*, 31 WASH. U. J. URB. & CONTEMP. L. 289 (1987) (discussing PRP liability and defenses under CERCLA).

Many courts have pierced the corporate veil to find corporate officers liable pursuant to CERCLA section 107(a)(1) and (a)(3). *See, e.g.,* *New York v. Shore Realty*, 759 F.2d 1032, 1052 (2d Cir. 1985) (finding that corporate officers and shareholders may be

Response costs are expenses to clean up hazardous substance sites. CERCLA defines "response" to mean "remove, removal, remedy and remedial action."⁴⁵ All costs for enforcement activities are also included in the CERCLA definition of "response."⁴⁶ Section 107(a)(4)(B) allows private parties to recover any "necessary costs of response" from responsible parties so long as the costs are "consistent with the National Contingency Plan."⁴⁷

Instead of providing a clear definition of costs that are necessary and consistent with the NCP,⁴⁸ CERCLA section 105 requires the Presi-

liable as "operators" within the meaning of CERCLA section 107(a)(1) for response costs); *United States v. Conservation Chem. Co.*, 628 F. Supp. 391, 420 (W.D. Mo. 1985) (finding a corporate officer and majority stockholder personally liable under § 107(a)); *United States v. Northeastern Pharm. & Chem. Co.*, 579 F. Supp. 823, 848 (W.D. Mo. 1984) (finding "that a 'person' arranging for the disposal of hazardous substance [sic] should be given a liberal interpretation that may include both the employee and corporation"), *rev'd on other grounds*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987). For a comprehensive discussion of veil piercing theories and CERCLA liability, see generally Elizabeth A. Noonan, Note, *To Pierce or Not to Pierce? When is the Question. Developing a Federal Rule of Decision For Piercing The Corporate Veil Under CERCLA*, 68 WASH. U. L.Q. 733 (1990).

45. CERCLA § 101(25), 42 U.S.C. § 9601(25) (1988). See Diane M. Connolly, *Successor Landowner Suits For Recovery of Hazardous Waste Cleanup Costs: CERCLA Section 107(a)(4)*, 33 UCLA L. REV. 1737, 1753-54 (1986) (discussing "response costs" under CERCLA and the actions required to assess and clean up hazardous waste sites within the definition of "response").

46. CERCLA § 101(25), 42 U.S.C. § 9601(25) (1988). See *infra* notes 104-09 and accompanying text for an example of a court's application of this rule.

47. A potentially responsible party (PRP) in a private party cause of action may be liable for "any other necessary costs of response incurred by any other person consistent with the national contingency plan." CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B) (1988). For a private party to recover response costs from a responsible party, "the release of hazardous substances must have 'caused' the incurrence of the costs." *General Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1417 (8th Cir. 1990), *cert. denied*, 111 S.Ct. 1390 (1991).

The complete unabbreviated title of the NCP is The National Oil and Hazardous Substance Pollution Contingency Plan. The NCP is a set of EPA regulations "which describe methods of responding to hazardous waste problems and set forth guidelines for the appropriate roles of state and federal agencies and private parties." *Walls v. Waste Resource Corp.*, 761 F.2d 311, 318 n.5 (6th Cir. 1985). The NCP is located at 40 C.F.R. §§ 300-300.920 (1991).

48. When Congress enacted CERCLA, Congress intended to give specific guidance to governmental authorities involved in hazardous substance cleanup efforts. See, e.g., *Bulk Distrib. Ctrs., Inc. v. Monsanto Co.*, 589 F. Supp. 1437, 1443 (S.D. Fla. 1984) (explaining congressional focus on governmental cleanups and the understandable "ill-defined" nature of private party causes of action). See also Heiring, *supra* note 2, at 1142 (explaining that the EPA promulgated the NCP "to provide guidelines for government response actions utilizing Superfund money"). The EPA gives minimal guidance

dent to continually revise the NCP to effectuate CERCLA's purposes.⁴⁹ However, the President, through the EPA, has given little guidance with respect to defining and limiting costs "consistent with the NCP."

Without a clear definition of "consistent with the NCP," courts have reached different conclusions about NCP consistency.⁵⁰ Although some courts have interpreted NCP consistency narrowly,⁵¹ most courts have adopted a more liberal interpretation of section 107(a)(4)(B)'s NCP consistency requirement.⁵²

Recently, the EPA has followed the liberal trend and interpreted

at 40 C.F.R. § 300.700 (1991), which applies to activities by other persons. See *infra* notes 55-56 and accompanying text for an elaboration on what is consistent with the NCP.

49. CERCLA § 105, 42 U.S.C. § 9605 (1988). See *Exxon Corp. v. Hunt*, 475 U.S. 355, 374 (1986) (explaining that CERCLA section 105 requires the President to regularly revise the NCP). Section 105(a)(8)(B) requires the President to create a national priorities list (NPL) of known hazardous substance disposal sites. *Id.* The current NPL is located at 40 C.F.R. pt. 300, app. B (1991). As of February, 1991, there were 1072 sites placed on the NPL. *Id.*

50. See *Connolly*, *supra* note 45, at 1759-62 (discussing courts' different conclusions about what is consistent with the NCP).

51. See, e.g., *Bulk*, 589 F. Supp. at 1444. The *Bulk* court held that the government must authorize a cleanup plan prior to a private remedial measures and recovery law suit pursuant to CERCLA section 107(a)(4)(B). *Id.* The court expressed a fear of shoddy cleanups and belief that government approval was necessary to ensure efficient private party cleanup. *Id.* at 1446.

52. See, e.g., *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 892 (9th Cir. 1986). The *Wickland* court held that government approval of a cleanup plan is not necessary prior to an action under CERCLA section 107. *Id.* The *Wickland* court reasoned that response costs are consistent with the NCP "so long as the response measures promote the broader purposes of the plan." *Id.* at 891. For a comprehensive analysis of *Wickland*, see generally *Holman*, *supra* note 2 (explaining and applauding the *Wickland* decision).

The 1985 NCP preamble makes it "absolutely clear that no Federal approval of any kind is a prerequisite to a cost recovery under section 107." 50 Fed. Reg. 47,934 (1985). See also *Richland-Lexington Airport Dist. v. Atlas Properties, Inc.*, 901 F.2d 1206, 1208-09 (4th Cir. 1990) (agreeing that governmental approval of a cleanup action is not necessary prior to private suit under CERCLA § 107(a)(4)(B)); *Wilshire Westwood Assoc. v. Atlantic Richfield Corp.*, 881 F.2d 801, 810 (9th Cir. 1989) (same); *Cadillac Fairview/California v. Dow Chem. Co.*, 840 F.2d 691, 695 (9th Cir. 1988) (same); *Tanglewood East Homeowners v. Charles-Thomas Inc.*, 849 F.2d 1568, 1575 (5th Cir. 1988) (same); *NL Industries, Inc. v. Kaplan*, 792 F.2d 896, 899 (9th Cir. 1986) (same); *Allied Towing v. Great Eastern Petroleum Corp.*, 642 F. Supp. 1339, 1349 (E.D. Va. 1986) (same). For an in-depth analysis of whether prior government approval or involvement is necessary pursuant to an action under CERCLA section 107(a)(4)(B), see *Gaba*, *supra* note 17, at 201-05 and *Heiring*, *supra* note 2, at 1145-46.

“consistent with the NCP” broadly.⁵³ Prior to the 1991 NCP revision, many commentators requested that the EPA clearly define and create a list of specific costs within NCP consistency.⁵⁴ Other commentators favored a broader, less restrictive definition of NCP consistency.⁵⁵ The EPA agreed with the latter group and explained that response costs are “consistent with the NCP” if the response, when evaluated entirely, substantially complies with applicable regulations⁵⁶ and results in a CERCLA-quality cleanup.⁵⁷ The EPA purposely defined “consistent with the NCP” broadly in order to avoid strict compliance to a rigid set of requirements for actions pursuant to section 107(a)(4)(B).⁵⁸ The EPA’s purposeful decision to define NCP consistency expansively accords with CERCLA’s remedial purpose to quickly and effectively eradicate hazardous substance sites.⁵⁹ The EPA’s broad interpretation removes private party obstacles and aids in the achievement of prompt hazardous substance site removal.⁶⁰ As a result, courts have full dis-

53. See 55 Fed. Reg. 8794 (1990) (to be codified at 40 C.F.R. § 300.700(c)) (stating that insubstantial deviations from the NCP should not defeat a cost recovery action).

54. See, e.g., 55 Fed. Reg. at 8792. These commentators argued that a comprehensive list of requirements that must be met pursuant to CERCLA § 107(a) action would promote certainty for everyone involved in hazardous substance cleanup efforts. *Id.* An EPA listing of costs “consistent with the NCP” would have permitted attorneys to define precisely which response costs under section 107(a) comport with the EPA list. *Id.*

55. *Id.* These commentators were afraid that a procedural, definitive list would discourage cleanups and frustrate CERCLA’s purpose of prompt private party cleanups. See *supra* notes 33-34 and accompanying text for a further explanation of CERCLA policies.

56. The governing applicable regulations are found at 40 C.F.R. §§ 300.700 (1991). Basically, these regulations establish that cleanup responses must be comprehensive, cost-effective, and provide an opportunity for public comment concerning selection of cleanup methods. *Id.*

57. 40 C.F.R. 300.700 (c)(3)(i) (1991). The EPA stated that the following requirements must be satisfied in order for a cleanup remedy to be a “CERCLA-quality cleanup:” “[t]he remedial action must be ‘protective of human health and the environment,’ utilize ‘permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable,’ and be ‘cost-effective’. . . and provide for meaningful public participation.” 55 Fed. Reg. 8793 (1990). The standards for cleanups are located within CERCLA § 121, 42 U.S.C. § 9621 (1988). Public participation provisions are located at CERCLA § 117, 42 U.S.C. § 9617 (1988).

58. 55 Fed. Reg. at 8793. “[R]igid adherence to a detailed set of procedures should not be required in order to recover costs under CERCLA for private party clean-ups.” *Id.*

59. See *supra* notes 34-35 and accompanying text for an explanation of CERCLA’s general purposes.

60. 55 Fed. Reg. at 8794-95. EPA believes “that it is an important public policy to

cretion to decide whether and to what extent response costs are consistent with the NCP for each individual case.⁶¹

Judicial and EPA interpretation of CERCLA's private cause of action under section 107(a)(4)(B) indicates continuous recognition of CERCLA's basic objectives.⁶² Effective private response cost recovery mechanisms are vital in combatting the dangers of hazardous substance disposal.⁶³ Therefore, courts have recognized that CERCLA's broad remedial purpose⁶⁴ promotes hazardous substance remedies independent of governmentally funded Superfund remedies.⁶⁵ In addition, an efficient private cause of action mechanism saves the government time and finances which otherwise would be expended on Superfund claims pursuant to CERCLA section 111(a)(2).⁶⁶ This lib-

encourage private parties to voluntarily clean up sites, and to remove unnecessary obstacles to their recovery of costs" from the parties that are liable for the contamination. *Id.* at 8794.

61. *Id.* "[T]he final rule provides a standard against which to measure 'consistency with the NCP,' but does not eliminate the very important role of courts in deciding, on a case-specific basis, what costs should be awarded to the party that has undertaken the clean-up." *Id.*

62. *See supra* notes 33-35 and accompanying text for a discussion of Congress' intentions in promulgating CERCLA.

63. This author asserts that liberal applications of CERCLA section 107(a)(4)(B) make it easier to recover cleanup costs from the party responsible for emitting the hazardous substance. More lenient recovery standards could serve as an effective deterrent against improper hazardous substance disposal. *See infra* notes 161-62 and accompanying text for a discussion of the effects of awarding costs to private parties bringing suit pursuant to CERCLA.

64. *See supra* note 33 and accompanying text for a list of cases finding that CERCLA should be broadly interpreted by the judiciary.

65. *See, e.g., Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 892 (9th Cir. 1986). The *Wickland* court recognized "CERCLA's broad remedial purpose" and acted in a way to promote "the effectiveness of private enforcement actions under section 107(a) as a remedy independent of governmental actions financed by Superfund." *Id.* *See also* *Cadillac Fairview/California v. Dow Chem. Co.*, 840 F.2d 691, 694 (9th Cir. 1988) (same as *Wickland*). *But see* *Bulk Distrib. Ctrs., Inc. v. Monsanto Co.*, 589 F. Supp. 1437, 1446 (S.D. Fla. 1984) (construing CERCLA narrowly to require government approval of a cleanup action prior to recovery under 107(a)(4)(B)). *See supra* note 51 for a discussion of the *Bulk* court's construction of CERCLA section 107(a)(4)(B).

66. *See Bulk*, 589 F. Supp. at 1444 (recognizing that the \$1.6 billion Superfund reservoir is not limitless). The *Bulk* court touched on an important idea. If there is a weak private party cause of action under CERCLA, more parties will need Superfund financing to reimburse cleanup costs under CERCLA § 111(a)(2). The government then must reimburse the Superfund through 107(a)(2)(A) actions against responsible parties. Instead of keeping funds in the Superfund treasury, funds would be paid out, forcing the government to seek recovery on its own.

eral reading of section 107(a)(4)(B) further promotes Congress' remedial purpose underlying CERCLA and helps the government maintain control of Superfund monies.⁶⁷

III. FEE SHIFTING

A. *The English Rule*

English courts have awarded attorney's fees to prevailing plaintiffs for centuries,⁶⁸ while successful defendants have received awards since 1607.⁶⁹ After the parties litigate their substantive claims, a separate hearing determines cost allocation, including attorney's fees.⁷⁰ The theory underlying the English Rule is that, but for another's wrongful conduct, the prevailing party would have no reason to endure troublesome litigation.⁷¹ A successful party receives complete compensation under the English Rule.⁷² The end result of English Rule fee shifting is total compensation to the victor through the loser's complete

67. See *Bulk*, 589 F. Supp. at 1444 (stating that private actions are necessary to clean up "sites beyond the reach of Fund-sponsored actions").

68. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1973) (noting that in England, "counsel fees are regularly allowed to the prevailing party"). See also Arthur L. Goodhart, *Costs*, 38 YALE L.J. 849, 852 (1929) (explaining that the first English Law giving a plaintiff attorney's fees was the Statute of Gloucester (1275)); Joseph H. King, Jr. & Zygmunt J.B. Plater, *The Right to Counsel Fees In Public Interest Environmental Litigation*, 41 TENN. L. REV. 27, 31-32 (1973) (same); Scott J. Jordan, Note, *Awarding Attorney's Fees To Environmental Plaintiffs Under a Private Attorney General Theory*, 14 B.C. ENVTL. AFF. L. REV. 287, 290-91 (1987) (same). For more on the history of English fee shifting practices, see CHARLES T. McCORMICK, *DAMAGES* § 60 (1935).

69. See *Alyeska*, 421 U.S. at 247 n.18 (noting that attorney's fees were awarded to defendants "in all actions where such awards might be made to plaintiffs"); Goodhart, *supra* note 68, at 853 (same); King & Plater, *supra* note 68, at 32 (same).

70. See, e.g., *Alyeska*, 421 U.S. at 247 n.18 (explaining that "[i]t is now customary in England, after litigation of substantive claims has terminated, to conduct separate hearings before special 'taxing Masters' in order to determine the appropriateness and the size of an award of counsel fees"); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967) (explaining the role of "taxing Masters" in attorney's fee awards in England and remarking that allowable fees may even include "the amounts that may be recovered for letters drafted on behalf of a client"); Goodhart, *supra* note 68, at 855 (explaining how English courts award attorney's fees and the role of the taxing Master in awarding those fees).

71. See Jordan, *supra* note 68, at 291 (explaining that under the English Rule "the costs of justice should be borne by the losing party because that party imposed the costs onto the other party by forcing the dispute to be resolved in court").

72. King & Plater, *supra* note 68, at 32. The prevailing party usually receives all damages directly caused by the losing party's actions including the costs of litigation.

liability.⁷³

B. American Rule

Despite the fact that American courts originally paralleled their English predecessor, American courts have not followed the English Rule approach.⁷⁴ In 1796, the Supreme Court in *Arcambel v. Wiseman*⁷⁵ refused to grant a \$1600 attorney's fee award.⁷⁶ The *Arcambel* Court explained that the American judicial system almost always disallowed fee shifting.⁷⁷

American courts continuously deny attorney's fees in most circumstances.⁷⁸ In *Alyeska Pipeline Service Co. v. Wilderness Society*,⁷⁹ the Supreme Court held that, unless specified in an enforceable contract or written in a statute, successful litigants could not recover attorney's fees.⁸⁰ This principle has prevailed and is now well entrenched in

Therefore, courts use their equitable discretion to compensate the prevailing party as if the losing party's actions and the suit never took place. *Id.*

73. See *Jordan*, *supra* note 68, at 291. The author notes that the English system "simply requires the losing party to compensate the winning party for its attorney's fees." *Id.*

74. See *King & Plater*, *supra* note 68, at 33. The authors explain that "the most intriguing aspect of the relationship of the American and English rules is the fact that American developments so closely tracked the English model yet ultimately produced such a different result." *Id.*

75. 3 U.S. (3 Dall.) 306 (1796).

76. *Id.*

77. *Id.* "The general practice of the United States is in opposition to [attorney's fees awards unless] it is changed, or modified, by statute." *Id.*

78. See, e.g., *F.D. Rich Co. v. United States ex rel. Indus. Lumber Co.*, 417 U.S. 116, 127 (1974) (prohibiting recovery of attorney's fees in litigation under the Miller Act because attorney's fees were not specifically mentioned in the Act nor was there any evidence of congressional intent to allow such recovery); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 720 (1967) (holding that counsel fees are not recoverable absent express statutorily mandated discretion to award those fees); *Stewart v. Sonneborn*, 98 U.S. 187, 197 (1878) (finding that plaintiffs attorney's fees in malicious prosecution actions are not recoverable); *Oelrichs v. Spain*, 82 U.S. (15 Wall.) 211, 230 (1872) (holding that "[i]n actions of trespass where there are no circumstances of aggravation, only compensatory damages can be recovered, and they do not include the fees of counsel"); *Day v. Woodworth*, 54 U.S. (13 How.) 363, 373 (1851) (disallowing attorney's fees recovery as plaintiffs' compensation or measurement of punitive damages).

79. 421 U.S. 240 (1975).

80. *Id.* at 257 (citing *F.D. Rich*, 417 U.S. at 128-31 and *Hall v. Cole*, 412 U.S. 1, 4 (1973)). The *Alyeska* Court explained that "the rule 'has long been that attorney's fees are not ordinarily recoverable.'" *Id.* at 257 (quoting *Fleischmann*, 386 U.S. at 717).

American jurisprudence.⁸¹ The rationale behind the American Rule is, because litigation is inherently risky,⁸² people should not be discouraged from participation in the judicial system for fear of both losing their case and paying their adversaries' costs.⁸³

Although American courts have adhered to the American Rule, courts have formulated exceptions.⁸⁴ For example, the Supreme Court in *Hall v. Cole*⁸⁵ recognized that federal courts may exercise their equitable powers to award attorney's fees.⁸⁶ As a result, two equitable exceptions have developed. First, courts have the power to shift fees when an adversary acts in bad faith,⁸⁷ punishing the party for acting

81. See, e.g., *Runyan v. McCrary*, 427 U.S. 160, 185 (1976) (making it clear that "absent explicit congressional authorization, attorneys' fees are not a recoverable cost of litigation"); *Fallowfield Dev. Corp. v. Strunk*, 766 F. Supp. 335, 338 (E.D. Pa. 1991) (requiring "an explicit statement of congressional intent to shift fees from the successful plaintiff to the defendant"); *T & E Indus., Inc. v. Safety Light Corp.*, 680 F. Supp. 696, 707 (D.N.J. 1988) (declaring that "it is well-established that a party cannot recover attorney fees unless provided for by contract or statute").

82. See *Fleischmann*, 386 U.S. at 718 (explaining the uncertainty of litigation as support for the American Rule).

83. *Id.* The *Fleischmann* Court reasoned that "one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel." *Id.*

Another argument in favor of the American Rule is the difficulty in obtaining proof of costs which, in turn, causes additional judicial and administrative costs. *Id.* (citing *Oelrichs v. Spain*, 82 U.S. (15 Wall.) 211, 231 (1872)).

84. *Fleischmann*, 386 U.S. at 718.

85. 412 U.S. 1 (1973).

86. *Id.* at 4-5. The *Hall* Court explained that attorney's fees could be awarded "when the interests of justice so require" and federal courts have this power as "part of the original authority of the chancellor to do equity in a particular situation." *Id.* at 5 (quoting *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 166 (1939)). See also *King & Plater*, *supra* note 68, at 38-40 (explaining the origins of equitable exceptions to the American Rule); *Jordan*, *supra* note 68, at 291-92 (same).

87. See, e.g., *F.D. Rich Co., Inc. v. United States Indus. Lumber Co.*, 417 U.S. 116, 129 (1974) (declaring that "attorneys' fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly or for oppressive reasons"); *Hall*, 412 U.S. at 5. (same); *Newman v. Piggie Park Enter., Inc.*, 390 U.S. 400, 401-03 (1968) (affirming a district court award for attorney's fees in a civil rights action due to a party's bad faith); *Toledo Scale v. Computing Scale Co.*, 261 U.S. 399, 427-28 (1923) (affirming an attorney fee award when a party acted in disrespect to the court); *City Bank v. Rivera Davila*, 438 F.2d 1367, 1371 (1st Cir. 1971) (requiring a party who prolonged a trial to pay opponent's costs). For a general discussion of the bad faith exception to the American Rule, see generally Jane P. Mallor, *Punitive Attorneys' Fees for Abuses of the Judicial System*, 61 N.C. L. REV. 613 (1983) (comprehensively looking

reprehensibly.⁸⁸ Second, the common benefit exception⁸⁹ allows a party to recover attorney's fees when the outcome of the case creates a fund benefiting an ascertainable class.⁹⁰ However, this exception is limited⁹¹ to actions which benefit a class and not the public in general.⁹² In the late 1960's and early 1970's, courts attempted to create a private attorney general exception,⁹³ but the Supreme Court's *Alyeska* decision thwarted this attempt by refusing to award attorney's fees unless a statute or enforceable contract granted fee shifting authority.⁹⁴

at fee shifting as a punishment for acting in bad faith). See also King & Plater, *supra* note 68, at 39-43; Jordan, *supra* note 68, at 292-93.

88. See *Hall*, 412 U.S. at 5. The *Hall* court explained that in bad faith cases, "the underlying rationale of 'fee shifting' is, of course, punitive, and the essential element in triggering the award of fees is therefore the existence of 'bad faith' on the part of the unsuccessful litigant." *Id.*

89. *Id.*

90. See *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939). In *Sprague*, the plaintiff sued to enforce a bank's fiduciary obligation. *Id.* at 163. The vindication of the plaintiff's rights necessarily vindicated the rights of many other beneficiaries and creditors who did not participate in the pending litigation. *Id.* To avoid an unjust enrichment, the court remanded the cost issue in the lower court to address the equitable concerns in awarding the plaintiffs attorney's fees. *Id.* at 167.

See also *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970). The *Mills* Court awarded attorney's fees to a plaintiff shareholder who prevailed in a derivative action for violating section 14(a) of the Securities Exchange Act of 1934. *Id.* at 389-90. The Court shifted fees because the suit benefitted an ascertainable class and by requiring the corporation to pay attorney's fees, the loss would spread throughout the benefitted class of shareholders. *Id.* at 394-97.

91. *Sprague*, 307 U.S. at 167 (warning that attorney's fees "allowances are appropriate only in exceptional cases and for dominating reasons of justice").

92. Jordan, *supra* note 68, at 294. This commentator suggests that if the benefitted class is too broad and cannot be ascertained, a court cannot properly spread costs; therefore, the suing party cannot receive attorney's fees. *Id.*

93. See, e.g., *Newman v. Piggie Park Enter., Inc.*, 390 U.S. 400, 402 (1968) (explaining that attorney's fees awards under Title II of the Civil Rights Act would be awarded to a plaintiff as a "private attorney general" to encourage Civil Rights plaintiffs to seek judicial relief and enforce congressional purposes); *Cooper v. Allen*, 467 F.2d 836, 841 (5th Cir. 1972) (permitting an award of attorney's fees under the "private attorney general" theory); *Lee v. Southern Home Sites Corp.*, 444 F.2d 143, 147-48 (5th Cir. 1971) (allowing attorney's fees in a civil rights suit under the "private attorney general" theory). For a history of the private attorney general theory, see *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 263 (1975) and Jordan, *supra* note 68.

94. *Alyeska*, 421 U.S. at 257. The *Alyeska* Court refused to award fees based on a private attorney general approach unless statutorily given the discretion to do so. *Id.* at 269. The *Alyeska* Court explained that without express discretion to shift fees in a statute, "courts are not free to fashion drastic new rules with respect to the allowance of attorney's fees to the prevailing party." *Id.* Some commentators advocate judicial ac-

As a result, but for a few limited exceptions, American courts will not award attorney's fees to prevailing litigants.⁹⁵ Only when a statute clearly awards attorney's fees to successful litigants will American courts shift attorney's fees.⁹⁶

IV. RECOVERY OF ATTORNEY'S FEES UNDER CERCLA § 107(a)(4)(B)

A. *Conflicting Authority*

Until recently, courts did not directly address⁹⁷ whether attorney's fees are recoverable response costs under CERCLA section 107(a)(4)(B). In the past three years, several courts have addressed the issue and reached contrary results. One line of cases takes a liberal approach relying on the plain meaning interpretation of 107(a)(4)(B).⁹⁸ The Eighth Circuit Court of Appeals and various dis-

ceptance of the private attorney general exception. *See, e.g.,* Jordan, Note, *supra* note 68, at 303-11.

95. *See supra* notes 78-81 and accompanying text for cases and discussion concerning the exceptions to fee shifting.

96. *Alyeska*, 421 U.S. at 257 (reaffirming the general rule that, absent statute or enforceable contract, litigants pay their own attorney's fees).

97. *See* Bulk Distrib. Ctrs., Inc., v. Monsanto Co., 589 F. Supp. 1437, 1452 (S.D. Fla. 1984). The plaintiffs in *Bulk* requested an attorney's fee award as well as other expenses. *Id.* Although the court refused to allow a section 107(a)(4)(B) action prior to government authorization of a cleanup plan, the court did not discount the attorney's fee claim. *Id.* The court stated that "[o]nce a claimant has begun to implement a government authorized clean-up program, then those preliminary costs heretofore non-recoverable (e.g. expenses for legal, architectural, engineering, and other planning) may be recaptured." *Id.* This language leaves little doubt that the *Bulk* court would allow attorney's fees pursuant to section 107(a)(4)(B).

98. *See, e.g.,* Key Tronic Corp. v. United States, 766 F. Supp. 865, 871 (E.D. Wash. 1991) (finding that attorney's fees are enforcement costs recoverable under CERCLA section 107); *Bolin v. Cessna Aircraft Co.*, 759 F. Supp. 692, 710 (D. Kan. 1991) (holding that litigation costs that fall within the meaning of "necessary costs" under section 107(a)(4)(B) are recoverable); *Gopher Oil Co. v. Union Oil Co.*, 757 F. Supp. 998, 1006-07 (D. Minn. 1991) (holding that attorney's fees are recoverable pursuant to section 107(a)(4)(B) because this interpretation of CERCLA's statutory language is consistent with Congress' purposes in enacting CERCLA). *See also* General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1422 (8th Cir. 1990) (concluding "that CERCLA authorizes, with a sufficient degree of explicitness, the recovery by private parties of attorney fees and expenses"), *cert. denied*, 111 S. Ct. 1390 (1991); *Pease & Curren Ref., Inc. v. Spectrolab, Inc.*, 744 F. Supp. 945, 950 (C.D. Cal. 1990) (finding that "Congress did intend to allow, and implicitly provided for, the recovery of attorney's fees by private parties as a necessary cost of response"); *Shapiro v. Alexanderson*, 741 F. Supp. 472, 480 (S.D.N.Y. 1990) (finding that Congress intended for attorney fee recovery under section 107(a)(4)(B)). *General Elec. Co. v. Litton Business Sys., Inc.*,

district courts have held that attorney's fees are encompassed in CERCLA's definition of "response"⁹⁹ costs and therefore avoid American Rule problems. The majority of district courts take a narrower approach and refuse to award fees because they fail to meet the American Rule requirements.¹⁰⁰ One district court awarded attorney's fees only to the extent that they are necessary response costs.¹⁰¹

B. *The Liberal Approach*

Only one circuit court of appeals has addressed whether attorney's fees are recoverable under CERCLA section 107(a)(4)(B). In *General Electric Co. v. Litton Industrial Automation Systems, Inc.*,¹⁰² the Eighth Circuit Court of Appeals adopted a liberal view and allowed attorney's fees as recoverable response costs.¹⁰³ Although the *General*

715 F. Supp. 949, 959 (W.D. Mo. 1989) (*General Electric I*) (holding that "CERCLA specifically allows for the recovery of attorney's fees").

99. See *infra* notes 106-09 and accompanying text for a discussion concerning whether attorney's fees fall within the meaning of response costs.

100. See, e.g., *New York v. SCA Services, Inc.*, 754 F. Supp. 995, 1000 (S.D.N.Y. 1991) (stating that "[t]he prevailing rule is that attorney's fees are not recoverable as response costs in actions under § 107 of CERCLA"); *Fallowfield Dev. Corp. v. Strunk*, No. 89-8644, 1990 WL 52745, at *6 (E.D. Pa. April 13, 1990) (declaring that Congress did not intend to allow private parties to collect attorney's fees in private cost recovery actions), *reh'g denied*, 766 F. Supp. 335, 338 (E.D. Pa. 1991); *United States v. Hardage*, 750 F. Supp. 1460, 1511 (W.D. Okla. 1990) (following prior district court decisions to hold that "[a]ttorneys fees and costs of litigation are not recoverable by a private litigant under CERCLA"); *Mesiti v. Microdot Inc.*, 739 F. Supp. 57, 62-63 (D.N.H. 1990) (holding that attorney's fees are not recoverable under section 107(a)(4)(B)); *In re Hemingway Transp., Inc.*, 108 B.R. 378, 383 (Bankr. D. Mass. 1989) (same), *aff'd*, 126 B.R. 656, 663 (Bankr. D. Mass. 1991); *Regan v. Cherry Corp.*, 706 F. Supp. 145, 149 (D. R.I. 1989) (agreeing that private party actions may not recover attorney's fees); *T & E Industries v. Safety Light Corp.*, 680 F. Supp. 696, 707 (D. N.J. 1988) (same as *Mesiti*).

See also *Idaho v. Hanna Mining Co.*, 882 F.2d 392 (9th Cir. 1989). *Hanna Mining* involved a cause of action under CERCLA sections 107(a)(4)(C) and 107(f) for natural resources damages liability. *Id.* at 393-94. Although these provisions are different than CERCLA section 107(a)(4)(B), the Ninth Circuit court refused to permit an award for attorney's fees. *Id.* at 396.

101. See *BCW Assoc., Ltd. v. Occidental Chem. Corp.*, No. 86-5947, 1988 WL 102641, at *22 (E.D. Pa. Sept. 29, 1988) (allowing partial recovery for plaintiffs attorney's fees in a CERCLA 107(a) action).

102. 920 F.2d 1415 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1390 (1991).

103. *Id.* at 1422. The attorney's fees and expenses amounted to more than \$419,000. *Id.* at 1417. The *General Electric* court affirmed an award for reasonable attorney's fees spent for the period before, during, and after filing the suit for response cost recovery. *Id.* at 1422. The court upheld the district court's fee allocation as "le-

Electric court was aware of the American Rule,¹⁰⁴ the court attempted to find CERCLA's express authorization of attorney's fee awards in section 107(a)(4)(B).¹⁰⁵ The *General Electric* court recognized that private parties may recover all necessary "response" costs that are "consistent with the national contingency plan."¹⁰⁶ "Response," as defined by CERCLA, includes removal and remedial actions and all related enforcement actions.¹⁰⁷ Thus, the *General Electric* court interpreted section 107(a)(4)(B) as an enforcement action¹⁰⁸ and concluded that attorney's fees, as necessary expenses in an enforcement action, clearly fell into "response" costs.¹⁰⁹ Furthermore, the *General Electric* court exercised its discretion to shift fees to the prevailing plaintiffs.¹¹⁰ The court explained that awarding private party attorney's fees pursuant to section 107(a)(4)(B) is consistent with CERCLA's purposes.¹¹¹ Moreover, the *General Electric* court feared that a

gally correct and reasonable." *Id.* See *General Elec. Co. v. Litton Business Sys.*, 715 F. Supp. 949, 954-55 (W.D. Mo. 1989) for the district court's attorney fee allocation.

104. 920 F.2d at 1421 (stating that the "general rule is that 'the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser'" (quoting *Alyeska Pipeline Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975))).

105. 920 F.2d at 1421. The *General Electric* court explained that because of the American Rule, "in order to uphold an award of attorney fees, we look to the language of CERCLA." *Id.* "We must find more than 'generalized commands,' there must be a clear expression of Congress' intent." *Id.* (citation omitted) (quoting *Runyan v. McCrary*, 427 U.S. 160, 186 (1976)).

106. 920 F.2d at 1421. See CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B) (1988).

107. CERCLA § 101(25), 42 U.S.C. § 9601(25) (1988) defines "respond" or "response" as: "remove, removal, remedy, and remedial action; all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto."

108. *General Elec.*, 920 F.2d at 1422. The court found that a "private party cost-recovery action such as this one is an enforcement activity within the meaning of the statute." (citing *Cadillac Fairview/California, Inc. v. Dow Chem. Co.*, 840 F.2d 691, 694 (9th Cir. 1988) and *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 892 (9th Cir. 1986)).

109. *Id.* at 1422. The court held that "it would strain the statutory language to the breaking point to read [attorney's fees] out of the 'necessary costs' that section 9607(a)(4)(B) allows private parties to recover." *Id.*

110. *Id.* The *General Electric* court properly took advantage of the statutory exception to the American Rule and shifted fees to the defendant. See *supra* notes 79-82 and accompanying text for cases discussing the statutory exception to the American Rule.

111. *General Elec.*, 920 F.2d at 1422. Awarding attorney's fees "based on [CERCLA's] 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." *Id.* See also notes 34-35 and accompanying text for cases discussing

refusal to award attorney's fees would create a disincentive to clean up hazardous substance sites.¹¹²

The liberal line of cases following the *General Electric* approach awards attorney's fees based on CERCLA's remedial purpose and plain language. These courts agree that Congress intended to give CERCLA a broad interpretation in order to avoid restricting responsible party liability.¹¹³ In addition, the *General Electric* approach bases its conclusion that attorney's fees are necessary¹¹⁴ costs to enforce CERCLA's remedial goals¹¹⁵ on the plain statutory meaning of "response."¹¹⁶ These courts reason that forcing responsible parties to pay

the impact of legislative intent on the shifting of fees in action brought pursuant to CERCLA.

112. 920 F.2d at 1422. The *General Electric* court explained that CERCLA's "purposes would be undermined if a non-polluter (such as GE) were forced to absorb the litigation costs of recovering its response costs from the polluter." *Id.* It continued to explain that the "litigation costs could easily approach or even exceed the response costs, thereby serving as a disincentive to clean the site." *Id.*

Some have argued that *General Electric* should be read as a clean-hands case and should be limited accordingly. See, e.g., *Key Tronic Corp. v. United States*, 766 F. Supp. 865, 872 n.3 (1991). In *Key Tronic*, the court refused to limit *General Electric* in this manner. The court stated that it "cannot find a statutory basis to justify an analytical distinction between those who have clean hands and bring a cost recovery action and those who do not." *Id.*

113. See, e.g., *Key Tronic*, 766 F. Supp. at 871 (holding that courts should read CERCLA broadly to permit recovery and hold wrongdoers responsible); *General Elec. Co. v. Litton Business Sys., Inc.*, 715 F. Supp. 949, 959 (W.D. Mo. 1989) (finding that congressional intent dictates that courts give CERCLA "broad interpretation so as not to restrict the liability of those responsible parties" (citing *United States v. Northeastern Pharm. & Chem. Co., Inc.*, 579 F. Supp. 823, 852 (W.D. Mo. 1984))), *aff'd*, 920 F.2d 1415 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1390 (1991); *Shapiro v. Alexanderson*, 741 F. Supp. 472, 480 (S.D.N.Y. 1990) (same); *Pease & Curren Ref., Inc. v. Spectrolab, Inc.*, 744 F. Supp. 945, 951 (C.D. Cal. 1990) (same).

114. See *General Elec. Co. v. Litton Business Sys., Inc.*, 920 F.2d 1415, 1422 (8th Cir. 1990) (explaining that "[a]ttorney 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"), *cert. denied*, 111 S. Ct. 1390 (1991).

115. See *Pease & Curren Ref. Co.*, 744 F. Supp. at 951. The *Pease & Curren* court explained that:

Congress intended for 'enforcement activities' to include attorney's fees expended to induce a responsible party to comply with the remedial actions mandated by CERCLA. This court cannot ascertain any other logical interpretation which would give effect to this phrase. If this court were to rule otherwise, the phrase "enforcement activities" would be superfluous.

Id.

116. See *supra* note 107 and accompanying text for the CERCLA definition of "re-

for legal costs incurred to clean up hazardous substance sites effectuates CERCLA's basic purposes.¹¹⁷

C. *The Narrow Approach*

Two recent cases represent the narrow approach to attorney fee recovery under CERCLA section 107(a)(4)(B). District courts in *T & E Industries, Inc. v. Safety Light Corp.*¹¹⁸ and *Fallowfield Development Corp. v. Strunk*¹¹⁹ concluded that attorney's fees were not recoverable response costs.¹²⁰ Bound by the American Rule, both courts searched for an attorney's fee provision within CERCLA's statutory language.¹²¹ Neither court interpreted an action under section 107(a)(4)(B) to be an "enforcement" action.¹²² Both courts found that because section 107(a)(4)(B) is not an "enforcement action," private parties cannot incur the enforcement cost that CERCLA contemplates.¹²³ The *Fallowfield* court went one step further and interpreted

sponse." See also *Shapiro*, 741 F. Supp. at 480 (interpreting CERCLA's definition of "response" to include reasonable attorney's fees expended on receiving compensation for response costs); *Pease & Curren*, 744 F. Supp. at 951 (same).

117. See *General Elec.*, 920 F.2d at 1422 (finding one of CERCLA's purposes to be "imposition of all cleanup costs on the responsible party").

118. 680 F. Supp. 696 (D.N.J. 1988).

119. No. 89-8644, 1990 WL 52745 (E.D. Pa. 1991), *reh'g denied*, 766 F. Supp. 335 (E.D. Pa. 1991).

120. *T & E Indus.* 680 F. Supp. at 707 (declaring that "[u]pon careful review . . . this Court finds no indication that attorney fees and costs of litigation are recoverable by a private litigant"); *Fallowfield*, 1990 WL 52745, at *6 (stating that Congress "did not intend to allow private parties to collect attorneys' fees in private cost recovery actions").

121. *T & E Indus.*, 680 F. Supp. at 707; *Fallowfield*, 1990 WL 52745, at *5.

122. Similar to the *General Electric* court, both of these courts began with CERCLA section 107(a)(4)(B) and focused on the word "response." *T & E Indus.*, 680 F. Supp. at 705; *Fallowfield*, 1990 WL 52745, at *6. Both courts then moved to CERCLA section 101(25) and noted that "response" includes "all enforcement activities related thereto." *T & E Indus.*, 680 F. Supp. at 705; *Fallowfield*, 1990 WL 52945, at *6. The disagreement among courts centers on their interpretation of whether section 107(a)(4)(B) is an "enforcement" action.

123. *T & E Indus.*, 680 F. Supp. at 708 n.13. The *T & E Industries* court explained that although "plaintiffs may bring an action for recovery of response costs, they may not bring an action to enforce CERCLA's cleanup provisions against another private entity. Thus, private parties do not incur 'enforcement costs' as contemplated by CERCLA." *Id.* See also *Fallowfield*, 1990 WL 52745, at *6 (same). But see *General Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1422 (8th Cir. 1990) (finding a private party recovery action to be an enforcement activity under CERCLA); *Pease & Curren Ref., Inc. v. Spectrolab, Inc.*, 744 F. Supp. 945, 951 (C.D. Cal. 1990) (holding

the 1986 SARA amendments as an expression of congressional intent to exclude private party attorney fee recovery under section 107(a)(4)(B).¹²⁴ The *Fallowfield* court relied upon comments¹²⁵ by the Committee on Energy and Commerce in determining the meaning of "response" in section 101 and concluded that "response" applies only to governmental recovery of enforcement costs.¹²⁶ This confirmed the *Fallowfield* court's belief that "enforcement" means "government cleanup enforcement" and not private party cost recovery actions.¹²⁷

The rationale behind the narrow approach is strict adherence to the American Rule and refusal to read section 107(a)(4)(B) broadly.¹²⁸ These courts would certainly grant attorney fee awards for government

that a section 107(a)(4)(B) action is an enforcement action within the meaning of CERCLA).

124. *Fallowfield*, 1990 WL 52745, at *6 (finding that "the legislative history of the SARA amendments reveals that Congress did not intend private parties to recover attorneys' fees in cost recovery actions"). For a comprehensive discussion of the 1986 SARA amendments, see generally Holman, *supra* note 2.

125. 1990 WL 52745, at *6. The court relied on comments made by the Committee on Energy and Commerce. *Id.*

126. *Id.* The court relied upon H.R. Rep. No. 235, 99th Cong., 1st Sess. 66-67 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2848-49. *Id.* The comments explain that section 101 "modifies the definition of 'response action' to include related enforcement activities. The change will confirm the EPA's authority to recover costs for enforcement actions taken against responsible parties." *Id.* (quoting H.R. Rep. No. 235). The court in *Fallowfield* restricted "enforcement activities" to actions to collect government response costs under 107(a)(4)(A) after a cleanup under section 104. 1990 WL 52745, at *6. The court refused to extend the same reasoning to private party response cost recovery actions under 107(a)(4)(B). *Id.*

See also *Regan v. Cherry Corp.*, 706 F. Supp. 145 (D.R.I. 1989). In *Regan*, the court refused to award attorney's fees pursuant to section 107(a)(4)(B) because Congress failed to specifically allow attorney's fees when Congress amended CERCLA through the 1986 SARA amendments. *Id.* at 149. The court in *Regan* explained that:

If Congress had intended to permit citizens seeking response costs to recover their attorney fees, it would simply have amended § 107 to allow the recovery of these litigation costs. SARA was a comprehensive overhaul of CERCLA. Therefore it would have been a [sic] simply matter to amend § 107 to allow the recovery of attorney fees.

Id.

127. *Fallowfield*, 1990 WL 52745, at *6. The *Fallowfield* court would award governmental attorney's fee awards under section 107(a)(4)(A). See *supra* note 40 and accompanying text for an explanation of government attorney fee recovery under CERCLA.

128. See *T & E Indus., Inc. v. Safety Light Corp.*, 680 F. Supp. 696, 708 (D.N.J. 1988) (finding no statutory authority for attorney's fee awards and refusing to create the right of recovery).

contribution actions under section 107(a)(4)(A).¹²⁹ Moreover, these courts concur that governmental cleanup responses are clearly “enforcement” actions which allow reimbursement of all necessary costs that are not inconsistent with the NCP.¹³⁰ However, the narrow line rejects the proposition that a private party response cost recovery action is an “enforcement activity.”¹³¹ The refusal to define section 107(a)(4)(B) actions as “enforcement” actions inevitably leads to preclusion of attorney’s fees under the American Rule.¹³²

V. ANALYSIS

A. *Awarding Attorney’s Fees in CERCLA Section 107(a)(4)(B) is Consistent with the American Rule.*

The American Rule disallowing attorney’s fees unless authorized in an enforceable contract or statute is a well-founded principle, requiring strict adherence.¹³³ Courts must find express congressional authorization in CERCLA in order to award attorney’s fees.¹³⁴ Clearly, the government may recover litigation costs in 107(a)(4)(A) actions after initiating site cleanups pursuant to section 104(a).¹³⁵ Specific language in section 104(b) grants authority for governmental attorney fee recov-

129. See *supra* notes 36-41 and accompanying text for an explanation of the governmental cause of action under CERCLA section 107(a)(4)(A) and governmental attorney fee recovery. See also *T & E Indus., Inc.*, 680 F. Supp. at 707-08 (explaining that the government is allowed to receive attorney’s fees under CERCLA section 104(b)); *Fallowfield Dev. Corp. v. Strunk*, No. 89-8644, 1990 WL 52745, at *5 (E.D. Pa. April 23, 1990) (stating that legal fees “were specifically provided for in actions by the government” (citing *United States v. Northeastern Pharm. & Chem. Co.*, 597 F. Supp. 823 (W.D. Mo. 1985), *aff’d in part, rev’d in part*, 810 F.2d 726 (8th Cir. 1986))).

130. See *supra* note 47 and accompanying text for a brief discussion of the NCP.

131. See *Fallowfield*, 1990 WL 52745, at *6 (stating that “enforcement activities” do not include private party recovery of attorney’s fees in an action for private cost recovery).

132. *Id.*

133. See *supra* notes 74-96 for a discussion of the American Rule and its statutory and contractual exceptions.

134. See *General Elec. Co. v. Litton Indus. Automation Sys.*, 920 F.2d 1415, 1421 (8th Cir. 1990) (finding that Congress must clearly express its intent in CERCLA in order to uphold an award of attorney’s fees).

135. See *United States v. Northeastern Pharm. & Chem. Co., Inc.*, 579 F. Supp. 823, 851 (W.D. Mo. 1984) (allowing governmental attorney fee recovery in a CERCLA section 107(a)(4)(A) action after incurring response costs pursuant to section 104(a)), *aff’d in part, rev’d in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987). See *supra* note 41 for a discussion and list of cases which grant attorney’s fees to the government.

ery.¹³⁶ CERCLA's private response cost recovery provision similarly allows private party litigation cost recovery pursuant to a section 107(a)(4)(B) action.¹³⁷ Section 107(a)(4)(B)'s plain language coupled with CERCLA's definition of "response" expressly permits attorney fee recovery and prevents any American Rule problems.¹³⁸

1. Private Causes of Action Pursuant to § 107(a)(4)(B) are Enforcement Actions.

Private parties may recover all "response" costs necessarily incurred that are consistent with the NCP.¹³⁹ CERCLA's definition of "response" includes all enforcement activities related to the response.¹⁴⁰ The central question in deciding attorney fee recovery pursuant to a section 107(a)(4)(B) action is whether a private party response cost action is an "enforcement" action.¹⁴¹ Courts which examine section 107(a)(4)(B) actions in light of CERCLA's broad remedial purpose¹⁴² should conclude that response activities are enforcement actions. Private cost recovery actions enforce CERCLA's objective of expeditious hazardous waste cleanup and place ultimate liability on the party responsible for creating the danger.¹⁴³ As a result, effective private enforcement mechanisms promote congressional goals underlying

136. See CERCLA § 104(b), 42 U.S.C. § 9604(b) (1988). See also *supra* note 41 for the pertinent text of section 104(b).

137. See *supra* note 7 and accompanying text for the language of CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B) (1988).

138. At least one commentator argues that attorney's fees are not recoverable under CERCLA § 107(a)(4)(B). Kanad S. Virk, Comment, *General Elec. Co. v. Litton Indus. Automation Systems, Inc.: Are Attorneys Fees Recoverable in CERCLA Private Cost Recovery Actions?*, 75 MINN. L. REV. 1541 (1991).

139. See CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B) (1988).

140. See *supra* note 107 and accompanying text for CERCLA's definition of "response."

141. This is the key difference between the liberal approach illustrated in *General Electric* (see *supra* notes 108-12 and accompanying text) and the narrow approach followed in *T & E Industries* (see *supra* notes 118-23 and accompanying text).

142. Courts have almost uniformly interpreted CERCLA liberally. See *supra* note 33 for a list of cases broadly interpreting CERCLA.

143. See *supra* notes 34-35 and accompanying text for a discussion of CERCLA's objectives. Forcing an innocent party to pay litigation costs resulting from the hazardous waste disposer's actions hinder CERCLA's goal of ultimate liability. See *supra* note 111 and accompanying text for the *General Electric* court's view that ultimate liability is one of Congress' purposes in enacting CERCLA.

CERCLA's enactment.¹⁴⁴

Courts which attempt to separate government enforcement actions from private cost recovery actions hinder congressional objectives underlying CERCLA. By refusing to classify section 107(a)(4)(B) actions as enforcement actions, these courts define "enforcement actions" as "governmental hazardous substance site cleanup responses,"¹⁴⁵ yet give no reason for choosing a restrictive definition of "enforcement." The plain meaning of "enforcement" is an action to further a command or effectuate something such as a law.¹⁴⁶ Common sense dictates that governmental cleanup responses are not the sole acts that take effect under CERCLA. Both governmental cleanups and private party cleanups achieve the same result¹⁴⁷ of furthering congressional objectives. When a private party sues a responsible party for response cost recovery, the private party should logically wear the same shoes as the government and recover attorney's fees.

House Commission reports do not overcome CERCLA's plain meaning. A House report mentioning that "enforcement" within CERCLA section 101(25) confirms the EPA's right to collect enforcement costs pursuant to section 107(a)(4)(A) does not effectively end the attorney fees inquiry. The House Report simply guides governmental authorities involved in hazardous substance site clean up. This guidance is consistent with CERCLA's general framework as a reference for government responses.¹⁴⁸ If Congress intended to apply two separate definitions of "response," one for the government and one for private parties, Congress would have expressly indicated this intention in

144. See *supra* notes 63-65 and accompanying text for an explanation of how an effective private cause of action promotes CERCLA's objectives.

145. See *supra* note 123 and accompanying text for a sample of cases which narrowly interpret the meaning of a CERCLA enforcement action.

146. BLACK'S LAW DICTIONARY 275 (5th ed. 1983) (defining enforcement as "[t]he act of putting something such as a law into effect; the execution of a law; the carrying out of a mandate or command").

147. This author asserts that there is one less hazardous substance site in the world regardless of whether the government or a private party cleaned up that site.

148. When Congress first enacted CERCLA, courts were unsure as to whether a private cause of action existed. See *supra* note 42 for cases in which courts denied that a private cause of action exists under CERCLA. This uncertainty exists because the language of CERCLA is sometimes unclear due to its quick passage and compromising nature. See *supra* notes 21 & 32 for a discussion of this proposition. The 1980 House Reports and 1986 SARA Amendments focused more on governmental cleanup authorization than private party cleanup actions. *Bulk Distrib. Ctrs., Inc. v. Monsanto Co.*, 589 F. Supp. 1437, 1443 (W.D. Fla. 1984). The *Bulk* court pointed out that "[w]ith Congress' attention focused on government involvement in waste site cleanup, it comes

CERCLA.¹⁴⁹ The SARA amendments added the “enforcement” language in the general definition section 101 of CERCLA, which applies to both governmental and private party causes of action under section 107(a).¹⁵⁰ Had Congress intended to apply “enforcement activities” merely to governmental parties, Congress could have instead placed the amendment in section 104, which applies only to governmental parties.¹⁵¹ The only logical definition of “response” encompasses private party 107(a)(4)(B) actions as “enforcement activities.”¹⁵² Therefore, CERCLA’s plain language requires courts to interpret 107(a)(4)(B) actions as enforcement actions¹⁵³ and not limit the definition of “enforcement.” As enforcement actions, 107(a)(4)(B) actions by private parties are statutorily defined response costs, capable of recovery from responsible parties.

2. Attorney Fee Awards Are Consistent with the NCP

For response cost recovery pursuant to section 107(a)(4)(B), the cost

as no surprise that those portions of CERCLA’s text and legislative history discussing a private party’s rights against *other private parties* . . . are ill-defined.” *Id.*

CERCLA was originally designed to guide governmental authorities and does not provide much guidance for private parties. *See supra* note 48 for a discussion of Congress’ guiding purposes in passing CERCLA.

149. *See Pease & Curren Ref., Inc. v. Spectrolab, Inc.*, 744 F. Supp. 945, 951 (C.D. Cal. 1990) (mentioning that “Congress has not expressly limited the definitions set forth in 101(25) to federal parties”).

150. Respondent’s Brief in Opposition to Petition for a Writ of Certiorari, *Litton Indus. Automation Sys., Inc. v. General Elec. Co.*, in *Hazardous Waste Litigation Reporter* 10, March 18, 1991. [hereinafter *Brief*]. *See also Key Tronic Corp. v. United States*, 766 F. Supp. 865, 871 (E.D. Wash. 1991) (“Congress drafted section 101(25) to establish the scope of response costs recoverable throughout CERCLA; thus, the definition of response, on its face, applies to both the Government and private parties.”).

151. *Brief, supra* note 150, at 11. *See also supra* notes 35-40 for an explanation of the governmental cause of action under CERCLA.

152. In *Regan v. Cherry Corp.*, 706 F. Supp. 145, 149 (D. R.I. 1989), the court disallowed attorney’s fees because Congress failed to specifically provide for attorney’s fees awards when it passed the 1986 SARA amendments. *See supra* note 127 for the relevant text of *Regan*. It should be kept in mind, however, that the 107(a)(4)(B) attorney fee case law had yet to develop when Congress promulgated the SARA amendments. *See Gopher Oil Co. v. Union Oil Co.*, 757 F. Supp. 998, 1006 n.5 (D. Minn. 1991) (explaining that “Congress may not have been aware that courts would interpret CERCLA as disallowing the recovery of attorneys’ fees”).

153. *See Pease & Curren Ref., Inc. v. Spectrolab, Inc.*, 744 F. Supp. 945, 951 (C.D. Cal. 1990). The court in *Pease & Curren* correctly explained that it was “bound by the plain language of the text and will not take it upon itself to so limit the statute.” *Id.*

must be necessarily incurred and consistent with the NCP.¹⁵⁴ A party intending to clean up a hazardous substance site must hire an experienced attorney.¹⁵⁵ Therefore, legal costs are reasonably included as necessary response costs.¹⁵⁶ Congress purposely defined NCP consistency in an open-ended fashion in order to prevent rigid adherence to unbending requirements¹⁵⁷ and promote private party cleanups pursuant to section 107(a)(4)(B).¹⁵⁸ So long as the cleanup itself substantially complies with NCP requirements and results in a CERCLA-quality cleanup,¹⁵⁹ a court cannot refuse attorney fee recovery for a practice inconsistent with the NCP.

B. Fee Shifting is Consistent with CERCLA's Purposes.

As previously mentioned, CERCLA's two basic purposes are prompt hazardous substance site removal and ultimate liability forced upon the party responsible for creating the danger.¹⁶⁰ Attorney fee awards are consistent with both of these general policies. In addition, the guarantee of attorney's fees to prevailing parties creates an incentive to litigate claims and clean up hazardous substance sites.¹⁶¹ Attor-

154. CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B) (1988).

155. Hiring an attorney is necessary if a PRP wants to clean up a hazardous substance site. *See supra* note 71 and accompanying text for an explanation of the theory underlying fee shifting. Environmental suits can be very complex and filled with legal maneuvering. "Dean S. Sommer, New York's assistant attorney general for hazardous waste prosecution . . . says the \$600,000 cleanup of a small waste-oil storage site in New York generated more than 30 depositions, 200 pleadings, and five years of fighting by law firms . . ." Marianne Lavella, *Setting Sites on Superfund*, NAT'L L.J., Feb. 18, 1991, at 37.

156. *See supra* note 114 for a discussion of a court's approach in viewing legal expenses as "necessary."

157. *See supra* note 57 and accompanying text for a discussion of actions that are consistent with the NCP.

158. *See supra* note 60 for an explanation of how broad interpretations of NCP consistency promote private party cleanups.

159. *See supra* notes 56-57 and accompanying text for an explanation of applicable cleanup regulations and the definition of "CERCLA-quality cleanup."

160. *General Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1422 (8th Cir. 1990).

161. Usually, federal courts frown upon incentives to litigate claims. However, this was precisely the purpose underlying CERCLA. Prior to CERCLA's enactment, abandoned hazardous substance sites were not adequately dealt with. *See supra* notes 22-28 and accompanying text for a discussion of the inadequacy of CERCLA's predecessor statute and the need to increase litigation to cleanup abandoned hazardous waste sites. Congress intended to create avenues to clean up these sites. Courts and the EPA have consistently stated that CERCLA's private cause of action is necessary to promote vol-

neys will also litigate more fervently if the party seeking litigation has a strong case.¹⁶² On the other hand, refusing to award attorney's fees creates a disincentive to litigate.¹⁶³ Most importantly, fee shifting promotes congressional objectives of forcing liability on persons responsible for hazardous substance disposal.¹⁶⁴ Parties which litigate pursuant to section 107(a)(4)(B) recover completely while the party disposing hazardous waste is completely liable for the resulting damages.¹⁶⁵

C. Fee Shifting Could Serve as a Deterrent Against Hazardous Substance Disposal and May Prevent Unnecessary Delay.

A stronger private enforcement mechanism makes it easier to recover response costs. Clearly, courts and the EPA need to act consistently to prevent needless or difficult obstacles to a successful private party response cost recovery.¹⁶⁶ Attorney's fee awards prevent potentially responsible parties from safely hiding behind an innocent party's fear of the immense costs involved in response cost recovery litigation. For responsible parties, hazardous substance disposal costs have risen, which could lead to more effective hazardous substance disposal. If the

untary cleanups without significant obstacles. *See supra* notes 60 & 66 and accompanying text for support for this proposition. Disallowing attorney's fees is an unnecessary obstacle to private party cleanups.

Awarding attorney's fees can also save the government money. Allowing attorney's fees strengthens private enforcement mechanisms creating incentives for private parties to litigate directly against PRPs. This saves the government the time, effort, and money that it would expend if a party sought reimbursement from the Superfund pursuant to section 111(a)(2). *See supra* note 66 and accompanying text for a further explanation of the limited finances in Superfund available to the government for enforcement actions under CERCLA.

162. This author believes that the plaintiff bringing an enforcement action can easily gain legal counsel because that counsel is guaranteed payment of a reasonable fee under a fee shifting scheme.

163. *See supra* note 112 explaining that there is no incentive for legal counsel to take CERCLA cases if no fee shifting statute exists.

164. *See supra* note 35 and accompanying text for a discussion of Congress' intent of placing ultimate liability on the party disposing of hazardous waste.

165. This is the English Rule rationale applied to CERCLA section 107(a)(4)(B). *See supra* notes 70-72 and accompanying text for a further explanation of the rationale underlying the English Rule.

166. Courts currently take either a liberal or conservative view in determining whether to award attorney's fees under CERCLA. *See supra* note 33 for a list of cases liberally interpreting CERCLA and notes 60-61 for the EPA interpretation of CERCLA 107(a)(4)(B).

price for hazardous substance disposal skyrockets, potential polluters will think twice before engaging in environmental abuse. This deterrent effect is consistent with congressional concerns about environmental indifference prior to CERCLA's enactment.¹⁶⁷

Attorney's fee awards could also prevent needless delays and hard-ball tactics used by PRP defendants in a CERCLA plaintiff's cost recovery action. Defendants resorting to such tactics will only be hurting themselves by paying higher cost recovery bills. By preventing unnecessary delays, section 107(a)(4)(B) actions will be more effective and will ultimately promote private party cleanup efforts.¹⁶⁸

VI. CONCLUSION

For the first time, courts have struggled with the issue of whether private parties may recover attorney's fees as necessary response costs pursuant to CERCLA section 107(a)(4)(B). Courts answering this question have examined CERCLA's language, under the American Rule direction, and have reached opposite results concerning the issue.¹⁶⁹ The minority of courts have properly concluded that attorney's fees are recoverable.

CERCLA section 107(a)(4)(B) allows prevailing party attorney fee recovery. Section 107(a)(4)(B) actions are enforcement actions and therefore qualify as recoverable response costs.¹⁷⁰ This conclusion is consistent with CERCLA's broad remedial purpose to promptly clean up hazardous substance sites at the expense of responsible parties.¹⁷¹ Courts must keep congressional objectives in mind and construe CERCLA liberally to promote them. Awarding attorney's fees pursuant to section 107(a)(4)(B) actions effectuates congressional purposes and helps strengthen private enforcement mechanisms. Courts that ignore CERCLA's plain language and refuse to allow attorney's fees weaken CERCLA and shift the blame to the American Rule. Instead, courts

167. See *supra* notes 33-34 for a discussion of CERCLA's general purposes.

168. See *supra* notes 65-66 explaining that Congress intended to prevent barriers to section 107(a)(4)(B) private causes of action.

169. See *supra* note 98 for a list of decisions in which courts awarded attorney's fees and note 100 for a list of decisions in which courts refused to award attorney's fees.

170. See *supra* notes 137-47 and accompanying text for a discussion of why CERCLA section 107(A)(4)(B) actions are enforcement actions within the meaning of CERCLA.

171. See *supra* notes 33-35 and accompanying text for a discussion of Congress' intentions in passing CERCLA.

must recognize CERCLA's express language and allow private parties to recover attorney's fees as authorized in section 107(a)(4)(B).

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