

# CERCLA DEFENDANTS: THE PROBLEM OF EXPANDING LIABILITY AND DIMINISHING DEFENSES

## I. INTRODUCTION

Late in 1980 Congress responded to the expensive problem of hazardous waste cleanup by passing the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),<sup>1</sup> commonly referred to as the Superfund.<sup>2</sup> Although the legislative history of CERCLA is somewhat vague and confusing,<sup>3</sup> courts recognize two overriding goals behind its passage.<sup>4</sup> First, Congress intended that the federal government have the power and money to promptly and effectively respond to the national problem of hazardous waste disposal.<sup>5</sup> Second, Congress intended that those parties responsible for the hazardous waste problem pay for its cleanup.<sup>6</sup> To meet these goals, Congress established<sup>7</sup> and the courts instituted<sup>8</sup> a system of defining responsible parties and imposing appropriate remedial costs.

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1. 42 U.S.C. §§ 9601-9657 (1982 & Supp. III 1985).

2. For an overview of CERCLA, see Macbeth & Mayer, *An Introduction to Superfund*, 30 PRAC. LAW. 53 (1984).

3. The vagueness and confusion resulted because Congress enacted the legislation hurriedly. See, e.g., *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1111 (D. Minn. 1982). See also Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982).

4. See, e.g., *Reilly Tar*, 546 F. Supp. at 1112.

5. See *United States v. Mottolo*, 605 F. Supp. 898, 903 (D.N.H. 1985); *Pinole Point Properties v. Bethlehem Steel Corp.*, 596 F. Supp. 283, 287 (N.D. Cal. 1984); *Reilly Tar*, 546 F. Supp. at 1112.

6. See *Mottolo*, 605 F. Supp. at 903; *Pinole Point Properties*, 596 F. Supp. at 287; *Reilly Tar*, 546 F. Supp. at 1112.

7. 42 U.S.C. §§ 9604, 9606 (1982) provide tools for government cleanup. 42 U.S.C. § 9607 provides for a system of liability so that those responsible for the particular hazardous waste problem will pay for the cleanup.

8. Courts have interpreted the statute to impose strict liability. See Giblin & Kelly, *Judicial Development of Standards of Liability in Government Enforcement Action Under the Comprehensive Environmental Response, Compensation and Liability Act*, 33 CLEV. ST. L. REV. 1, 11-13 (1984-85).

CERCLA provides a mechanism for governmental or private cleanup of hazardous wastes.<sup>9</sup> The Act establishes a system of liability<sup>10</sup> to shift the costs of cleanup to certain defined parties.<sup>11</sup> Either the government agency cleaning up the waste or a private party complying with certain requirements<sup>12</sup> may bring a cause of action. This Recent

9. See Note, *Joint and Several Liability under CERCLA—United States v. Chem-Dyne Corp.*, 57 TEMPLE L.Q. 885 (1984).

10. Section 107 contains the heart of the liability provisions, stating that certain persons shall be liable for:

(A) all costs of removal or remedial action incurred by the United States' Government or a state not inconsistent with the National Contingency Plan, (B) any other necessary costs incurred by any other person consistent with the National Contingency Plan, and (C) damages for injury to, destruction of, or loss of national resources, including the reasonable costs of assessing such injury, destruction or loss resulting from such release.

42 U.S.C. § 9607(a)(4)(A)-(C) (1982).

The standard of liability imposed is strict liability. See *United States v. Price*, 577 F. Supp. 1103 (D.N.J. 1983) (imposing strict liability on a past, nonnegligent off-state generator for hazardous waste). Although the language "joint and severally liable" was deleted from the statute, the courts have read the language back in. See, e.g., *United States v. A & F Materials Co.*, 578 F. Supp. 1249 (S.D. Ill. 1984) (holding that Congress intended the courts to impose common law liability rules and that this did not preclude imposition of joint and several liability); *United States v. Wade*, 577 F. Supp. 1326 (E.D. Pa 1983) (holding that the federal courts are justified in developing common law on scope of liability and that joint and several liability should be imposed unless defendants established that a reasonable basis exists for apportioning the harm among them).

11. See *infra* notes 17-20 and accompanying text for a discussion of the potential classes of CERCLA defendants under § 107(a)(1)-(4), 42 U.S.C. § 9607(a)(1)-(4) (1982).

12. 42 U.S.C. § 9607(a)(4)(B) provides for a private cause of action. See *Bulk Distrib. Centers, Inc. v. Monsanto Co.*, 589 F. Supp. 1437, 1443 (S.D. Fla. 1984); *Pinole Point Properties*, 596 F. Supp. at 289; *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 588 F. Supp. 515, 515-17 (D. Mass. 1983).

In order for a private party to file a suit, a release of a reportable quantity of hazardous substance must occur. Subsequently, the private party must make a demand for recovery of costs incurred in cleaning up the spill, and must wait sixty days for satisfaction of the demand. 42 U.S.C. § 9612(a).

The plaintiff must establish two facts to bring a private cause of action under § 107(a)(4)(B). First, he must show that the cleanup is consistent with the National Contingency Plan. See *Pinole Point Properties*, 596 F. Supp. at 290; *United States v. Northeastern Pharmaceutical & Chem. Co. (NEPACCO)*, 579 F. Supp. 823, 850-51 (W.D. Mo. 1984); *New York v. General Elec. Co.*, 592 F. Supp. 291, 303-04 (N.D.N.Y. 1984). The plaintiff does not need to prove preauthorization by the government. *Pinole Point Properties*, 596 F. Supp. at 290.

A second prerequisite is a showing by the plaintiff of some cleanup cost. *A & F Materials Co.*, 578 F. Supp. at 1254. The plaintiff need not show complete cleanup of the site. *Jones v. Inmont Corp.*, 584 F. Supp. 1425, 1430 (S.D. Ohio 1984). The EPA

Development will first explore the various actions<sup>13</sup> that expose a party to CERCLA liability.<sup>14</sup> Second, this paper will examine the extent of the potential liability. Third, the statutory affirmative defenses that a defendant may assert will be investigated. Finally, the ability of a defendant to decrease any damage awards against him, through apportionment, will be explored.

## II. POTENTIALLY LIABLE PARTIES

### A. *A Statutory Overview*

CERCLA specifically imposes liability for cleanup costs<sup>15</sup> on the owner or operator of a site,<sup>16</sup> a prior owner or operator at the time of the hazardous waste disposal,<sup>17</sup> those who arranged for waste disposal or treatment at the site,<sup>18</sup> and any transporter of the hazardous waste.<sup>19</sup> Courts interpret this statutory language to implicitly impose liability on a number of other parties.

### B. *Generators and Transporters*

CERCLA makes parties who generate or transport hazardous wastes found at existing dumpsites liable for their cleanup costs.<sup>20</sup> This liability applies retroactively to reach all past and present genera-

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has stated that cost recovery actions should, however, follow a partial or completed cleanup.

13. Two commentators suggest that a party does not need to take any action to incur CERCLA liability. See Angelo & Bergeson, *The Expanding Scope of Liability for Environmental Damage and Its Impact on Business Transactions*, 8 CORP. L. REV. 101, 106 (1985).

14. An example of a multi-million dollar liability suit under CERCLA is the Love Canal situation. There, the government sued Hooker Chemicals & Plastic Corporation for over \$100 million. Private landowners in the vicinity filed suits for over \$1 billion. Hall, *The Problem of Unending Liability for Hazardous Waste Management*, 38 BUS. LAW. 593, 595 n.11 (1983).

15. 42 U.S.C. § 9607(a)(4)(A) (1982) imposes liability for "all costs of removal or remedial action incurred by the [federal] government or a state not inconsistent with the National Contingency Plan."

16. *Id.* § 9607(a)(1).

17. *Id.* § 9607(a)(2).

18. *Id.* § 9607(a)(3).

19. *Id.* § 9607(a)(4).

20. *Id.* § 9607(a). CERCLA's cleanup and liability provisions are triggered by the release or threatened release of a hazardous substance. See 42 U.S.C. §§ 9604(a)(1)(A), 9606(a), 9607(a) (1982).

tors of hazardous wastes.<sup>21</sup>

Some courts have suggested that Congress intended that those who create and profit from businesses dealing with hazardous waste should be responsible for paying the cleanup costs.<sup>22</sup> The courts, however, have held even non-negligent actors liable for cleanup costs<sup>23</sup> because they interpret the statute as imposing strict liability.<sup>24</sup> Moreover, because the courts read joint and several liability into the statute,<sup>25</sup> a generator or transporter who produces only a small fraction of the hazardous waste may be liable for the cleanup costs for an entire site.<sup>26</sup>

To determine whether a transporter or generator<sup>27</sup> is subject to CERCLA liability, three issues must be considered:<sup>28</sup>

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21. See, e.g., *NEPACCO*, 579 F. Supp. at 839; *Ohio ex rel. Brown v. Georgeoff*, 562 F. Supp. 1300, 1302-12 (N.D. Ohio 1983); *United States v. Waste Indus.*, 556 F. Supp. 1301, 1316-17 (E.D.N.C. 1982), *rev'd*, 734 F.2d 159 (4th Cir. 1984); *United States v. Wade*, 546 F. Supp. 785, 792-93 (E.D. Pa. 1982); *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1140-41 (E.D. Pa. 1982).

22. *NEPACCO*, 579 F. Supp. at 839-40 (construing 126 CONG. REC. S14,962-63 (1980) (remarks of Sen. Randolph); S14,966 (remarks of Sen. Stafford); S14,972 (remarks of Sen. Tsongas); and 126 CONG. REC. H11,799 (1980) (remarks of Rep. Jeffords)). The court stated that Congress wanted to spread the cost of cleanup and decided that those who had caused or profited from the problem should pay for its remedy.

See also *Stepan Chem. Co.*, 544 F. Supp. at 1143 n.10 (suggesting that Superfund liability be confined to those who engaged in hazardous waste disposal for commercial profit). See generally Dore, *The Standard of Civil Liability for Hazardous Waste Disposal Activity: Some Quirks of Superfund*, 57 NOTRE DAME LAW. 260 (1981).

23. See *NEPACCO*, 579 F. Supp. 823 (W.D. Mo. 1984) (court held that CERCLA applies retroactively to impose liability for response costs on nonnegligent off-site generator of hexachlorophane; cost computed after CERCLA's effective date).

24. See *supra* notes 8, 10.

25. See *supra* note 10.

26. See generally Moore & Kowalski, *When Is One Generator Liable for Another's Waste?*, 33 CLEV. ST. L. REV. 93 (1984-85). The authors argue that while some courts have imposed joint and several liability, the decision to impose this liability is discretionary, not mandatory, under the statute. The authors note that some courts are reluctant to hold small contributors jointly and severally liable for massive cleanup costs. *Id.* at 105.

27. For a discussion of ways that a party can argue that he is not a generator, see Comment, *CERCLA Litigation Update: The Emerging Law of Generator Liability*, 14 *Env't. L. Rep.* (Env't. L. Inst.) 10,224, 10,225-26 (1984) [hereinafter *CERCLA Litigation Update*]. Notably, the "generators" are often corporations. Recent cases suggest that shareholders and officers may not be protected from liability by the corporate veil. See *infra* notes 74-89 and accompanying text.

28. See *CERCLA Litigation Update*, *supra* note 27, at 10,227-29.

### 1. Timing

Transporters and generators are liable for pre-CERCLA acts if they are connected to current or threatened releases of hazardous materials.<sup>29</sup>

### 2. Standard of Culpability

Though the statute is silent on which liability standard to impose, courts typically impose strict liability.<sup>30</sup>

### 3. Causation

The courts find causation when a party sends wastes to a site, when these wastes were present at the time of a release, and when a release of hazardous waste occurs.<sup>31</sup>

## C. Owners of Contaminated Property

CERCLA specifically holds all owners of a contaminated site liable for cleanup costs.<sup>32</sup> Because a majority of courts impose strict liability,<sup>33</sup> an "innocent" property owner may be held liable for cleanup costs resulting from illegal or unauthorized hazardous waste dumping. Courts have discussed the liability associated with two particular types of "innocent" parties.

### 1. Owners of Property On Which Illegal Dumping Has Occurred

In *City of Philadelphia v. Stepan Chemical Co.*<sup>34</sup> the City of Philadel-

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29. *Id.* at 10,227. See also *NEPACCO*, 579 F. Supp. at 839 (court held that liability applied retroactively); *Ohio ex rel. Brown v. Georgeoff*, 562 F. Supp. 1300 (N.D. Ohio 1983) (CERCLA authorizes retroactive liability for transporters).

30. See *supra* notes 8, 10. See also *CERCLA Litigation Update*, *supra* note 27, at 10,228 n.4.

31. See *CERCLA Litigation Update*, *supra* note 27, at 10,228-29. See also *United States v. Wade*, 577 F. Supp. 1326 (E.D. Pa. 1983); *United States v. South Carolina Recycling & Disposal, Inc.*, 14 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 20,272 (D.S.C. 1984) (preliminary opinion granting summary judgment).

32. 42 U.S.C. § 9607(a)(1) states that "the owner and operator of a vessel . . . or a facility [shall be liable for clean up costs]." 42 U.S.C. § 9601(9) defines "facility" to include "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise came to be located."

33. See *supra* notes 8, 10. See also *United States v. Maryland Bank & Trust*, 632 F. Supp. 573 (D. Md. 1986) (an owner of contaminated property need not have been the operator).

34. 544 F. Supp. 1135 (1982).

phia sought to recover costs incurred when cleaning up a city dump contaminated by the defendant's illegal dumping of hazardous waste. The defendant argued that the city should be liable as a responsible party under CERCLA.<sup>35</sup> Although the court did not determine whether Philadelphia was a responsible party,<sup>36</sup> it discussed in dicta the liability of such an "innocent" party. The court noted that if the entity falls within the technical description of a responsible party but has little or no connection with the creation of the hazardous condition, CERCLA liability may be unwarranted.<sup>37</sup> The language suggests that a court should limit liability to parties who engage in substantial and purposeful hazardous waste disposal activity or who obtain some commercial benefit from their conduct.<sup>38</sup>

The majority of courts, however, have not been lenient in their imposition of strict liability.<sup>39</sup> Because the Act specifically states that site owners are responsible for cleanup costs<sup>40</sup> and because courts impose strict liability,<sup>41</sup> an "innocent" owner of property on which illegal or unauthorized dumping occurred will probably be held liable.<sup>42</sup> To hold a landowner strictly liable for the cleanup cost of any toxic waste on his property would, however, make him liable for toxic wastes that are illegally dumped, run off neighbor's property, or inadvertently find their way on to his property.

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35. Stepan argued that because the city owned the dump site, it was a responsible party under 42 U.S.C. § 9607(a)(1)-(4). It contended that the term "any other person" as used in § 107(a)(4)(B) did not include a party that is itself subject to liability. The court rejected Stepan's argument that responsible parties did not have the right to sue other responsible parties. 544 F. Supp. at 1139-42.

36. Philadelphia did not seriously oppose Stepan's contention that it was a responsible party. *Id.* at 1143 n.10.

37. *Id.* The court quoted an article which argues that CERCLA liability should only attach to parties who either engage in substantial and purposeful hazardous waste disposal or profit from their conduct. *Id.* See Dore, *supra* note 22, at 276.

38. 544 F. Supp. at 1143 n.10.

39. *But cf.* New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985) (court declined to hold liable tenant who had dumped hazardous wastes on the property; landlord held liable).

40. 42 U.S.C. § 9607(a)(2) (1982).

41. See *supra* notes 8, 10.

42. See Angelo & Bergeson, *supra* note 13, at 106-07. The authors note that certain situations such as land trusts in which title to property is held in the name of a trustee are common. They state that "[c]ommon sense suggests that mere possession of title in such a situation should not be dispositive as to the question of ownership of the property." *Id.*

## 2. Innocent Purchasers of Contaminated Property

In *New York v. Shore Realty Corp.*<sup>43</sup> the Second Circuit Court of Appeals addressed the question of whether a purchaser of contaminated property is liable for the cleanup costs associated with previously dumped hazardous waste. The court held that to allow the new owners to avoid CERCLA liability would frustrate the statute's goals.<sup>44</sup> The court noted that persons who dump or store hazardous waste often cannot be located, may be deceased, or may be judgment proof.<sup>45</sup> Though the defendant in *Shore Realty* knew of the toxic waste on the property at the time of purchase,<sup>46</sup> the court's reasoning suggests that an "innocent,"<sup>47</sup> unknowing purchaser would also be liable.<sup>48</sup>

### D. Lessors and Lessees

In *United States v. South Carolina Recycling and Disposal, Inc. (SCRDI)*<sup>49</sup> the district court held both a lessor and a lessee liable for cleanup costs on contaminated property. In *SCRDI* the Columbia Organic Chemical Company (COCC) negotiated a lease of property and then subleased a tract to South Carolina Recycling and Disposal.<sup>50</sup> During COCC's leasehold, SCRDI deposited hazardous substances on the property.<sup>51</sup> The court, imposing liability on COCC as a

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43. 759 F.2d 1032 (2d Cir. 1985).

44. *Id.* at 1045.

45. *Id.*

46. *Shore Realty* had prepared estimates of the cleanup cost and had unsuccessfully attempted to obtain a waiver for cleanup cost from the New York Department of Environmental Conservation. *Id.* at 1038-39.

47. In *D'Imperio v. United States*, 575 F. Supp. 148 (D.N.J. 1983), an "innocent" purchaser of contaminated property tried to obtain a declaratory judgment that a purchaser was not liable for cleanup costs of toxic waste of which he was unaware. Although sympathetic to plaintiff's position, the court declined to rule because the question was not ripe.

48. See *United States v. Carolawn Co.*, 14 *Envtl. L. Rep.* (Envtl. L. Inst.) 20,699 (D.S.C. 1984).

49. 14 *Envtl. L. Rep.* (Envtl. L. Inst.) 20,272 (D.S.C. Feb. 23, 1984) (preliminary opinion granting summary judgment against SCRDI, the sublessee), 14 *Envtl. L. Rep.* (Envtl. L. Inst.) 20,895 (D.S.C. Aug. 28, 1984).

50. COCC and SCRDI were essentially the same entity. COCC officials incorporated SCRDI for the purpose of continuing COCC's waste brokering and recycling operations under the auspices of a separate corporation. 14 *Envtl. L. Rep.* (Envtl. L. Inst.) at 20,273. The court's analysis, however, does not treat this fact as significant.

51. *Id.* at 20,273-74.

lessee/sublessor,<sup>52</sup> stated that “[a]part and distinct from its participation in the operation of the . . . site, COCC, as lessee of the site, maintained control over and responsibility for the use of the property and, essentially, stood in the shoes of the property owners.”<sup>53</sup> Thus, under *SCRDI* the lessor in a typical lessor-lessee relationship will be liable for the lessee’s contamination of the property.<sup>54</sup>

### E. *Liability of Creditors*

CERCLA’s imposition of liability on any past or present owner or operator of a hazardous waste site may extend to secured creditors.<sup>55</sup> The statute, however, defines owner or operator so as to exclude a “person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.”<sup>56</sup> The wording of the statute suggests that any secured creditor who participates in the financial management of a vessel or facility may be liable for waste release cleanup. Because secured creditors often participate in the financial affairs of debtors, this interpretation could emasculate the exception for secured creditors.

This broad interpretation of “participation in . . . management” by creditors was rejected in *United States v. Mirabile*.<sup>57</sup> The district court distinguished between participation in financial decisions and participation in operational, production, or waste disposal activities,<sup>58</sup> finding

52. *SCRDI*, 14 Env’tl. L. Rep. (Env’tl. L. Inst.) at 20,897. The court also found COCC liable for the actions of its corporate officers, *id.* at 20,897-98, and co-joint ventures, *id.* at 20,898, and liable as a “person who arranged for disposal or treatment” of hazardous substances, *id.*, and as a transporter of hazardous substances, *id.*

53. *Id.* at 20,897. The court cited other cases in which “owner” was construed to include leaseholders in the context of condemnation. *Id.* See *Hager v. Devil’s Lake Pub. School Dist.*, 301 N.W.2d 630 (N.D. 1981); *Allen v. Hall County*, 156 Ga. App. 629, 275 S.E.2d 713 (1980); *Elliott v. Joseph*, 351 S.W.2d 879 (Tex. 1961).

54. See also *United States v. Mirabile*, 15 Env’tl. L. Rep. (Env’tl. L. Inst.) 20,994 (E.D. Pa. 1985).

55. 42 U.S.C. § 9607(g) (1982).

56. *Id.* § 9601(20)(A). A party seeking to fall within this exemption has the burden of proving it is so entitled. Cf. *United States v. First Nat’l Bank*, 386 U.S. 361, 366 (1967) (Bank Merger Act of 1966); *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948) (Robinson-Patman Act); *SEC v. American Int’l Sav. & Loan Ass’n*, 199 F. Supp. 341, 347 (D. Md. 1961) (Securities Act of 1933).

57. 15 Env’tl. L. Rep. (Env’tl. L. Inst.) 20,994 (E.D. Pa. 1985).

58. *Id.* at 20,995.



the former too attenuated.<sup>59</sup> The court concluded that actual participation in operational, production, or waste disposal activities was necessary to impose liability.<sup>60</sup> The court, however, limited this distinction to secured creditors of businesses who dispose of hazardous waste as a result of operations,<sup>61</sup> noting that a different test might apply to creditors of entities whose sole business is waste disposal.<sup>62</sup>

Two commentators suggest that when a lender becomes involved in the management of the property, as in a bankruptcy workout or creditor in possession situation, the creditor may become liable for cleanup.<sup>63</sup> In *United States v. Maryland Bank and Trust*<sup>64</sup> the court found a bank that held a mortgage on some property and then later purchased the property at a foreclosure sale<sup>65</sup> liable for cleanup costs. The court held that the secured creditors exception does not apply to former mortgagees who purchase the property before cleanup costs are incurred.<sup>66</sup>

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59. *Id.* at 20,995 ("mere financial ability to control waste disposal practices . . . is not . . . sufficient for the imposition of liability").

60. *Id.* The court noted that Congress had this distinction in mind when enacting CERCLA. "In the case of a facility, an 'operator' is defined to be a person who is carrying out *operational* functions for the owner. . . ." *Id.* at 20,995-96 (quoting H.R. REP. NO. 172, 96th Cong., 2d Sess. 37, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6160, 6182).

61. 15 Env'tl. L. Rep. (Env'tl. L. Inst.) at 20,996 n.5.

62. *Id.*

63. Angelo & Bergeson, *supra* note 13, at 101, 111-12. The authors also point out that creditors may lose their status through state environmental laws that place "super liens" on property that contains toxic waste. *Id.* at 106-08. See generally Note, *Priority Lien Statutes: The States' Answer to Bankrupt Hazardous Waste Generators*, 31 WASH. U.J. URB. & CONTEMP. L. 373 (1987).

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

65. *Id.* at 577. Maryland Bank & Trust held a mortgage on the site beginning on December 16, 1980. *Id.* at 575. It instituted foreclosure proceedings in 1981 and purchased the property at the foreclosure sale on May 15, 1982. *Id.* The EPA cleanup took place in 1983. *Id.*

66. *Id.* at 579. The court reserved judgment on the liability of a creditor who purchases property at a foreclosure sale and then promptly resells it. See also *Mirabile*, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) at 20,996 (holding that a former mortgagee who purchased property at a foreclosure sale and assigned it four months later was exempt from liability); *In re T.P. Long Chem., Inc.*, 22 Env't Rep. Cas. (BNA) 1547 (Bankr. N.D. Ohio 1985) (court suggested in dictum that if the bank had repossessed its collateral in a toxic waste dump it would have qualified for the exemption).

## F. *Liability of Corporations and Those Within A Corporation*

### 1. Successor or Merged Corporations

In addition to incurring liability for activities such as generating hazardous waste,<sup>67</sup> transporting hazardous waste,<sup>68</sup> or purchasing contaminated property,<sup>69</sup> a corporation may incur liability for other activities. The EPA argues that a corporation assumes the environmental liabilities of a corporation with which it merges.<sup>70</sup> The EPA also contends that liability should be imposed on a successor corporation in an asset purchase.<sup>71</sup> One commentator maintains that successor liability is a better method than joint and several liability for insuring that liability is imposed on the enterprise.<sup>72</sup> He claims that successor liability internalizes costs within the particular type of manufacturing enterprise rather than within the industry as a whole.<sup>73</sup>

### 2. Corporate Officials

Courts recently extended liability to officers of corporations that incur CERCLA liability.<sup>74</sup> In *United States v. Northeastern Pharmaceutical and Chemical Co. (NEPACCO)*<sup>75</sup> the court found both the president and vice president of a corporation jointly and severally liable for the cleanup costs at a hazardous waste site.<sup>76</sup> The corporation, under the president and vice president's direction, engaged in manufac-

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67. 42 U.S.C. §§ 9604(a)(1)(A), 9606(a), 9607(a) (1982).

68. *Id.* § 9607(a)(4).

69. *Id.* § 9607(a)(1).

70. Angelo & Bergeson, *supra* note 13, at 109 n.2 (citing Memorandum from Courtney M. Price, EPA Assistant Administrator for Enforcement and Compliance Monitoring, Liability of Corporate Shareholders and Successor Corporations for Abandoned Sites Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) 12 (June 13, 1984)).

71. *Id.* But see *United States v. Bliss*, 108 F.R.D. 127, 132 (E.D. Miss. 1985) (a successor corporation is generally not liable for the former corporation's debts and liabilities).

72. See Comment, *Successor Corporate Liability for Improper Disposal of Hazardous Waste*, 7 W. NEW ENG. L. REV. 909, 921 (1985).

73. *Id.*

74. See *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985); *United States v. NEPACCO*, 579 F. Supp. 823 (W.D. Mo. 1984); *United States v. Carolawn Co.*, 14 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,699 (D.S.C. 1984).

75. 579 F. Supp. 823 (W.D. Mo. 1984).

76. *Id.* at 849.

turing processes of which dioxin was a byproduct.<sup>77</sup> The president and vice president authorized the burial of eighty-five 55-gallon drums of toxic waste in trenches on a farm.<sup>78</sup> The United States brought an action against the chemical company and the two corporate officers for the cleanup cost at the site.<sup>79</sup> The court rejected the argument that corporate officers are not normally liable for acts of the corporate entity.<sup>80</sup> Responding to defendant's claims that as corporate officers they neither owned nor possessed the hazardous waste involved,<sup>81</sup> the court declared that section 107(a)(3) does not require that an individual actually own or possess the hazardous waste to be subject to liability,<sup>82</sup> but requires only that the person arrange for the disposal of the hazardous waste.<sup>83</sup> The court then proceeded to give "person" a broad definition to include both an officer and the corporation.<sup>84</sup>

The court further implied that liability would be imposed on any person owning an interest in or participating in the management of a corporation that disposes hazardous wastes.<sup>85</sup> The court reached this result based on its determination that Congress intended persons who bore the fruits of hazardous waste to also bear the cleanup costs.<sup>86</sup>

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77. *Id.* at 828.

78. *Id.* at 830.

79. *Id.* at 826.

80. *Id.* at 847.

81. *Id.*

82. *Id.* Section 107(a)(3) states in pertinent part:

(3) any person who by contract, agreement or otherwise arranged for disposal or treatment, or arranged with a transporter to transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, and any facility owned or operated by another party or entity and containing such hazardous substances. . . .

42 U.S.C. § 9607(a)(3) (1982).

83. 579 F. Supp. at 847.

84. *Id.* at 848. The court analogized from the case of *Apex Oil Co. v. United States*, 530 F.2d 1291, 1293 n.6 (8th Cir. 1976), *cert. denied*, 429 U.S. 827 (1976), in which the court construed § 311(b)(5), (6) of the Water Pollution Control Act, 42 U.S.C. § 1321(b)(5), (6). The Eighth Circuit held that "person in charge" could include both the individual employee and the corporation. 530 F.2d at 1294.

85. 579 F. Supp. at 848 & n.29. *See also* *United States v. Carolawn Co.*, 14 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,699, 20,700 (1984) (corporate officials who participate in hazardous waste disposal activities are subject to individual liability); *Dewitt Truck Brokers v. Ray Fleming Fruit Co.*, 540 F.2d 681 (4th Cir. 1976) (rejecting corporate officers' contention that government could not pierce the corporate veil).

86. *Id.* at 848. *See also* *State ex rel. Brown v. Georgeoff*, 562 F. Supp. 1300, 1312

### 3. Shareholder Liability

The EPA contends that a shareholder comes within the statutory definition of "owner and operator" and should therefore be held responsible for a corporation's CERCLA liability.<sup>87</sup> In *United States v. NEPACCO* the court found a major shareholder who also actively participated in management to be an "owner and operator" within the Act's definition.<sup>88</sup> Under *NEPACCO*, therefore, the court may pierce the corporate veil to subject shareholders to CERCLA liability.<sup>89</sup>

## III. THE DEFENDANT'S POTENTIAL LIABILITY

### A. Statutory Overview

When enacting CERCLA, Congress intended to hold those parties responsible for inadequate hazardous waste disposal liable for the costs associated with removal or remedial action.<sup>90</sup> Consequently, CERCLA's provisions specifically hold defendants liable for incurred "response costs."<sup>91</sup> Three parties are allowed to collect incurred response costs from responsible defendants: government entities,<sup>92</sup> private parties,<sup>93</sup> and trustees of public lands.<sup>94</sup> Reimbursement for removal or

(N.D. Ohio 1983); *United States v. Waste Indus.*, 556 F. Supp. 1301, 1316 (E.D.N.C. 1982), *rev'd*, 734 F.2d 159 (4th Cir. 1984).

87. Angelo & Bergeson, *supra* note 13, at 110.

88. *NEPACCO*, 579 F. Supp. at 848. The court continued: "[f]rom the language of the statute either an owner or operator or both can be held liable. In some circumstances these parties may be the same or separate and distinct persons." *Id.* at 848 n.29.

89. See also *Carolawn*, 14 *Envtl. L. Rep. (Envtl. L. Inst.)* at 20,700; *Shore Realty*, 759 F.2d at 1052. In Angelo & Bergeson, *supra* note 13, at 110, the authors suggest subjecting shareholders to liability because of ownership or management involvement as a liability basis different than piercing the corporate veil.

90. See *supra* note 6 and accompanying text.

91. The statute states that persons associated with a facility: from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for:

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

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

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

42 U.S.C. § 9607(a)(4)(A)-(C) (1982).

92. *Id.* § 9607(a)(4)(A).

93. *Id.* § 9607(a)(4)(B).

remedial action, however, is conditioned on consistency with the National Contingency Plan.<sup>95</sup>

### B. *Action by the Federal or State Government*

Under section 107(a)(4)(A) a federal or state governmental entity may sue parties responsible for inadequate toxic waste disposal<sup>96</sup> to recover incurred response costs. Controversy arises in defining recoverable costs,<sup>97</sup> interpreting the requirement that costs be incurred before suit is filed,<sup>98</sup> and determining whether the response is consistent with the National Contingency Plan.<sup>99</sup>

94. *Id.* § 9607(a)(4)(C).

95. *Id.* § 9607(a)(4)(A)-(B). *See infra* notes 118-124, 132-39 and accompanying texts.

96. 42 U.S.C. § 9607(a)(4)(A).

97. The Act defines response costs as expenditures for removal or remedial action. *Id.* § 9607(a)(4). *See infra* notes 103-110 and accompanying text.

98. *See infra* note 113-17 and accompanying text.

99. *See infra* notes 118-24 and accompanying text. Preliminary requirements to a section 107(a)(4) action include the release of a reportable quantity of a hazardous substance. CERCLA defines a release as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment." 42 U.S.C. § 9601(22) (1982). A hazardous substance is defined as:

(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. 6921]; (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. 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the [EPA] has taken action pursuant to section 2606 of title 15.

42 U.S.C. § 9601(14) (1982). A reportable quantity is defined by reference to quantities established under the Clean Water Act. *See* 40 C.F.R. § 117 (1986).

Defendants often challenge whether the waste emitted is a controllable hazardous substance. In *United States v. A. & F. Materials Co.*, 582 F. Supp. 842 (S.D. Ill. 1984), McDonnell Douglas Corporation (MDC) contended that a by-product of its caustic etching solution was not a hazardous material within the terms of § 9601(14). The court concluded that although the caustic etching was occasionally resold for industrial purposes, it constituted a waste for purposes of CERCLA under 40 C.F.R. § 261.2(b)(2) because MDC occasionally paid to dispose the caustic etching. *Id.* at 844.

A hazardous substance is categorized as waste if it

(1) Is discarded or being accumulated, stored or physically, chemically, or biologically treated prior to being discarded; or (2) Has served its original intended purpose and sometimes is discarded; or (3) Is a manufacturing or mining by-product and sometimes is discarded.

40 C.F.R. § 261.2(b) (1986).

## 1. Definition of Response Costs

Under CERCLA, government agencies can recover costs associated with the removal of, or remedial action to neutralize, toxic waste. CERCLA defines removal<sup>100</sup> and remedial<sup>101</sup> action to include the costs incurred in recovering land and neutralizing toxic waste.<sup>102</sup> Although recovery of direct removal and remedial costs is clear, the right to recover peripheral expenses is not settled. Peripheral expenses include investigation and monitoring costs, legal fees, and interest expenses. One court characterized peripheral expenses as reimburseable response costs. In *United States v. Northeastern Pharmaceutical and Chemical Co.*<sup>103</sup> the district court enumerated basic principles for the government's recovery of response costs. Initially, the court observed that the government's recovery rights, based on the statutory language, should be broadly construed.<sup>104</sup> Accordingly, the court held that attor-

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100. Section 101(23) states:

"[R]emove" or "removal" means the clean up or [removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances.

42 U.S.C. § 9601(23) (1982).

Removal action also includes any emergency assistance such as temporary housing, alternative water supplies, and security fencing outlined under the Disaster Relief Act of 1974. *See* 42 U.S.C. § 5121-5202 (1982).

101. Section 101(24) defines remedial actions as:

actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare of the environment.

42 U.S.C. § 9601(24) (1982).

102. *See supra* note 100-01.

103. 579 F. Supp. 823 (W.D. Mo. 1984).

104. *Id.* at 850. The court stated that the recovery provisions apply against "any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of the section." *Id.* (citing § 107(a), 42 U.S.C. § 9607(a) (1982)). In support of this position, the court quoted § 104(b), which states:

Whenever the president is authorized to act pursuant to subsection (a) of this section . . . [he] may undertake such planning, legal, fiscal, economic, engineering, architectural, and other statutes or investigation 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.

42 U.S.C. § 9604(b) (1982).

ney's fees<sup>105</sup> and monitoring and assessment costs<sup>106</sup> are recoverable costs. Exercising its discretionary power, the court also awarded prejudgment interest, stating that the award furthered the legislative intent of imposing broad liability on responsible parties.<sup>107</sup>

## 2. Incurrence of Response Costs

Defendants often argue, and the courts generally agree,<sup>108</sup> that the government must first incur expenses before initiating a CERCLA cause of action.<sup>109</sup> In defense, respondents argue that recoveries against co-defendants adequately compensate the government for incurred cleanup costs.<sup>110</sup> In addition, respondents state that no new and separable cost is incurred. In reviewing the respondents' argument, one federal district court applied the excess recovery of response costs to estimated future response costs.<sup>111</sup> The court also held that defendants' payments in related motions are not applicable to response costs.<sup>112</sup>

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105. 579 F. Supp. at 851. The court concluded that § 104(b) entitled the government to recovery of all litigation costs, including attorney fees. *Id.*

106. *Id.* at 851-52. The court concluded that § 104(b) also allowed recovery of monitoring, assessment, and evaluative activities, including the salaries and expenses of personnel involved in these activities. *Id.*

107. *Id.* at 852. CERCLA does not address prejudgment interest. *Id.* In terms of precedent, prejudgment interest is awarded at the discretion of the court to further the intent of Congress. The award of prejudgment interest, however, is a recovery and not a punitive measure. See *Bricklayers' Pension Trust Fund v. Taiariol*, 671 F.2d 988 (6th Cir. 1982). Prejudgment interest is often awarded in environmental actions. *United States v. M/V Zoe Colocotroni*, 602 F.2d 12 (1st Cir. 1979); *United States v. Hollywood Marine, Inc.*, 519 F. Supp. 688 (S.D. Tex. 1982) (prejudgment interest of 9% was awarded from the date the amended complaint was filed until the date of settlement).

Procedurally, the *NEPACCO* court also found that the federal government was not required to file a claim with Superfund or enter a cooperative agreement with the State of Missouri prior to taking action against the defendant. 579 F. Supp. at 850.

108. See, e.g., *Ohio ex rel. Brown v. Georgeoff*, 562 F. Supp. 1300 (N.D. Ohio 1983); *United States v. Wade*, 577 F. Supp. 1326 (E.D. Pa. 1983).

109. This argument is based on the statutory language of § 107(a)(4)(A). Section (a)(4) requires the incurrence of response costs. Section (a)(4)(A) provides for reimbursement of "all costs of removal or remedial action incurred." 42 U.S.C. § 9607(a)(4)(A) (1982). This construction serves CERCLA's broad purposes by allowing recovery of incurred costs before the cleanup process is completed. *United States v. Wade*, 577 F. Supp. 1326, 1335-36 (E.D. Pa. 1983).

110. See *Wade*, 577 F. Supp. at 1335-36.

111. *Id.*

112. *Id.* at 1336. Although the court recognized a potential problem with double recoveries, it felt that the application of funds to future potential response costs ade-

Defendants also argue that the government must prove causation<sup>113</sup> between defendant's action and the response costs incurred. In *United States v. Wade*<sup>114</sup> the district court concluded that the government met its burden of proof when the defendant dumped wastes at a particular site and later testing revealed traces of the same hazardous waste at the site.<sup>115</sup> The court based its broad construction of causation on an analysis of CERCLA's legislative history, particularly on evidence that the House and Senate systematically lessened the causation requirement with each draft.<sup>116</sup> The court concluded that its broad construction of causation best served the legislative intent.<sup>117</sup>

### 3. Consistency with the National Contingency Plan

Section 107(a)(4)(A) clearly states that costs associated with a government cleanup are recoverable if the action is not inconsistent with the National Contingency Plan.<sup>118</sup> A question arises, however, in characterizing the consistency requirements as an affirmative defense or as an element of the cause of action.<sup>119</sup> One federal district court

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quately solved this problem. *Id.* at 1336-37. In a related issue, the courts have held that to recover incurred costs, the state and federal governments are not required to enter into a cooperative agreement. Either entity or both may file suit. *Id.* at 1336; *Georgeoff*, 562 F. Supp. at 1315.

113. CERCLA makes no reference to a standard of proof for causation. Most causation arguments are based on traditional common law concepts of proximate cause. See *Wade*, 577 F. Supp. at 1331-32.

114. 577 F. Supp. 1326 (E.D. Pa. 1983).

115. *Id.* at 1334.

116. *Id.* at 1333. The court stated:

Stripping away the excess language, the statute appears to impose liability on a generator who has (1) disposed of its hazardous substances (2) at a facility which now contains hazardous substances of the sort disposed of by the generator (3) if there is a release of that or some other type of hazardous substance (4) which causes the incurrence of response costs. . . . The only required nexus between the defendant and the site is that the defendant have dumped his waste there and that the hazardous substance found in the defendant's waste are also found at the site.

*Id.*

117. *Id.* at 1334. The court pointed out that the defendant relied on a House report relating to a bill hearing no real resemblance to the bill the House actually passed. *Id.* The court concluded that the statute clearly places liability on "those who have disposed of hazardous substances at the site if hazardous substances of that sort are present at the site." *Id.*

118. See *supra* note 91.

119. See *Georgeoff*, 562 F. Supp. at 1315 (court declined to decide this issue, stating that the contours of the recently revised natural contingency plan are unclear).



described the consistency requirement as an affirmative defense, placing the burden of pleading and proof on the defendant.<sup>120</sup> In *United States v. NEPACCO*<sup>121</sup> the court based this conclusion on statutory language requiring action "not inconsistent" with the National Contingency Plan.<sup>122</sup> The court interpreted the statute as creating a presumption that government cleanup costs are reasonable and recoverable.<sup>123</sup> A defendant can, however, rebut the presumption by proving that the government's cleanup action is inconsistent with the National Contingency Plan.<sup>124</sup>

### C. Action by Private Parties

Under section 107(a)(4)(B) a private party can sue responsible persons for inadequate toxic waste disposal.<sup>125</sup> According to the statute, a defendant is potentially liable for necessary costs incurred in response to the toxic waste hazard.<sup>126</sup> The issues concerning liability parallel those under section 107(a)(4)(A) concerning government action.

#### 1. Definition and Incurrence of Response Costs

Plaintiffs in a section 107(a)(4)(B) action may recover necessary, incurred response costs.<sup>127</sup> The statute does not provide a definition of

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120. *United States v. NEPACCO*, 579 F. Supp. 823, 851 (W.D. Mo. 1984).

121. *Id.*

122. *Id.*

123. *Id.* The court stated:

As long as the actions taken by the government were in harmony with the national contingency plan, the costs incurred pursuant to those actions are presumed to be reasonable and therefore recoverable. If Congress had intended otherwise, they would have merely stated in section 107(a)(4)(A) "all reasonable costs," instead of the present language of "all costs."

*Id.*

124. *Id.* at 850. The court stated:

To give meaning to every term in the statute, the Court reads the insertion of the word "not" immediately prior to "inconsistent" to mean that the defendants are presumed liable for all response costs incurred *unless* they can overcome this presumption by presenting evidence of inconsistency.

*Id.* (emphasis in original).

125. 42 U.S.C. § 9607(a)(4)(B) (1982).

126. *Id.* CERCLA is oriented to assist government entities in hazardous waste cleanups. As a result, the statute and legislative history do not clearly define the elements of a private cause of action. Analysis of case law is therefore essential to define the cause of action.

127. *Id.*

"necessary," leaving the courts to define the term's parameters. Unfortunately, few courts have addressed response costs in private party CERCLA suits. Uncertain of section 107(a)(4)(B)'s parameters, federal district courts disagree on the extent of necessary response cost reimbursement.<sup>128</sup> The courts, however, recognize that cost recovery under section 107(a)(4)(B) is narrower than the recovery mechanisms of section 107(a)(4)(A).<sup>129</sup>

Despite uncertainty concerning what constitutes a recoverable cost, the federal district courts agree that a private party plaintiff must incur response costs prior to filing a suit under section 107(a)(4)(B).<sup>130</sup> Claimants, however, need only plead the incurrence of costs, not specific descriptions of costs.<sup>131</sup>

### 3. Consistency with the National Contingency Plan

Private parties may seek reimbursement for remedial action costs from either the responsible party or the Superfund. Section 107(a)(4)(B) states that remedial action taken by a private party plaintiff must be consistent with the National Contingency Plan.<sup>132</sup> Despite the apparent clarity of the consistency requirement, court interpretations vary dramatically. If the reimbursement is sought from the Superfund, the private cleanup must meet the consistency requirement. If, however, the private party seeks reimbursement from a responsible party, circuits differ on whether consistency is required.

Courts requiring consistency<sup>133</sup> support their position with a policy argument. They maintain that government standards set out in the

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128. See, e.g., *New York v. General Elec. Co.*, 592 F. Supp. 291, 298 (N.D.N.Y. 1984) (investigatory costs are recoverable in private suits); *D'Imperio v. United States*, 575 F. Supp. 248 (D.N.J. 1983) (investigatory costs are not recoverable in a private suit).

129. *NEPACCO*, 579 F. Supp. at 850-51.

130. *Jones v. Inmont Corp.*, 584 F. Supp. 1425 (S.D. Ohio 1984) (for standing to sue, claimants must incur cleanup expenses, but need not complete the toxic waste cleanup); *D'Imperio*, 575 F. Supp. 248 (D.N.J. 1983) (incurrence of response costs triggers a cause of action).

131. *General Elec. Co.*, 592 F. Supp. 291 (N.D.N.Y. 1984) (allegations of general expenses without a particularized cost schedule are sufficient); *Inmont Corp.*, 584 F. Supp. 1425 (S.D. Ohio 1984) (although allegations of specific costs are helpful, pleadings lacking specified costs are permissible as a matter of law).

132. 42 U.S.C. § 9607(a)(4)(B) (1982).

133. *Artesian Water Co. v. Government of New Castle County*, 605 F. Supp. 1348 (D. Del. 1985); *Bulk Distrib. Centers, Inc. v. Monsanto Co.*, 589 F. Supp. 1437 (S.D. Fla. 1984); *Wickland Oil Terminals v. Asarco, Inc.*, 590 F. Supp. 72 (N.D. Cal. 1984).

National Contingency Plan provide adequate guidelines for economical, efficient cleanup.<sup>134</sup> Courts that do not require consistency<sup>135</sup> argue that the financial burden of assessing plans should not be placed on the government when it is not a party to the action.<sup>136</sup> Furthermore, these courts claim that because the ultimate determination of what constitutes fair response costs is subject to question throughout the litigation, the consistency requirement is meaningless.<sup>137</sup>

Despite these two schools of thought, most courts hold that the consistency issue does not provide grounds for dismissal.<sup>138</sup> The underlying theory of these holdings is that the consistency requirement relates to the issue of damages and is not sufficient to block a claim.<sup>139</sup>

#### D. *Action by Trustees of Natural Resources*

Public lands held by both the federal and state governments comprise a significant percent of total land in the United States.<sup>140</sup> The trustees of federal and state lands are responsible for the preservation of natural resources on public lands.<sup>141</sup> Under CERCLA, federal and state public land trustees may sue parties responsible for injury to, destruction of, or loss of<sup>142</sup> natural resources<sup>143</sup> for the amount needed to

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134. See, e.g., *Bulk Distrib. Centers*, 589 F. Supp. at 1446.

135. *Fishel v. Westinghouse Elec. Corp.*, 617 F. Supp. 1531 (M.D. Pa. 1985); *Pinole Point Properties, Inc. v. Bethlehem Steel Corp.*, 596 F. Supp. 283 (N.D. Cal. 1984); *Homart Dev. Co. v. Bethlehem Steel Corp.*, 22 Env't Rep. Cas. (BNA) 1357 (N.D. Cal. 1984).

136. See, e.g., *Fishel*, 617 F. Supp. at 1535.

137. *Id.*

138. See, e.g., *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135 (E.D. Pa. 1982) (consistency issue is not determinable on the pleadings); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 588 F. Supp. 515 (D. Mass. 1983) (disposition of a "consistency" issue must await the full development of the record).

139. See, e.g., *Jones v. Inmont Corp.*, 584 F. Supp. 1425 (S.D. Ohio 1984) (consistency with the national contingency plan relates to the recoverability of damages, not to the existence of a claim for relief).

140. In 1983 the federal government owned 732 million acres of land. In the same year, the state, local, and municipal governments owned 1.54 billion acres of land. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, 193, Table 330 (105th ed. 1985).

141. See 42 U.S.C. § 9607(f) (1982) (the President and state-appointed officials are the respective trustees of federal and state natural resources).

142. See *id.* § 9607(a)(4)(C) (1982).

143. *Id.* § 9601(16). Natural resources are defined as: "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging

“restore, rehabilitate, or acquire the equivalent of”<sup>144</sup> the impaired natural resources.<sup>145</sup>

Liability for damages to natural resources is dependent on the method of damages assessment. Official evaluation methods do not currently exist.<sup>146</sup> Section 301(c) of CERCLA requires the President and designated federal agencies to promulgate rules for assessing natural resource damages.<sup>147</sup> The EPA was assigned responsibility for developing specific damage procedures, and the Department of the Interior was given authority to establish damage assessment methods.<sup>148</sup>

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to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States . . . any State or local government, or any foreign government.”

144. 42 U.S.C. 9607(f) (1982). The Department of Interior defines the extent of liability for impaired natural resources as the lesser of (1) restoration or replacement costs, or (2) a diminution of use values. *See infra* notes 146-70 and accompanying text.

145. In order to establish a prima facie case, trustees need only describe harm to natural resources in pleadings. *Ohio ex rel. Brown v. Georgeoff*, 562 F. Supp. 1300, 1316 (N.D. Ohio 1983). A final determination of damages after liability is ascertained requires a specific assessment method. *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1120 (D. Minn. 1982). An affirmative defense to damages to natural resources exists if the damages occurred pursuant to a permit or license, an environmental impact statement, or a comparable environmental analysis. 42 U.S.C. § 9607(f) (1982). The intervening acts of God, war, and third parties are also affirmative defenses. *Id.* § 9607(b).

146. Courts have refused, however, to dismiss cases because of the unavailability of official assessment methods for natural resource damages. In *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100 (D. Minn. 1982), the district court held that promulgation of final damages assessment rules is not a prerequisite to recovery actions. *Id.* at 1119-20. In support of its holding, the court stated that the legislative history did not express an intent to render natural resources damage claims a nullity until the promulgation of final damage assessment rules. *Id.* Subsequent cases recognize the viability of natural resources claims despite the lack of final damages assessment rules. *See, e.g.*, *New York v. General Elec. Co.*, 592 F. Supp. 291, 304 (N.D.N.Y. 1984). *See also* Newlon, *Defining the Appropriate Scope of Superfund Natural Resource Damage Claims: How Great an Expansion of Liability*, 5 VA. J. NAT. RESOURCES L. 197 (1985) (discussing theoretical approaches to quantifying damages to natural resources).

147. 42 U.S.C. § 9651(c) (1982). Section 301(c)(1) requires the President, acting through federal agencies, to promulgate rules regarding both standardized monitoring assessments (Type A regulations) and detailed, individualized assessments (Type B regulations). *Id.*

148. The powers vested in the President under § 301(c) were delegated to the Department of Interior. Executive Order No. 12,316, 46 Fed. Reg. 42,237 (1981). The same Executive Order vested the EPA with the executive powers authorized by §§ 101(24), 104(a)-(b), and 105. *Id.*

When the EPA and the Department of the Interior failed to produce guidelines in a timely manner, a New Jersey district court compelled consent to a publication timeta-

The Department of the Interior proposed Type A regulations<sup>149</sup> to provide a simplified, accelerated method of quantifying injuries to natural resources when the toxic waste release is relatively insubstantial.<sup>150</sup> Based on data collected regarding the toxic waste release, a computer model calculates expected damages.<sup>151</sup> Because the model is based on statistical averages, the ultimate Type A damage determination may not directly reflect the actual harm suffered.<sup>152</sup> Defendants, therefore, can request a specific quantification of damages under the proposed Type B regulations.<sup>153</sup>

Type B regulations provided for individualized, in-depth assessment of natural resource damages.<sup>154</sup> The proposed rules outline a uniform system for determining the extent of damages to natural resources. Although not yet adopted, the proposed rules provide insight into the Department of the Interior's position on the natural damages issue.

Analysis of harm under Type B regulations entails three phases: verification, quantification, and damage determination.<sup>155</sup> Initially, the proposed Type B regulations require verification of an injury to natural resources.<sup>156</sup> The definition of injury is twofold. First, an incremental, measurable adverse change in the chemical or physical quality or viability of a natural resource must be ascertained.<sup>157</sup> Second, proof of

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ble. *New Jersey v. Ruckelshaus*, No. 84-1668, slip op. (D.N.J. 1984). In the consent decree, the Department agreed to propose "Type A regulations" before April 5, 1986 and to promulgate final "Type A regulations" before August 7, 1986. *Id.*

149. 51 Fed. Reg. 16,636 (1986) (proposed May 5, 1986). The proposed Type A regulations apply only to coastal and marine natural resource injuries. *Id.* at 16,636-37.

150. *Id.* at 16,642 (to be codified at 43 C.F.R. § 11.33(a)(1)(iv)-(ix)). The quantification method of the Type A regulation is applicable when the release was of a short duration, constituted a single event, and resulted mainly in the mortality of wildlife. *Id.*

151. *Id.* at 16,636.

152. *Id.* at 16,637.

153. *Id.* at 16,642 (to be codified at 43 C.F.R. § 11.33(a)(2)(i)). If a request is made that quantification of injuries be made under Type B regulations, the potentially responsible party must agree in advance to bear responsibility for assessment costs. *Id.*

154. 50 Fed. Reg. 52,126 (1985) (to be codified at 43 C.F.R. pt. 11) (proposed December 20, 1985). *See also* 48 Fed. Reg. 34,768 (1984) (summarizing the commentary received and soliciting additional comments).

155. 50 Fed. Reg. 52,155 (1985) (to be codified at 43 C.F.R. § 11.60(b)).

156. *Id.* (to be codified at 43 C.F.R. § 11.61) (proposed Dec. 20, 1985).

157. *Id.* at 52,149 (to be codified at 43 C.F.R. § 11.14(v)) (proposed Dec. 20, 1985). The regulation also provides definitions of injury in terms of specific resources. *Id.* at 52,155-58 (to be codified at 43 C.F.R. § 11.62).

actual<sup>158</sup> or hypothesized<sup>159</sup> causation between the toxic waste release and the injured natural resource is required.

Injury to natural resources under the Type B regulations is quantified through a comparison with a "base line."<sup>160</sup> The injury is measured by the difference between the "services"<sup>161</sup> provided by both the baseline and the current condition of the damaged natural resource.<sup>162</sup> The increment measured by this difference includes deterioration in both human<sup>163</sup> and nonhuman<sup>164</sup> services.

Information provided in the verification and quantification phases assists in determining damages. Under Type B regulations trustees of natural resources are entitled damages equal to the lesser of (1) restoration or replacement costs or (2) diminution of use values.<sup>165</sup> Restoration and replacement damages are measured by the costs incurred in

158. The presence of the hazardous substances in sufficient concentrations in the pathway analysis provides adequate proof of actual causation. *Id.* at 52,159 (to be codified at 43 C.F.R. § 11.63(a)(2)) (proposed Dec. 20, 1985).

159. A model demonstrating that conditions existed in a route that could have served as a pathway provides adequate proof of hypothesized causation. *Id.*

160. *Id.* at 52,149 (to be codified at 43 C.F.R. § 11.14(e)) (proposed Dec. 20, 1985). The baseline is defined as "the condition or conditions that would have existed at the assessment area had the discharge of oil or release of a hazardous substance not occurred." *Id.* Determination of the baseline is not limited to the status of resources prior to the discharge or release. The definition of the baseline includes human (change in-land use) and natural (ecological succession) changes in the condition of natural resources in establishing the baseline. The proposed rule also considers normal variation in the recovery abilities of natural resources. *Id.* at 52,139-40.

161. *Id.* at 52,150 (to be codified at 43 C.F.R. § 11.14(nn)) (proposed Dec. 20, 1985). Services are defined as "physical and biological functions performed by the resource including the human uses of those functions. These services are the result of the physical, chemical, or biological quality of the resource." *Id.*

162. *Id.* at 52,163 (to be codified at 43 C.F.R. § 11.70(a)(1)) (proposed Dec. 20, 1985). The ability of the natural resource to recover from the injury is considered when measuring incremental injury. *Id.* at 52,168-9 (to be codified at 43 C.F.R. § 11.73) (proposed Dec. 20, 1985).

163. Injuries to human services include harm to drinking water and the recreational value of natural resources. *Id.* at 52,138.

164. Injuries to non-human services include harm to animal habitats and food chains. *Id.*

165. *Id.* at 52,154 (to be codified at 43 C.F.R. § 11.35(a)) (proposed Dec. 20, 1985). An exception to the valuation of damages method is made for special resources that are worthy of protection but have relatively low use or restoration values. The threshold determination for special resources status is whether the resource is specifically designated for protection by a legislative body. A damage determination for special resources considers three factors: (1) the statutory responsibility to manage or protect the injured resource; (2) the demonstration that the costs of restoration will not be grossly

reinstating the impaired natural resource baseline.<sup>166</sup> These costs, however, must represent the most cost effective means of restoring or replacing the lost natural resource.<sup>167</sup> If damages are measured by the diminution of use values, defendants are liable for losses to the general public because of the discharge or release.<sup>168</sup>

Adoption of the proposed Type B rules forecloses options and increases the defendant's burden of proof. First, by limiting the methods of natural resource damage valuation to restoration cost, replacement cost, or a diminution of use values, the proposed rules eliminate other valuation methods that may produce a lower damage award for plaintiffs.<sup>169</sup> Second, because the damage assessment method establishes a rebuttable presumption as to its accuracy, the proposed rules significantly increase the burden of proof placed on a defendant to defeat or lessen a damages award.<sup>170</sup>

#### IV. AFFIRMATIVE DEFENSES

##### A. *Statute of Limitations*

Presentation of CERCLA claims must be timely. CERCLA contains two statute of limitations provisions. First, section 112(d)<sup>171</sup> re-

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disproportionate to the benefits gained by restoration; and (3) the technical feasibility of the restoration. *Id.* (to be codified at 43 C.F.R. § 11.35(d)(2)).

166. *Id.* at 52,169 (to be codified at 43 C.F.R. § 11.81) (proposed Dec. 20, 1985). Restoration or replacement measures are defined as "those actions that restore or replace the resource services to no more than its baseline." *Id.*

167. The proposed rules require consideration of alternative methods of restoration and replacement of natural resources. *Id.* (to be codified at 43 C.F.R. § 11.81(d)(1)). Alternative plans are analyzed in terms of cost effectiveness. The most efficient alternative is adopted. *Id.* (to be codified at 43 C.F.R. § 11.81(f)(1)).

168. *Id.* at 52,170 (to be codified at 43 C.F.R. § 11.83(b)(1)). A diminution of use value is measured by the decrease in services provided to humans. *Id.* If a competitive market exists for the service, the service value is reflected in the market price. *Id.* at 52,171 (to be codified at 43 C.F.R. § 11.83(c)). If no competitive market for the service exists, the service's value is measured by alternative methods. *Id.* (to be codified at 43 C.F.R. § 11.83(d)).

169. *Id.* at 52,171 (to be codified at 43 C.F.R. § 11.83(d)). The proposed regulation eliminates awards based on negotiations between the parties and the actual or imputed market value or the organism or resource lost. *Id.*

170. *Id.* at 52,172 (to be codified at 43 C.F.R. § 11.91(c)). Defendants can rebut the presumption by defeating the legitimacy of the assessment by a preponderance of the evidence. *Id.* See also Menefe, *Recovery for Natural Resources Damages Under Superfund: The Rule of Rebuttable Presumption*, 12 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 15,057 (1982).

171. 42 U.S.C. § 9612(d) (1982).

quires commencement of a claim "within three years from the date of the discovery of the loss."<sup>172</sup> Second, section 112(a)<sup>173</sup> requires that the claimant seek compensation from the responsible party sixty days before the claim's presentation in court.<sup>174</sup> CERCLA clearly defines as untimely those causes of action brought three years after either the loss discovery date or CERCLA's enactment date.<sup>175</sup> Interpretations of the sixty day notice rule, however, vary among the judicial circuits. First, several federal district courts hold that a sixty day notice to the responsible party is a condition precedent to a cost recovery action.<sup>176</sup> Courts rely on both the plain language of the statute<sup>177</sup> and judicial efficiency<sup>178</sup> to support this position. Other district courts, however, hold that the sixty day notice provision applies only to actions seeking reimbursement from the Superfund.<sup>179</sup> These courts base this opinion on

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172. *Id.* The provision specifically states that "[n]o claim may be presented, nor may an action be commenced for damages under this subchapter, unless that claim is presented or the action commenced within three years from the date of the discovery of the loss or December 11, 1980 [the date of CERCLA's enactment], whichever is later." *Id.*

173. *Id.* § 9612(a).

174. *Id.* This provision, § 112, is commonly referred to as the sixty day notice rule. The section provides:

All claims which may be asserted against the Fund pursuant to section 9611 of this title shall be presented in the first instance to the owner, operator, or guarantor of the vessel or facility from which a hazardous substance has been released, if known to the claimant, and to any other person known to the claimant who may be liable under section 9607 of this title. In any case where the claim has not been satisfied within sixty days of presentation in accordance with this subsection, the claimant may elect to commence an action in court against such owner, operator, guarantor, or other person or to present a claim to the Fund for payment.

*Id.*

175. *Id.* Case law interpreting § 112 addresses ministerial problems. *See, e.g., Idaho v. Howmet Turbine Component Corp.*, 627 F. Supp. 1274 (D. Idaho 1986) (if the last day of the filing period is Saturday, Sunday, or a legal holiday, the period runs until the end of the next day that is not Saturday, Sunday, or a legal holiday).

176. *See, e.g., Idaho v. Howmet Turbine Component Corp.*, 627 F. Supp. 1274 (D. Idaho 1986); *Bulk Distrib. Centers, Inc. v. Monsanto Co.*, 589 F. Supp. 1437 (S.D. Fla. 1984); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 588 F. Supp. 515 (D. Mass. 1983); *United States v. Allied Chem. Corp.*, 587 F. Supp. 1205 (N.D. Cal. 1984).

177. *See, e.g., Howmet Turbine*, 627 F. Supp. at 1279.

178. *See, e.g., Bulk Distrib. Centers*, 589 F. Supp. at 1449 (the sixty day rule applies to all claims in order to promote joint settlement efforts).

179. *See, e.g., United States v. Conservation Chem. Co.*, 619 F. Supp. 162 (W.D. Mo. 1985); *Colorado v. Asarco, Inc.*, 616 F. Supp. 822 (D. Col. 1985); *New York v. General Elec. Co.*, 592 F. Supp. 291 (N.D. N.Y. 1984).



statutory interpretation<sup>180</sup> and judicial operating procedures.<sup>181</sup>

### B. *Intervening Acts*

CERCLA is accurately described as a strict liability statute. Strict liability can be challenged by asserting that intervening acts caused a hazardous waste release. The statute specifically permits a defendant to assert that the intervention of an act of God,<sup>182</sup> an act of war,<sup>183</sup> or the acts or omissions of third parties caused the resulting harm.<sup>184</sup> To assert the "third party" defense, the respondent must prove that he exercised due care with respect to the hazardous substance and took precautions against the foreseeable acts or omissions of any third party and the consequences thereof.<sup>185</sup> "Due care" requires that the respondent take positive action to insure a safety level commensurate with the hazard risked by a potential toxic spill. One commentator argues that the mere execution of a disposal contract, without additional action to ensure safe transport, does not demonstrate an adequate level of care to assert the third party defense.<sup>186</sup>

Judicial interpretations of the third party defense emphasize a narrow statutory construction over the development of a clear, conceptual definition of "third party" or "due care," focusing on whether damages resulted *solely* because of a third party's act or omission. In *United States v. South Carolina Recycling and Disposal, Inc. (SCRDI)*<sup>187</sup> the district court reviewed this issue with respect to the liability of a landowner who rented property to a hazardous waste facility operator who

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180. See, e.g., *General Elec. Co.*, 592 F. Supp. at 300. The court specifically relied on § 112(a), which states: "All claims which may be asserted against the Fund [the Superfund] pursuant to section 9611 of this title shall be presented in the first instance to the owner. . . ." 42 U.S.C. § 9612(a) (1982).

181. See, e.g., *General Elec. Co.*, 592 F. Supp. at 300-01 (the procedural rules of the circuit embody the principle that neither the notice requirements nor the rule's purpose of promoting negotiated settlements are jurisdictional oriented).

182. 42 U.S.C. § 9607(b)(1) (1982).

183. *Id.* § 9607(b)(2).

184. *Id.* § 9607(b)(3). The "third party" defense, also known as the "due care" defense, is most often asserted.

185. *Id.*

186. Tripp, *Liability Issues in Litigation Under the Comprehensive Environmental Response, Compensation and Liability Act*, 52 UMKC L. REV. 364, 381-82 (1984). The author states that only by proving the performance of precautionary actions consistent with the hazard posed by the waste does a generator begin to show "due care" as intended by the statute. *Id.* at 382.

187. 14 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,272 (D.S.C. 1984).

subsequently stored hazardous wastes on the property.<sup>188</sup> Although the landlord conceded liability under section 107(a)(2),<sup>189</sup> he asserted a third party defense.<sup>190</sup> The court, rejecting this defense, stated that the damages were not caused *solely* by a third party because the contractual relationship between the respondent and the responsible party constituted joint action.<sup>191</sup>

In *United States v. Argent Corporation*<sup>192</sup> a landlord rented a warehouse to a tenant, who later disposed of hazardous waste material near the warehouse.<sup>193</sup> The United States filed suit against the tenant and the landlord to recover cleanup costs.<sup>194</sup> In response, the landlord argued that the third party defense protected him from liability.<sup>195</sup> Invoking the *SCRDI* rule, the court rejected this defense, stating that the contractual relationship between the defendant and the responsible party implied that the toxic spills were not caused *solely* by the tenant.<sup>196</sup>

Courts continue to require that parties claiming the third party defense prove that the injury was caused by the acts of third parties. In *New York v. Shore Realty Corporation*<sup>197</sup> the district court addressed a

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188. *Id.* at 20,273.

189. 42 U.S.C. § 9607(a)(2) (1982). *See also supra* notes 8, 10, 32-33 and accompanying texts.

190. 14 *Env'tl. L. Rep.* (*Env'tl. L. Inst.*) at 20,275.

191. *Id.* ("Because there is no question of the contractual link between the landowners and *SCRDI*, whose liability is admitted, the landowners cannot under any circumstances prove that the release was caused "solely" by a third party which did not share a contractual relationship with them.")

192. 21 *Env't Rep. Cas.* (*BNA*) 1354 (*D.N.M.* 1984).

193. *Id.* at 1355.

194. *Id.*

195. *Id.* at 1356.

196. *Id.* The court explained that because of the contractual link between the landlord and the tenant, the landlord could not claim that the release was caused *solely* by the tenant. Thus, the court concluded, the third party defense was, "as a matter of law," not available for the landlord's use. *Id.*

The landlord also argued that his mere ownership of the warehouse and surrounding property, with an attendant connection to *Argent Corporation*, excluded him from the class of owners covered under *CERCLA*. *Id.* at 1355-56. The court held that the landlord was an owner within the *CERCLA* definition because participation in management or operations is not required to invoke ownership liability. *Id.* at 1356. The court further noted that *CERCLA*'s legislative history shows a deliberate omission from the Act of language that would have required participation in management or in operation as a prerequisite to owner liability. *Id.*

197. 759 F.2d 1032 (2d Cir. 1985).

new landowner's liability for toxic spill damages caused by a tenant both before and after the land purchase.<sup>198</sup> Finding that some toxic leaks occurred subsequent to the new landowner's ownership, the court held the landowner liable for damages caused by the tenant.<sup>199</sup> The court observed that the landowner could reasonably foresee the tenant's continued disposal of hazardous waste on the land, and took no action to prevent it.<sup>200</sup> Shore Realty's failure to take precautionary action against foreseeable acts or omissions of third parties led to the dismissal of its third party defense.<sup>201</sup>

*Shore Realty* provides interesting insights into the third party defense as applied to land purchases. Under *Shore Realty* a third party defense is successful if a new landowner proves that all of the claimed toxic waste damages occurred prior to his ownership, that no hazardous leaks occurred subsequent to his ownership and operation of the land, and that no leases exist with tenants who caused or are currently causing toxic waste damages.<sup>202</sup>

## V. CONCLUSION

CERCLA liability has become a hidden trap. Ordinary business and legal transactions may subject parties to multi-million dollar liability.<sup>203</sup> Furthermore, the Act's few defenses do not always allow blameless parties to escape liability.<sup>204</sup>

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198. *Id.* at 1037-39.

199. *Id.* at 1048.

200. *Id.* at 1049.

201. *Id.* The court stated:

Shore was aware of the nature of the tenant's activities before the closing and could readily have foreseen that they would continue to dump hazardous waste at the site. In light of the knowledge, we cannot say that the releases and threats of release resulting of these activities were "caused solely" by the tenants or that Shore "took precautions against" those "foreseeable acts or omissions."

*Id.*

202. See also *D'Imperio v. United States*, 575 F. Supp. 248 (D.N.J. 1983). In *D'Imperio* plaintiff purchased land unaware of the presence of toxic wastes on the property. Upon receiving a letter from the EPA informing him of potential liability for cleanup costs, plaintiff filed suit seeking a declaratory judgment exonerating his CERCLA liability, guaranteeing compensation for any future contributions to cleanup costs, and renaming the *D'Imperio* site as it appeared on the National Priorities List. Although the court expressed sympathy for the plaintiff's position, it dismissed the case for lack of ripeness. *Id.* at 254.

203. See *supra* notes 20-26, 43-73 and accompanying texts.

204. Burying previously contaminated property or acquiring a security interest in

These results are undesirable for several reasons. First, persons who did not contribute to the hazardous waste problem may be held liable under CERCLA.<sup>205</sup> The tremendous potential liability for a cleanup increases costs for certain business transactions<sup>206</sup> and may totally preclude other business transactions.<sup>207</sup>

To avoid these problems, CERCLA's liability and defense sections should be amended or construed to hold liable only parties who have engaged in substantial and purposeful hazardous waste disposal or who have profited from such conduct. Though this approach was suggested in *City of Philadelphia v. Stephan Chemical Co.*,<sup>208</sup> courts have not adopted it, in part because the Act makes equitable approach difficult. Consequently, Congress should act to limit CERCLA liability and expand the allowable defenses.

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contaminated property may expose a party to CERCLA liability. *See supra* notes 43-48, 55-66 and accompanying texts.

205. The owner of property on which hazardous waste has been secretly and illegally dumped could be held liable even though he knew nothing of the event. *See supra* notes 34-42 and accompanying text.

206. For example, banks and other financial institutions would be unwise not to inspect property offered as loan security when even a remote possibility exists that hazardous materials may be present.

207. Parties may be wary of involving themselves with a company engaged in toxic waste cleanup for fear that an accidental or purposeful release may expose them to liability.

208. *See supra* notes 34-38 and accompanying text for a discussion of this case.