St. Mary's Law Journal

Volume 20 | Number 2 Article 4

1-1-1989

Toxic Waste: Who Pays the Piper - A Private Party's Federal and Texas Rights to Recovery of Voluntary Cleanup Costs of Toxic Waste.

Barbara Hanson Nellermoe

TOXIC WASTE: WHO PAYS THE PIPER? A PRIVATE PARTY'S FEDERAL AND TEXAS RIGHTS TO RECOVERY OF VOLUNTARY CLEANUP COSTS OF TOXIC WASTE

Barbara Hanson Nellermoe*

* Partner, Shannon & Weidenbach, Inc., San Antonio, Texas. B.A., Concordia College; M.A., Mankato State University; J.D., St. Mary's University. The author wishes to express deep appreciation to Charles S. Estee for his analysis of state remedies, and to Fred Shannon, who was lead counsel for the plaintiffs in *Interchange Office Park, Ltd. v. Standard Industries, Inc.*, for his insight and helpful suggestions in writing this article.

I. INTRODUCTION

Acquiring real estate has become risky business. Purchasers, developers, and, in particular, lenders have become increasingly concerned that they may be buying an environmental time bomb. The presence of hazardous waste is often difficult to determine before closing the real estate transaction. Because of the potential liability for cleanup expenses, all parties to a real estate transaction, including lenders and insurers, need to inquire more closely than ever as to land use and waste disposal by prior occupants. The Hazardous Substance Response Fund, more commonly known as the "Superfund,"[1] has been established by Congress to provide resources for governmental cleanup of dangerous or potentially dangerous sites. Landowners in Texas are discovering, however, that the Environmental Protection Agency and its various state agency designees, such as the Texas Water Commission,[2] look to them either for reimbursement to the Superfund or for direct payment of the costs of cleanup, even though the hazardous waste disposal occurred prior to their acquisition of the land. Cleanup costs may range from thousands to millions of dollars and often interfere with current land use and development planned for the property. The current landowner will, therefore, have the most direct interest in seeing that remedial action is completed in as short a period of time and as inexpensively as possible.

This article provides a brief overview of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and its provisions for a private right of recovery. Past confusion over a private right of recovery under CERCLA and the current prerequi-

1. 42 U.S.C. § 9611 (1982 & Supp. IV 1986).

2. In the early 1980s, the EPA entered into general cooperative agreements with the state agency so designated by each governor. In Texas, the Governor has designated the Texas Water Commission as the lead agency for EPA enforcement activities. The trend in cooperative agreements today is away from general agreements and toward site-by-site cooperative agreements. Telephone interview with Steven Dickman, Legal Department Texas Water Commission (Oct. 27, 1988).

sites for such recovery are reviewed. The article discusses remedies and defenses under CERCLA as well as Texas remedies which, to some extent, parallel CERCLA. The primary thrust of this article is a discussion of federal and Texas remedies available to an innocent landowner who seeks reimbursement of the "necessary costs of response" it was required to pay.

II. AN OVERVIEW OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT

Public outcry surrounding the Love Canal housing project and similar industrial practices prompted congressional hearings concerning environmental protection legislation.[3] In 1980, amidst a great deal of struggle and compromise, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[4] to address concerns about dangers to the public and the environment created by widespread and irresponsible dumping of hazardous wastes and chemicals.[5] CERCLA gives the federal government the option of cleaning up the site or mandating cleanup by the potentially responsible parties (PRPs).[6]

Through CERCLA, Congress created a bifurcated remedy for the

---

3. *See* 42 U.S.C. §§ 9601-9675 (1982 & Supp. IV 1986); Bulk Distrib. Centers, Inc. v. Monsanto Co., 589 F. Supp. 1437, 1441 (S.D. Fla. 1984)(court notes disasters like Love Canal prompted congressional action).

4. 42 U.S.C. §§ 9601-9675 (1982 & Supp. IV 1986). Passage of this most significant piece of environmental legislation did not follow the normal course of development in either the House or the Senate. *See generally* Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 1 (1982)(commenting on Senate agenda priority and House rule suspension). Consequently, the legislative history of the statute, and in particular that of section 9607(a)(4)(B), is vague and ambiguous, offering little aid to construction. *See id.* at 2-35 (legislative history detailed and described as fragmented).

5. H.R. REP. NO. 1016, 96th Cong., 2nd Sess. 18, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6120. CERCLA was established to address abandoned and inactive waste disposal sites which were not covered by its precursor, the Resource Conservation Recovery Act of 1976 (RCRA). *See Bulk Distrib. Centers*, 589 F. Supp. at 1441 (RCRA required continuous monitoring of active sites but application to inactive sites limited to those imposing "imminent hazard").

6. 42 U.S.C. §§ 9604(a), 9606(a) (1982 & Supp. IV 1986). Potentially responsible parties are generally defined as present or former owners of the disposal site, those who transport or arrange for transport of the hazardous waste and those who actually dispose of the waste. *See, e.g.*, State of New York v. Shore Realty Corp., 759 F.2d 1032, 1043-44 (2d Cir. 1985)(current owner liable for unauthorized tenant's dumping); United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 577 (D. Md. 1986)(purchase of foreclosure site rendered former mortgagee owner liable under 9607(a)(1)); United States v. Carolawn Co., 21 Env't Rep. Cas.

problem of hazardous waste cleanup and allocation of response costs.[7] First, it established the Superfund to provide financial resources necessary for prompt and effective governmental response to sites which pose the most significant threat to the public and the environment.[8] Second, Congress created liability provisions to make "those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created."[9] The liability provisions provide both a private and a governmental right of recovery for the cost of removing or remedying the hazardous situation.[10] Governmental entities may recover response costs from PRPs as long as remedial steps are "not inconsistent with the National Contingency Plan."[11] A right of recovery will also extend to "any other person" who has incurred "any other necessary costs of response . . . consistent with the National Contingency Plan."[12]

(BNA) 2124, 2128 (D.S.C. 1984)(one hour of ownership raised fact issue under 9607(a)(1)). *See generally* 42 U.S.C. § 9607(a) (1982 & Supp. IV 1986)(defines owner).

7. *See* 42 U.S.C. §§ 9607, 9611 (1982 & Supp. 1986)(Congress provided Superfund for governmental cleanup and liability provisions for private cleanup costs allocation). In general, response costs include costs of assessing injury to natural resources, costs of restoring the natural resource, costs of an enforcement program to abate hazardous substance releases, costs related to determining effects of substance on persons, costs of equipment and overhead for national contingency response teams, and costs of programs to protect employee health and safety. *Id.* § 9611(c).

8. *Id.* § 9611(p). The Hazardous Substance Response Fund, commonly called the "Superfund," originally allocated $1.6 billion in federal funds to finance governmental cleanups of hazardous substances. Bulk Distrib. Centers, Inc. v. Monsanto Co., 589 F. Supp. 1437, 1442 (S.D. Fla. 1984). CERCLA permits the government to replenish the fund by seeking reimbursement of cleanup costs from responsible parties. *See* 42 U.S.C. § 9607(a)(4)(A) (Supp. IV 1986).

9. Pinole Point Properties, Inc. v. Bethlehem Steel Corp., 596 F. Supp. 283, 287 (N.D. Cal. 1984)(quoting *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982)); *see also* 42 U.S.C. § 9607 (1982 & Supp. IV 1986).

10. 42 U.S.C. § 9607(a)(4)(A), (B) (Supp. IV 1986).

11. 42 U.S.C. § 9607(a)(4)(A) (Supp. IV 1986); *see also Pinole Point Properties*, 596 F. Supp. at 289. Under certain circumstances, private parties may also use Superfund to clean up toxic waste. 42 U.S.C. § 9607(a)(4)(B).

12. 42 U.S.C. § 9607(a)(4)(B) (Supp. IV 1986); *see also Pinole Point Properties*, 596 F. Supp. at 288. The purpose of the private right of recovery is to "assure an incentive for private parties, including those who may themselves be subject to liability under the statute, to take a leading role in cleaning up hazardous waste facilities as rapidly and completely as possible." City of New York v. Exxon Corp., 633 F. Supp. 609, 617 (S.D.N.Y. 1986). The National Contingency Plan (NCP) is a plan to be prepared by the President to carry out the provisions of the Act. 42 U.S.C. § 9605 (Supp. IV 1986). Although CERCLA imposes this duty on the President, the duty has been delegated to the EPA. *See* 40 C.F.R. § 300.21 (1986). The NCP was established by the EPA in 1982 and amended in 1985. *See* C.F.R. §§ 300.1-300.86 (1986).

Congress created the Superfund to provide financial resources for government action and to provide reimbursement funds for private cleanup.[13] There are several conditions which a private party must meet prior to seeking funds for cleanup from the Superfund. There must first be a release[14] of a hazardous substance[15] in a reportable quantity.[16] The party must then demand reimbursement for cleanup costs from PRPs.[17] If the PRPs refuse to pay such costs within sixty (60) days, then the requesting party may seek reimbursement from the Superfund or institute a private suit against the PRPs.[18]

Under CERCLA, the President, or a state agency which has entered into a cooperative agreement with the President, is charged with

---

13. 42 U.S.C. § 9611 (Supp. IV 1986), *originally codified* at 42 U.S.C. § 9631 (1982).

14. 42 U.S.C. § 9601(22) (Supp. IV 1986). Release is defined as "any spilling, leading, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment" of hazardous substances. *Id.*

15. 42 U.S.C. § 9601(14) (Supp. IV 1986). 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.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).

Id.

16. *See* Bulk Distrib. Centers, Inc. v. Monsanto Co., 589 F. Supp. 1437, 1442 (S.D. Fla. 1984). Reportable quantities are established under the Clean Water Act, 40 C.F.R. § 117 (1986).

17. 42 U.S.C. § 9612(a) (Supp. IV 1986); *see also Bulk Distrib. Centers*, 589 F. Supp. at 1442.

18. 42 U.S.C. § 9607(a)(4)(B) (Supp. IV 1986). Parties found liable for the release may be liable for damage to natural resources, for private or governmental response costs as well as costs of assessing health affects. *Id.* § 9607(a)(4)(A)-(C). The types of response costs found in each case vary. *See, e.g.*, State of New York v. Shore Realty Corp., 759 F.2d 1032, 1042-43 (2d Cir. 1986)(site assessment costs); *Bulk Distrib. Centers*, 589 F. Supp. at 1452 (investigatory expenses and attorney fees); Jones v. Inmont Corp., 584 F. Supp. 1425, 1429 (S.D. Ohio 1984) (medical test fees). Multiple parties acting in concert may be held jointly and severally liable. *See* United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 844-45 (W.D. Mo. 1984)(joint and several liability under Missouri law); *see also* Note, *Joint and Several Liability for Hazardous Waste Releases Under Superfund*, 68 VA. L. REV. 1157, 1182-95 (1982)(analyzing various ways to allocate liability including joint and several liability).

the responsibility of enforcement.[19] By Executive Order, the President has delegated all presidential duties under CERCLA to the Environmental Protection Agency (EPA).[20] The EPA has entered into a cooperative agreement with the Texas Water Commission (TWC) to act in its behalf on CERCLA matters as the "lead agency" in Texas.[21] CERCLA requires the EPA or its lead agency to permit private cleanup whenever it can be "determined that such removal and remedial action will be done properly by the owner or operator of the vessel or facility from which the release or threat of release emanates, or by any other responsible party."[22] This is particularly important to the owner or operator who has the means to direct and initially finance the cleanup because if the government finances the cleanup, it will typically add a multiplier of two or three to the total cost before seeking reimbursement for the Superfund.[23]

III. Recognition of a Private Right of Recovery in Voluntary Cleanup

A. *Ambiguities of CERCLA Resulted in Denial of Recovery for Voluntary Cleanup*

During its first years of existence, several courts narrowly construed CERCLA to provide a private cause of action only where a number of preconditions had been met.[24] One such prerequisite was

---

19. 42 U.S.C. § 9606(c) (1982).

20. 40 C.F.R. § 300.2 (1986). The EPA is charged with the responsibility for promulgation of amendments to the NCP and for "all of the other functions vested in the President by section 105 [42 U.S.C. § 9604 (1982)] of CERCLA." *Id.*

21. Telephone interview with Steven Dickman, Legal Department, Texas Water Commission (October 27, 1988).

22. 42 U.S.C. § 9604(a) (1983). The Act is structured to promote voluntary private cleanup as the preferred means of curing a hazardous waste problem. *Id.* "Vessel" refers to those types of vehicles capable of transporting water. *Id.* § 9601(28). "Facility" means any structure, motor vehicle, or aircraft, or any site or area where a hazardous substance has been deposited. *Id.* § 9601(9).

23. *See id.* § 9607(c)(3) (failure to provide removal or remedial action in response to order creates punitive liability).

24. *See, e.g.*, Wickland Oil Terminal v. Asarco, Inc., 590 F. Supp. 72, 77 (N.D. Cal. 1984) (prior government authorization necessary), *rev'd in part*, 792 F.2d 887 (9th Cir. 1986); Cadillac Fairview/Calif., Inc. v. Dow Chem. Co., 21 Env't Rep. Cas. (BNA) 1108, 1113 (C.D. Cal. 1984)(prerequisite that site be placed on National Priorities List); Bulk Distrib. Centers, Inc. v. Monsanto Co., 589 F. Supp. 1437, 1448 (S.D. Fla. 1984)(demand letter giving notice as prerequisite).

that the site be placed on the National Priorities List.[25] Designation of the site for Superfund cleanup by having it placed on the National Priorities List was deemed conclusive evidence that the response costs were consistent with the NCP.[26] In *Cadillac Fairview/California, Inc. v. Dow Chemical Co.*,[27] the trial court dismissed plaintiff's action where the site had not been listed as a priority for cleanup.[28] The court reasoned that cleanup cannot be consistent with the National Contingency Plan if the cleanup site is not listed on the National Priorities List.[29] This placed a more onerous burden on private plaintiffs than that placed on government agencies because governmental agencies could still seek reimbursement for cleanup of sites not listed as priorities.[30]

Another precondition to private recovery that gained credence in the early 1980's was the requirement that a CERCLA enforcement action must precede a private suit for damages.[31] In *Wickland Oil Terminal v. Asarco, Inc.*,[32] the trial court held that costs do not ripen into "response costs" until some appropriate governmental agency has authorized a removal or remedial action plan.[33] Without prior approval of the EPA or its lead agency, plaintiff's cleanup costs could not be response costs recoverable under CERCLA.[34] The *Wickland*

---

25. *See Cadillac Fairview*, 21 Env't Rep. Cas. (BNA) at 1114 (private recovery not allowed where EPA refused to place site on national priorities list).

26. *Id.* Section (B) of 42 U.S.C. § 9607(a)(1) states that private parties may recover necessary costs of response that are consistent with the National Contingency Plan. 42 U.S.C. § 9607(a)(1)(b) (1982 & Supp. IV 1986).

27. 21 Env't Rep. Cas. (BNA) 1108 (C.D. Cal. 1984).

28. *Cadillac Fairview*, 21 Env't Rep. Cas. (BNA) at 1118.

29. *Id.* at 1114-15. The court later issued a "clarification" and indicated that inclusion on the NPL, while not an absolute prerequisite to a private suit, is the usual method by which a private plaintiff may demonstrate that the cleanup is the result of some prior governmental action, which was an absolute prerequisite. *See id.*

30. Bulk Distrib. Centers, Inc. v. Monsanto Co., 589 F. Supp. 1437, 1444 (S.D. Fla. 1984). Since the government's response must not be "inconsistent" with the NCP and a private party's response must be "consistent" with the NCP in order for successful recovery, it was argued that a separate standard was mandated for each such claimant. *Id.*

31. Wickland Oil Terminal v. Asarco, Inc., 590 F. Supp. 72, 77 (N.D. Cal. 1984), *rev'd in part*, 792 F.2d 887 (9th Cir. 1986).

32. 590 F. Supp. 72 (N.D. Cal. 1984), *rev'd in part*, 792 F.2d 887 (9th Cir. 1986).

33. *Wickland Oil Terminal*, 590 F. Supp. at 77.

34. *Id.* The Ninth Circuit subsequently overruled this contention, noting that the EPA had clarified its regulations in 1985 after this case was decided by the trial court. *Wickland Oil Terminal*, 792 F.2d at 892. The EPA interpreted the 1982 NCP and stated that the "lead agency does not have to evaluate and approve a response action for those costs to be recovered from a responsible party pursuant to CERCLA section 107" [now codified at § 9604]. *Id.*

court also held that some governmental response costs had to be incurred before a private party might seek reimbursement for its own costs.[35] In *Bulk Distribution Centers, Inc. v. Monsanto Co.*,[36] as well as in *Wickland*, the trial courts required that private plaintiffs be subject to orders compelling cleanup before their costs could ripen into "response costs" and become recoverable under CERCLA.[37] Thus, plaintiff had to be ordered by the EPA or by the judiciary to cleanup the site, plaintiff had to seek EPA approval of the removal or remedial plan that plaintiff intended to use, and the government had to incur response costs at the site before plaintiff could bring an action against PRPs for response costs.

Service of a proper demand letter upon the alleged PRPs specifying a "sum certain," was also considered a condition precedent to a private suit for response costs pursuant to section 9607(a)(4)(B).[38] Failure of a private party to make such demand was held as a bar to recovery of response costs under CERCLA.[39]

B. *EPA Clarification of Private Party Recovery*

Much of the courts' confusion regarding preconditions to a private cause of action under CERCLA stemmed from CERCLA's vague legislative history.[40] While CERCLA required the EPA to formulate a National Contingency Plan or NCP, the 1982 version of the NCP contained ambiguities which fell short of providing the guidance to courts which Congress had contemplated.[41] In 1985, the EPA re-

---

Therefore, prior governmental approval is no longer a requirement to private party reimbursement. *Id.*

35. *Id.*

36. 589 F. Supp. 1437 (S.D. Fla. 1984).

37. *See Bulk Distrib. Centers*, 589 F. Supp. at 1444 (private party must win governmental approval of plan prior to cost recovery); *see also Wickland Oil Terminal*, 590 F. Supp. at 77 (government authorization of cleanup program held prerequisite to private cost recovery). *But cf.* Cadillac Fairview/Calif., Inc. v. Dow Chem. Co., 21 Env't Rep. Cas. (BNA) 1108, 1114-15 (C.D. Cal. 1984)(inclusion on National Priorities List not absolute prerequisite to recovery).

38. *See* Bulk Distrib. Centers, Inc. v. Monsanto Co., 589 F. Supp. 1437, 1448 (S.D. Fla. 1984).

39. *Id.* at 1448.

40. *Id.* at 1441 ("legislative history is riddled with uncertainty" since bill did not follow normal passage procedure in Congress).

41. *See, e.g.*, Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1080-81 (1st Cir. 1986)(attempting to analyze the legislative history in support of notice prerequisite to private action and noting its indefiniteness); Wickland Oil Terminal v. Asarco, Inc., 590 F. Supp. 72, 77 (N.D. Cal. 1984)(stating language ambiguous as to governmental pre-approval

sponded to these ambiguities by revising the NCP.[42]

In the revisions, the EPA "makes it absolutely clear that no federal approval of any kind is a prerequisite" for private recovery under CERCLA.[43] By specifically stating that the NCP does not require a government agency to approve cleanup procedures before a private party may file a private action to recover its damages, the EPA eliminated the requirements outlined in *Bulk Distribution Centers* and *Wickland Oil Terminal* regarding prior approval.[44]

Since the 1985 clarifications, courts have unanimously recognized a private cause of action under CERCLA.[45] Some of the preconditions have been judicially abrogated. For example, after a thorough analysis of section 9607 in *Dedham Water Company v. Cumberland Farms Dairy, Inc.*,[46] the First Circuit determined that a demand letter giving notice, while required for reimbursement from the Superfund, is not a prerequisite when seeking reimbursement from a PRP under section 9607.[47] Nevertheless, the EPA[48] and at least one commentator[49] sug-

---

requirement for private cost recovery), *rev'd in part*, 792 F.2d 887 (9th Cir. 1986); Bulk Distrib. Centers, 589 F. Supp. at 1444-45 (noting court confusion with prerequisites to private party cost recovery action).

42. 40 C.F.R. §§ 300.1-300.86 (1986); *see* 50 Fed. Reg. 5862 (1985)(purpose of revisions to respond to issues raised by litigation and to clarify responsibilities); *see also Wickland Oil Terminal*, 792 F.2d at 892 (noting that preamble stated revisions would clarify NCP). Some issues were clarified in the Preamble to the proposed revisions which expressed the intent of the EPA in revising the NCP; others were clarified in the Preamble to the final rule. *See* Preamble to Proposals, 50 Fed. Reg. 5862-83 (1985); *see also* Preamble, 50 Fed. Reg. 47,912-50 (1985). In its preamble to the proposed rule changes affecting the 1982 NCP, the EPA stated that they would clarify the prerequisites to private recovery of response costs. Preamble to Proposals, 50 Fed. Reg. 5870 (1985). In its preamble to the final rule, the EPA acknowledges "widespread confusion and conflicting judicial interpretations" of the phrase "consistent with the national contingency plan." *See* Preamble to Final Rule, 50 Fed. Reg. 47,934 (1985).

43. *See Wickland Oil Terminal*, 792 F.2d at 892 (using statements in preamble, court overruled trial court and held no pre-approval required).

44. *See Wickland Oil Terminal*, 792 F.2d at 892 (citing 50 Fed. Reg. 5870 and 47,934 (1985) as authority for eliminating requirements). As a result of the EPA clarifications, the Ninth Circuit reversed the trial court's dismissal of a private CERCLA action in *Wickland Oil Terminal* on the ground that private action is independent of governmental actions. *Id.*

45. *See, e.g.*, Kalik v. Allis-Chalmers Corp., 658 F. Supp. 631, 637 (W.D. Pa. 1987)(expressly stating CERCLA creates private cause of action); City of New York v. Exxon Corp., 633 F. Supp. 609, 616 (S.D.N.Y. 1986)(neither statute nor NCP requires prior approval); Artesian Water Co. v. Government of New Castle County, 605 F. Supp. 1348, 1356 (D. Del. 1985) (noting that virtually every court recognizes some type of private cause of action).

46. 805 F.2d 1074 (1st Cir. 1986).

47. *Id.* at 1082; *see also* Utah State Dep't of Health v. Ng, 649 F. Supp. 1102, 1107-08 (D. Utah 1986)(demand letter a prerequisite only to Superfund reimbursement); State of New York v. General Electric, 592 F. Supp. 291, 300 (N.D.N.Y. 1984)(demand letter not prerequi-

gest that prior notification to PRPs concerning the development of a cleanup plan is highly advisable. Giving a PRP the opportunity to participate in the investigatory and planning stages of a response may lead to a cooperative effort among the PRPs and accomplish the ultimate purpose of CERCLA.[50] It may also prove helpful later when the plaintiff must establish that the response was consistent with the NCP. Objections that the response was not "cost-effective" may be rebutted by showing that PRPs had an earlier opportunity to criticize the cleanup proposal and failed to do so.[51]

C. *Recognition in Texas:* Interchange Office Park, Ltd. v. Standard Industries, Inc.

Amidst all the confusion concerning private remedies under CERCLA, a Texas real estate developer was notified by the Texas Water Commission (TWC) that the property it had purchased three years earlier for development purposes contained significant deposits of lead, the release of which threatened to contaminate the region's water supply.[52] In 1984, during voluntary cleanup operations in cooperation with the TWC, Interchange Office Park, Ltd., the developer, filed suit in federal district court seeking reimbursement from the original owner and operator, Standard Industries, Inc. of the necessary response costs.[53]

Standard Industries filed a pre-answer Motion to Dismiss raising four grounds for dismissal. Standard Industries contended that no private cause of action existed because: 1) the site in question had not been listed on the NPL; 2) the cleanup plan instituted by Interchange had not been approved by the EPA or TWC; 3) there were no allegations in the complaint of release or threatened release of hazardous waste from the site; and 4) Interchange did not give notice by a de-

---

site to reimbursement from PRP). The prerequisite that the site be listed on the NPL in order to be consistent with the NCP has been clarified to be a prerequisite to Superfund reimbursement only. *See* Interchange Office Park, Ltd. v. Standard Indus., Inc., No. SA-84-CA-2457 (W.D. Tex. 1984).

48. *See* Revised NCP, 50 Fed. Reg. at 47,935.

49. *See* Gaba, *Recovering Hazardous Waste Cleanup Costs: The Private Cause of Action Under CERCLA*, 13 ECOLOGY L.Q. 181, 206 (1986).

50. *Id.*

51. *Id.* at 213.

52. Interchange Office Park, Ltd. v. Standard Indus., Inc., No. SA-84-CA-2457, 1 (W.D. Tex. 1984).

53. *Id.*

mand letter to the defendants.[54]

Standard Industries' motion was denied and the Honorable Hippolito F. Garcia rendered the first federal district court opinion within the Fifth Circuit to provide guidance on the requisites of a private CERCLA action. Judge Garcia rejected Standard's argument that placement of the cleanup site on the NPL was a prerequisite to recovery.[55] Judge Garcia agreed with the Second Circuit that such placement was intended to be a requirement only for access to the Superfund,[56] and would tend to emasculate a private party's attempts to obtain contribution or reimbursement from the PRP.[57]

Standard had argued that because Interchange had instituted a cleanup plan voluntarily, the costs incurred were not "response costs" as contemplated under CERCLA.[58] Citing the *Wickland Oil Terminal* trial court opinion, Standard argued that cleanup expenses cannot ripen into "necessary response costs" until an appropriate governmental agency had authorized a removal or remedial action plan or had itself incurred some governmental response costs.[59] Since Interchange had not been compelled to institute an environmental cleanup, Standard reasoned that it could not be compelled to pay for it.[60]

---

54. *Id.* at 1-2.

55. *Id.* at 5.

56. *Id.* at 3-5 (citing *State of New York v. Shore Realty Corp.*, 759 F.2d 1023 (2d Cir. 1985)).

57. *Id.* (citing *Allied Towing v. Great Eastern Petroleum Corp.*, 642 F. Supp. 1339, 1349 (E.D. Va. 1986)).

58. Interchange Office Park, Ltd. v. Standard Indus., Inc., No. SA-84-CA-2457, 5-6 (W.D. Tex. 1984).

59. Defendant's Brief In Support Of Motion To Dismiss at 5-6, Interchange Office Park, Ltd. v. Standard Indus., Inc., No. SA-84-CA-2457 (W.D. Tex. 1985)(defendants contended no response cost without prior governmental approval).

60. *Id.* at 5. The *Wickland Oil Terminal* case presented similar facts: the defendant was a former owner and operator of property on which significant amounts of lead waste were deposited over a period of many years. Wickland Oil Terminal v. Asarco, Inc., 590 F. Supp. 72, 78 (N.D. Cal. 1984), *rev'd in part*, 792 F.2d 887 (9th Cir. 1986). After the plaintiff, like Interchange, purchased the property for development purposes, it was notified that a release of lead deposits was threatening the area's water table. *Id.* The purchaser instituted a removal plan and sued the former owner and operator for contribution for the response costs. The trial court which issued its opinion prior to the EPA's clarifications held that these costs were developmental rather than "necessary costs of response," in part because of their voluntary nature. *Id.* The court in *Bulk Distribution Centers* had taken a similar position in requiring plaintiffs to show they were under compulsion to incur cleanup costs and that those costs were incurred pursuant to a governmentally approved plan. Bulk Distrib. Centers, Inc. v. Monsanto Co., 589 F. Supp. 1437, 1453 (S.D. Fla. 1984); *see also* Artesian Water Co. v. Govern-

Between the time that Standard filed their motion to dismiss and the court issued its ruling thereon, the *Wickland Oil Terminal* decision was reversed.[61] The Ninth Circuit and several district courts around the country, with the benefit of EPA clarifications to the NCP, were now distinguishing prerequisites for reimbursement of response costs from the Superfund from prerequisites to contribution from PRPs.[62] Rejecting the reasoning in *Bulk Distribution Centers* and *Artesian Water Company* that government approval or supervision of the cleanup plan was necessary to maintain a private cause of action,[63] Judge Garcia held that such prior approval could not be used to defeat a private cause of action under CERCLA.[64]

In addressing defendant's third contention, the *Interchange* court broadly construed the term "release" to include allegations of "depositing" as well as "dumping and disposing" as had been pled in Plaintiff's First Amended Complaint.[65] Lastly, the Court rejected any notion that a proper demand letter specifying a sum certain must be served upon the defendant before a cause of action arises under CERCLA.[66] Again, refusing to follow the rationale of *Bulk Distribution*

---

ment of New Castle County, 605 F. Supp. 1348, 1361 (D. Del. 1985)(private party may not recover costs unless remedial actions were governmentally approved).

61. In 1984, shortly after the California District Court dismissed *Wickland Oil Terminal* for failure to state a claim upon which relief may be granted, the *Interchange* plaintiffs filed their complaint in Texas. Standard Industries responded by filing a pre-answer Motion to Dismiss on January 7, 1985. Judge Garcia took the Motion under advisement while closely following developments in other circuits and in the executive branch. In the meantime, the Ninth Circuit reversed *Wickland Oil Terminal*. Judge Garcia overruled Standard Industries' Motion to Dismiss on February 26, 1987.

62. *See, e.g.*, State of New York v. Shore Realty Corp., 759 F.2d 1032, 1046 (2d Cir. 1985)(listing on NPL is no longer prerequisite to private recovery of response costs); Allied Towing v. Great Eastern Petroleum Corp., 642 F. Supp. 1339, 1349 (E.D. Va. 1986)(requirement of NPL listing hinders citizen cleanup); Pinole Point Properties, Inc. v. Bethlehem Steel Corp., 596 F. Supp. 283, 290 (N.D. Cal. 1984)(NPL listing only necessary for Superfund reimbursement).

63. *See Bulk Distrib. Centers*, 589 F. Supp. at 1453 (authorization and approval by government prerequisite to private recovery); *Artesian Water Co.*, 605 F. Supp. at 1361-62 (government approval necessary before private party can incur response costs).

64. *Interchange Office Park, Ltd. v. Standard Indus., Inc.*, No. SA-84-CA-2475, 5-6 (W.D. Tex. 1984).

65. *See id.* at 6.

66. *Id.* at 6-7. The 1986 amendments to section 9607 indirectly support this holding by providing that prejudgment interest shall be calculated from the "later of (i) the date payment of a specified amount is demanded in writing, *or* (ii) the date of the expenditure concerned." *See* 42 U.S.C. § 9607(a) (Supp. IV 1986). It follows from this that a written demand is not an essential element; however, pre-judgment interest shall not accrue until the PRP has at least

Centers, the court found that such requirements arise only in connection with reimbursement from the Superfund and do not preclude recovery from private parties.[67] The court noted, however, that the determination of whether cleanup costs were consistent with the NCP is a fact issue to be determined at trial.[68]

IV. REQUIREMENTS OF A PRIVATE CAUSE OF ACTION UNDER 42 U.S.C. 9607

A private party will be held strictly liable in a CERCLA action where the plaintiff establishes that the defendant is one of those identified as a "covered person,"[69] and that the plaintiff has incurred damages recoverable under the statute.[70] If the plaintiff is a governmental entity, it has the burden of establishing that it incurred costs in a removal or a remedial action that are "not inconsistent with the national contingency plan."[71] If the plaintiff is a private party, the burden is to prove "any other necessary costs of response incurred by any other person consistent with the national contingency plan."[72] Due to the equitable nature of a CERCLA action, defendants are not entitled to a jury verdict on those issues.[73]

---

had an opportunity to mitigate interest damages by participating in paying for the cleanup expenses at the time they accrue.

67. *Interchange Office Park*, No. SA-84-CA-2475 at 7.

68. *Id.* at 8.

69. 42 U.S.C. § 9607(a)(1)-(4) (Supp. IV 1986)(owner or operator of vessel or facility, persons disposing waste, persons transporting waste, and persons arranging for transport).

70. *Id.* § 9607(a)(4)(A)-(D) (damages include all response costs, injury to natural resources, costs of assessing damages, and costs of assessing health effects). Persons are held strictly liable because CERCLA uses the standard set out in section 311 of the Clean Water Act, 33 U.S.C. § 1321 (1982), which is strict liability. *Id.* § 9601(32). For cases referring to section 311 of the Clean Water Act for imposition of strict liability, see *State of New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985); *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823, 844 (W.D. Mo. 1984); *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1140 n.4 (E.D. Pa. 1982).

71. 42 U.S.C. § 9607(a)(4)(A) (Supp. IV 1986).

72. *Id.* § 9607(a)(4)(B).

73. The equitable nature of the remedy for reimbursement of cleanup costs is explained in the case law denying a jury trial for cleanup costs under CERCLA. In *United States v. Mottalo*, 605 F. Supp. 898, 913 (D.N.H. 1985), the court explained:

> Plaintiffs seek merely equitable relief, the return of monies expended for the cleanup of hazardous waste. Plaintiffs seek restitution, that is, to restore the *status quo* by receiving their rightful reimbursement. This restitution remedy is under the jurisdiction of a court of equity, and there is no jury trial where purely equitable relief is sought.

Id.; *accord* United States v. Dickerson, 640 F. Supp. 448, 453 (D. Md. 1986)(courts uniformly agree that CERCLA provides no right to jury trial); United States v. Ward, 618 F. Supp. 884,

A. *Potentially Responsible Parties*

When a release[74] of a hazardous substance[75] occurs or threatens to occur which necessitates a cleanup, the costs of responding to this situation are recoverable from four classes of persons targeted by the CERCLA liability provision of section 9607:

(1) an owner and/or operator[76] of a facility,[77] generating hazardous

---

913 (E.D.N.C. 1985)(no jury trial under CERCLA due to equitable nature of Act); Wehner v. Syntex Corp., 618 F. Supp. 37, 38 (E.D. Mo. 1984)(CERCLA provides equitable relief, thus no jury trial). This rationale has been extended beyond government CERCLA actions to deny a jury trial in private CERCLA response cost recovery actions. *See Wehner*, 618 F. Supp. at 37-38.

74. "Release" is defined as:

> . . . any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant), but excludes (A) any release which results in exposure to persons solely within a workplace, with respect to a claim which such persons may assert against the employer of such persons, (B) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine, (C) release of source, byproduct, or special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954 [42 U.S.C. § 2011-2796], if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under section 170 of such Act [42 U.S.C. § 2210], or, for the purposes of 104 of this title [42 U.S.C. § 9604] or any other response action, any release of source byproduct, or special nuclear material from any processing site designated under section 7912(a)(1) or 7942(a) of this title, and (D) the normal application of fertilizer.

42 U.S.C. § 9601(22) (Supp. IV 1986).

75. "Hazardous substance" is defined as:

> . . . [A]ny 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](but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C. § 6901-6987] 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. § 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).

Id. § 9601(14).

76. Even though the statute states "owner *and* operator," the phrase has been construed in the disjunctive as well. *See* United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 577-78 (D. Md. 1986). In the case of a corporate owner, certain officers and employees may be

waste;[78]

(2) the owner and/or operator of a facility at the time hazardous substances were deposited thereon;[79]

(3) the person who arranged for disposal or transportation of hazardous substances to a facility;[80] or

(4) a transporter of hazardous substances to a facility.[81]

Current property owners[82] are within the class of persons liable for cleanup costs under CERCLA regardless of whether any disposal occurred while they owned an interest in the property.[83] In *State of New York v. Shore Realty Corporation*,[84] an unauthorized tenant had

---

potentially liable "owners" as well. State of New York v. Shore Realty Corp., 759 F.2d 1032, 1052 (2d Cir. 1985). In *State of New York v. Shore Realty Corp.*, the court found a managing shareholder to be an owner under CERCLA. *Id.* Reasoning that since the statutory definition of owner excludes those who do not participate in management but merely hold security interest in the property, the term "owner" impliedly includes those who participate in management. *Id.*

77. CERCLA defines the term "facility" as:

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

42 U.S.C. § 9601(9) (Supp. IV 1986).

78. *Id.* § 9607(a)(1).

79. *Id.* § 9607(a)(2).

80. *Id.* § 9607(a)(3).

81. *Id.* § 9607(a)(4).

82. *See* 42 U.S.C. § 9601 (20)(a) (Supp. IV 1986). Property owner is defined under CERCLA as:

> . . . (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility. . . .

Id.

83. *See, e.g.*, State of New York v. Shore Realty Corp., 759 F.2d 1032, 1043-44 (2d Cir. 1985)(current owner liable for unauthorized tenant's dumping); United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 577 (D. Md. 1986)(purchase under foreclosure sale rendered former mortgagee an owner); *cf.* United States v. Carolawn Co., 21 Env't Rep. Cas. (BNA) 2124, 2128 (D.S.C. 1984)(one hour of ownership raised fact issue of ownership during disposal).

84. 759 F.2d 1032 (2d Cir. 1985).

dumped hazardous substances on property owned by Shore Realty.[85] Shore Realty argued that because it neither caused the toxic release nor owned the site at the time of disposal it was not a covered person under Section 9607(a)(1).[86] The court disagreed[87] and defined the scope of liability for current owners as being much broader than that of prior owners.[88] Specifically, the court stated that "[p]rior owners and operators are liable only if they owned or operated the facility at the time of disposal of any hazardous substance; this limitation does not apply to current owners . . . ."[89]

Persons who owned or operated the facility or the real estate subsequent to the disposal activity, but who are not owners or operators at the time the property is cited or designated for cleanup, generally do not fall within these categories.[90] In *United States v. Carolawn Company*,[91] however, title to property passed from seller to a company and within one hour, the company transferred title to three company officers.[92] The company, sued along with the current title holders, sought dismissal on the grounds that it served as a mere conduit in the transaction.[93] The government argued that the company had retained an ownership interest in the property after transfer of the title.[94] The court denied the motion stating that the brief period of ownership did not summarily entitle the company to dismissal of the complaint without further evidence that movant did not retain a right to control the property.[95] It could not be determined from the record whether the company had a right to control the property after the transfer and the court would not, therefore, dismiss the complaint.[96]

---

85. *See Shore Realty Corp.*, 759 F.2d at 1037 (current owner of disposal site held liable for cleanup of site even though it did not generate waste).

86. *Id.* at 1044.

87. *Id.* at 1043.

88. State of New York v. Shore Realty Corp., 759 F.2d 1032, 1043-44 (2d Cir. 1985).

89. *Id.* at 1044.

90. *Id.* (prior owners liable only if they owned facility at time of disposal).

91. 21 Env't Rep. Cas. (BNA) 2124 (D.S.C. 1984).

92. *See id.* at 2128-29 (one hour of ownership raised fact issue of ownership).

93. *Id.*

94. *Id.* Further inquiry as to whether after the transfer defendant retained an interest in the property, either legal or equitable, was required to ascertain defendant's liability as owner. *Id.*

95. *Id.* at 2128-29.

96. United States v. Carolawn Co., 21 Env't Rep. Cas. (BNA) 2124, 2128-29 (D.S.C. 1984).

Lessors are equally vulnerable under CERCLA.[97] Lack of knowledge that a tenant is generating or dumping hazardous substances on the property will not exculpate an owner.[98]In the face of strict liability, landlords must inquire closely of a tenant's waste generation and removal activities and ensure that the property remains clean.

A lender who forecloses upon and purchases a site containing toxic waste either prior to or during a cleanup operation may be held liable for response costs under section 9607.[99] In *United States v. Maryland Bank & Trust Co.*,[100] the bank took a security interest in a garbage dump site to secure a note.[101] Following a default, the bank purchased the site at a foreclosure sale.[102] Two years later, the EPA allocated funds to conduct a removal action under CERCLA and notified the bank, which still held the property, that it should take corrective action or the Superfund would be utilized to cleanup the site.[103] The bank failed to do so, and the EPA ultimately funded the cleanup and then sought recovery of response costs from the bank.[104] The bank argued that it was not the "owner" as defined by CERCLA, seeking exculpation under the security interest holder exception to the definition of the term.[105] The court found that the bank, in foreclosing on the site, had acted to protect its investment, not its security interest.[106] The court stated that the "security interest must exist at

---

97. *See* United States v. Argent Corp., 21 Env't Rep. Cas. (BNA) 1354, 1356 (D.N.M. 1984)(lessor as owner liable under CERCLA as a matter of law).

98. *See* State of New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985) (contractual relationship through lease agreement prevents showing by lessor that lessee was sole cause); *see also Argent Corp.*, 21 Env't Rep. Cas. (BNA) at 1356 (lease agreement prevents lessor from asserting lessee solely liable).

99. *See* United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 577 (D. Md. 1986)(bank obtaining property through foreclosure sale held liable for response costs).

100. 632 F. Supp. 573 (D. Md. 1986).

101. *Id.* at 575.

102. *Id.*

103. *Id.* at 575-76.

104. *See id.* (after bank's refusal of offer to cleanup, EPA removed hazardous waste at cost of $551,713.50 which it demanded bank pay).

105. *See* United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 578-79 (security interest extinguished by foreclosure and bank became owner). Owner is defined in 42 U.S.C. § 9601(20)(A) (Supp. IV 1986). The Act excludes from the definition of owner any person who bears the indicia of ownership merely to protect his or her security interest. *Maryland Bank & Trust Co.*, 632 F. Supp. at 579; *see also* 42 U.S.C. § 9601(20)(A) (Supp. IV 1986).

106. *Maryland Bank & Trust Co.*, 632 F. Supp. at 579. When the bank foreclosed and placed the highest bid at the foreclosure sale, it became the owner. Its security interest no longer existed and thus, it could not take advantage of the security interest exclusion in section 9601. *Id.*

the time of cleanup" in order to exculpate the owner.[107] In this case, the bank had already extinguished the security interest when it foreclosed and acquired full title.[108]

B. *"Necessary" Costs of Response Incurred by "Any Other Party"*

An additional element of an action by private parties seeking reimbursement for cleanup costs is proof by the plaintiff that the response costs were necessary, which is a question of fact.[109] The term "response" includes both remedial and removal activities[110] and has been

---

107. *Id.*

108. *Id.* The court expressed concern that CERCLA could be misused by lenders as an insurance policy. *Id.* at 580. The court also found that lenders could protect themselves by making prudent loans, by declining to foreclose, and by declining to bid on the property at the foreclosure sale. *Id.*

109. *See* City of New York v. Exxon Corp., 633 F. Supp. 609, 618 n.26 (S.D.N.Y. 1986) (costs must fall under definition of remedial or removal costs to be response costs); Fishel v. Westinghouse Elec. Corp., 617 F. Supp. 1531, 1535 (M.D. Pa. 1985)(although response costs not specifically claimed, facts established response costs); Pinole Point Properties, Inc. v. Bethlehem Steel Corp., 596 F. Supp. 283, 290 (N.D. Cal. 1984)(consistency with NCP factual question based on cost-effectiveness); Interchange Office Park, Ltd. v. Standard Indus., Inc., No. SA-84-CA-2457, 8 (W.D. Tex. 1987)(factual determination whether costs are consistent with NCP); *see also* 42 U.S.C. § 9607(a)(4)(B) (Supp. IV 1986).

110. 42 U.S.C. § 9601(25) (Supp. IV 1986). The term "remedial" is generally reserved for those actions which are "intended to restore long-term environmental quality." *See* City of New York v. Exxon Corp., 633 F. Supp. 609, 614 (S.D.N.Y. 1986)(remedial are permanent and removal actions are short-term). CERCLA defines "remedial" activities as

> those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes but is not limited to such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances or contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, on-site treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the costs of permanent relocation of residents and businesses and community facilities [under certain circumstances] . . . . The term does not include off-site transport of hazardous substances, or the storage, treatment, destruction, or secure disposition off-site of such hazardous substances or contaminated materials [except under certain conditions].

42 U.S.C. § 9601(24) (Supp. IV 1986). A removal action is one designated "for short-term abatement of toxic waste hazards." State of New York v. Shore Realty Corp., 759 F.2d 1032, 1040 (2d Cir. 1985); *see also Exxon Corp.*, 633 F. Supp. at 614. CERCLA defines "removal" activities as

> the cleanup or removal of released hazardous substances from the environment, such ac-

liberally construed to cover a wide range of costs.[111] The statute implies that some response cost must be incurred before a private cause of action can be brought.[112] At least one commentator has suggested that preliminary site investigation expenses fall within the cost of response and could satisfy the prerequisite to a cause of action.[113] Decisions are split on this question and the Fifth Circuit has not yet

---

tions as may be necessary [sic] 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, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief Act of 1974.

42 U.S.C. § 9601(23) (Supp. IV 1986).

111. *See, e.g., Exxon Corp.*, 633 F. Supp. at 618 (costs of collecting and analyzing groundwater samples at landfills, conducting hydrogeological studies and air quality monitoring and waste oil remediation study at landfill recoverable); Mayor and Bd. of Aldermen v. Drew Chem. Corp., 621 F. Supp. 663, 668 (D.N.J. 1985)(pre-CERCLA response costs recoverable under the Act); United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 850 (W.D. Mo. 1984)(response costs include litigation fees and expenses, government salaries associated with monitoring and evaluating releases, past and future costs of planning and implementing response, and prejudgment interest).

112. 42 U.S.C. § 9607(a)(4)(B) (Supp. IV 1986) (statute states "any other necessary costs" which implies prior cost incurred); *see also* Bulk Distrib. Centers, Inc. v. Monsanto Co., 589 F. Supp. 1437, 1452 (S.D. Fla. 1984)("other" indicates incurring of some governmental costs). Contention over whether the statutory reference to "other" costs required governmental expenditures before a private party could recover its costs has been rejected. *See* Wickland Oil Terminal v. Asarco, Inc., 792 F.2d 887, 891 (9th Cir. 1986)(term used to distinguish between governmental and private costs); City of New York v. Exxon Corp., 633 F. Supp. 609, 617 (S.D.N.Y. 1986)(Congress used term "other" merely to differentiate between government response costs and private response costs); Artesian Water Co. v. Government of New Castle County, 605 F. Supp. 1348, 1357 n.11 (D. Del. 1985)("other" distinguishes governmental from private response costs). *But see Bulk Distrib. Centers*, 589 F. Supp. at 1446-47 ("other" costs refer to government expenditure as prerequisite).

113. Gaba, *Recovering Hazardous Waste Cleanup Costs: The Private Cause of Action Under CERCLA*, 13 ECOLOGY L.Q. 181, 215 (1986)(definition of response cost broad enough to include preliminary expenses). In arguing for such a position, Professor Gaba stated:

> A broad definition of the items eligible for recovery as "necessary costs of response" is certainly consistent with the congressional intent to encourage private cleanup efforts and courts should allow for ultimate recovery of even preliminary expenses when they were necessary to determine the scope of the cleanup effort. To condition access to courts on whether funds were expended in conceiving or in implementing the cleanup plan seems arbitrary. Expenses for plan development are just as necessary as the expenditures for implementation.

Id.

indicated which way it will swing.[114]

PRPs should consider the option of filing a federal declaratory judgment action to determine liability and allocation of response costs at an early stage of the cleanup process.[115] While courts are unanimous in holding that declaratory judgments may be used when seeking future removal costs,[116] at least one court has held that a private

---

114. Courts holding that preliminary expenses are recoverable response costs include *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042-43 (2d Cir. 1985)(site assessment costs); *State of New York v. General Electric Co.*, 592 F. Supp. 291, 298 (N.D.N.Y. 1984)(costs of evaluating release are response costs); *Jones v. Inmont Corp.*, 584 F. Supp. 1425, 1429 (S.D. Ohio 1984)(medical tests). Those ruling no recovery for preliminary expenses include *Cadillac Fairview/California, Inc. v. Dow Chemical Co.*, 21 Env't Rep. Cas. (BNA) 1108, 1118 (C.D. Cal. 1984)(posting no trespass signs, hiring guard, and conducting chemical analysis not response costs) and *D'Imperio v. United States*, 575 F. Supp. 248, 253 (D.N.J. 1983)(costs to determine feasibility of cleanup action are pre-response costs). The district court in *Bulk Distribution*, while opining that investigatory expenses were compensable, concluded that without additional expenditures for actual cleanup, the preliminary costs would not constitute sufficient "necessary costs incurred" to bring an action under section 9607(a)(4)(B). *See* Bulk Distrib. Centers, Inc. v. Monsanto Co., 589 F. Supp. 1437, 1452 (S.D. Fla. 1984).

115. *See* 28 U.S.C. § 2201(a) (Supp. IV 1986). The statute states in pertinent part as follows:

> (a) In a case of actual controversy within its jurisdiction . . . upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Id. Parties seeking relief under this statute must be careful to plead facts sufficient to show an "actual controversy." *See* Caldwell v. Gurley Ref. Co., 755 F.2d 645, 650 (8th Cir. 1985) (EPA notice to lessor and lessee of toxic dump sites that either or both could be required to reimburse Superfund for past and future cleanup was "actual controversy"). Also, the parties must plead such facts as to invoke the court's jurisdiction on independent federal or diversity grounds. *See, e.g.*, Bucks County Bd. of Comm'rs v. Interstate Energy Co., 403 F. Supp. 805, 809 (E.D. Pa. 1975); City of Highland Park v. Train, 374 F. Supp. 758, 768-69 (N.D. Ill. 1974), *aff'd*, 519 F.2d 681 (7th Cir. 1975), *cert. denied*, 424 U.S. 927 (1976). Both insurers and insureds utilize declaratory judgment actions to determine coverage issues under policies issued to owners, manufacturers and transporters, as well as to determine the insurer's obligation to defend toxic waste cases. *See* United States Aviex Co. v. Travelers Ins. Co., 125 Mich. App. 579, 336 N.W.2d 838, 841-42 (1983)(damages included reimbursement paid to government for cleanup and insurance carrier was liable to insured for such costs); *see also* Continental Ins. Co. v. Northeastern Pharmaceutical & Chem., Inc., 811 F.2d 1180 (8th Cir. 1987), *rehearing granted en banc*, 815 F.2d 51 (8th Cir. 1987)(damage to environment was property damage covered under policy); Maryland Casualty Co. v. Armco, Inc., 822 F.2d 1348, 1353 (4th Cir. 1987)(court refused to expand insurance company's liability beyond the express provisions of contract). An in-depth discussion of an insurer's duty to defend and other insurance coverage issues is beyond the scope of this article.

116. *See* O'Neil v. Picillo, 682 F. Supp. 706, 730 (D.R.I. 1988)(state granted declaratory judgment to recover future response costs); *see also* United States v. Conservation Chem. Co., 619 F. Supp. 162, 211 (W.D. Mo. 1985)(declaratory relief within court's discretion); United

party may not institute a declaratory judgment proceeding against any other party until the declaratory plaintiff has incurred some "necessary costs of response."[117] Unless a declaratory judgment plaintiff can allege that investigative costs, or other preliminary costs, qualify as "necessary costs of response," or that the government has incurred response costs for which plaintiff may be liable, there can be no declaratory action.[118]

Many CERCLA cleanup disputes involve parties who do business nationwide and some involve multi-state remedial activities - a situation which provides parties with a choice of jurisdictions and venues. Insureds and insurers, as well as other PRPs, often find it expedient to file a declaratory judgment in their arena of choice as quickly as possible. Courts tend to stay declaratory relief actions in one jurisdiction where comprehensive declaratory relief has already been filed elsewhere. Multi-district litigation designation may be appropriate to conserve and coordinate litigation efforts in complex, multiple suit situations.[119]

C. *"Consistent" with the National Contingency Plan*

One of the key requirements for private recovery of response costs under CERCLA is that those costs must be "consistent with the national contingency plan."[120] A primary impetus in revising the 1982 NCP was the need to address the "widespread confusion and conflicting judicial interpretations" of the phrase "consistent with the national contingency plan."[121] It is now clear that a site need not be

---

States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 852-53 (W.D. Mo. 1984)(declaratory relief granted for future removal costs).

117. *See* Levin Metals Corp. v. Parr-Richmond Terminal Co., 608 F. Supp. 1272, 1275 (N.D. Cal. 1985)(party must affirmatively demonstrate costs incurred before seeking relief).

118. *See, e.g.*, Caldwell v. Gurley Ref. Co., 755 F.2d 645, 649 (8th Cir. 1985)(EPA had notified lessor and lessee of liability for government cleanup costs already incurred); State of New York v. General Elec. Co., 592 F. Supp. 291, 298-99 (N.D.N.Y. 1984)(plaintiff properly asserted claim by showing costs incurred); D'Imperio v. United States, 575 F. Supp. 248, 253 (D.N.J. 1983)(declaratory plaintiff cannot bring action until funds have been spent in manner consistent with NCP).

119. *See* 28 U.S.C. § 1407 (1968).

120. 42 U.S.C. § 9607(a)(4)(B) (Supp. IV 1986).

121. *See* Preamble to Proposed Revisions, 50 Fed. Reg. 47,934 (1985); *see also* Wickland Oil Terminal v. Asarco, Inc., 792 F.2d 887, 892 (9th Cir. 1986)(court notes EPA's response to "widespread confusion"). The once valid preconditions to private recovery of governmental approval and demand letters were invalidated due to the 1985 clarifications of the NCP. *See Wickland Oil Terminal*, 590 F. Supp. at 77 (government approval of plan prerequisite to pri-

listed on the National Priorities List (NPL) in order for a private party to establish that the cleanup undertaken is consistent with the NCP.[122] It is equally clear that prior governmental expense or approval is only a prerequisite to reimbursement from the Superfund and not to recovery from PRPs.[123]

Although these prerequisite barriers will no longer frustrate the plaintiff seeking private recovery, the plaintiff retains a significant burden of proving that the response costs incurred were consistent with the NCP. New requirements to show consistency with the NCP have been promulgated in section 300.71 of the NCP.[124] The factors and standards to be applied depend upon the circumstances presented at a specific site.[125] If removal action is taken, the private parties must follow a response action consistent with regulations which control federal cleanup activities.[126] If, however, long-term remedial action is required, several steps must be addressed to show consistency.[127] First, a private party must show it has initiated proper site analysis and conducted appropriate investigations.[128] Environmentally acceptable cleanup alternatives must be developed which meet or exceed both federal and state standards,[129] from which the most cost-effective

---

vate recovery); *see also* Bulk Distrib. Centers, Inc. v. Monsanto Co., 589 F. Supp. 1437, 1448 (S.D. 1984)(demand letter a prerequisite).

122. *See* 50 Fed. Reg. 47,934 (1985); *see also* Allied Towing v. Great Eastern Petroleum Corp., 642 F. Supp. 1339, 1349 (E.D. Va. 1986)(requirement of NPL listing would conflict with EPA's construction of section 9607); Interchange Office Park, Ltd. v. Standard Indus., Inc., No. SA-84-CA-2457, 4-5 (W.D. Tex. 1987)(requiring listing on NPL conflicts with purpose behind CERCLA).

123. 50 Fed. Reg. 47,934 (1985). The EPA administrator wanted to make it perfectly clear that no federal approval is required before private parties may seek recovery of response costs under CERCLA. *See Wickland Oil Terminal*, 792 F.2d at 892 (requirement of government approval contradicts EPA's interpretation of section 9607); Fishel v. Westinghouse Elec. Corp., 617 F. Supp. 1531, 1535 (M.D. Pa. 1985)(prior approval required only when reimbursement is sought from government). In *City of New York v. Exxon Corporation*, the court held that the requirement of prior governmental approval to private party action would restrict private cleanup to the "volume of activity which the federal government could centrally supervise, and this would defeat the Act's basic intent." City of New York v. Exxon Corp., 609 F. Supp. 633, 617 (S.D.N.Y. 1986).

124. 40 C.F.R. § 300.71(a)(2) (1986).

125. *Id.* Response action is considered consistent with the NCP if the removal action is warranted under the circumstances and is consistent with 40 C.F.R. § 300.65 (section providing different procedures for removal depending on the type of waste). *Id.*

126. 40 C.F.R. § 300.71(a)(2)(i) (1986).

127. *Id.* § 300.71(a)(2)(ii)(A)-(D).

128. *Id.* § 300.71(a)(2)(ii)(A).

129. Professor Gaba raises a number of issues concerning EPA discretion in requiring

approach shall be selected.[130] If superfunds are involved, a private party must now offer the general public an opportunity to comment on the selected plan before it is implemented.[131]

D. *Possible Defense Strategies Under CERCLA*

While a PRP has a paltry arsenal of defenses to liability under CERCLA,[132] the revised NCP regulations raise a number of arguable defenses as to the amount of damages.[133] Each item of expense incurred in the cleanup may be challenged as unnecessary.[134] Disputes concerning the cost-effectiveness of the cleanup plan implemented as opposed to other environmentally acceptable alternatives should provide fertile ground for expert testimony.[135] If successful, a PRP defendant may reduce the plaintiff's recovery of the response cost actually incurred to an amount equal to the most cost-effective alter-

---

compliance with a variety of non-applicable but "relevant and appropriate" federal environmental standards. Gaba, *Recovering Hazardous Waste Cleanup Costs: The Private Cause of Action Under CERCLA*, 13 ECOLOGY L.Q. 181, 209-211 (1986). Private plaintiffs must also show compliance with state environmental laws and local permits. *Id.*; *see also* 40 C.F.R. 300.71(a)(4) (1986)(person performing response actions shall comply with all appropriate federal, state and local requirements).

130. 40 C.F.R. § 300.71(a)(2)(ii)(C) (1986).

131. *Id.* § 300.71(a)(2)(ii)(D). No forum for such public hearing is dictated by the regulations.

132. *See* 42 U.S.C. § 9607(b)(1),(2),(3) (1983). Defenses listed in the Act are:

(1) an act of God;
(2) an act of war;
(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstance, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or (4) any combination of the foregoing paragraphs.

Id.

133. 40 C.F.R. § 300.69 (1986).

134. 42 U.S.C. § 9607(a)(4)(B) (Supp. IV 1986). The term "necessary" is not defined by CERCLA.

135. Gaba, *Recovering Hazardous Waste Cleanup Costs: The Private Cause of Action Under CERCLA*, 13 ECOLOGY L.Q. 181, 212 (1986). Indeed, Professor Gaba suggests that the cost of the actual cleanup selected may become irrelevant if the defense strategy is directed toward litigating cost-effective alternatives. *See id.*

native remedy.[136]

Several courts have recognized that the plaintiff bears the burden of proving that the costs incurred are consistent with the NCP.[137] It has been argued, however, that this burden is unfairly placed and that it may serve as a deterrence to private parties who are most likely to institute voluntary cleanups.[138] An alternative suggestion is that cost-*in*effectiveness should more properly be raised as an affirmative defense by PRPs.[139]

E. *Strict Liability and Statutory Defenses for Potentially Responsible Parties*

Courts have construed section 9607 as holding covered persons strictly liable.[140] Only three statutory defenses exculpate a person covered under this section.[141] If the release of a hazardous substance and the damages flowing from it were caused solely by an act of God[142] or an act of war,[143] the owner or operator will not be held

---

136. *Id.* at 213.

137. *See* Pinole Point Properties, Inc. v. Bethlehem Steel Corp., 596 F. Supp. 283, 290 (N.D. Cal. 1984)(private plaintiff bears burden that costs be consistent with NCP); United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 850-51 (W.D. Mo. 1984)(costs must be proven consistent with NCP for private recovery).

138. *See* Gaba, *Recovering Hazardous Waste Cleanup Costs: The Private Cause of Action Under CERCLA*, 13 ECOLOGY L.Q. 181, 213 (1986)(person undertaking cleanup should not have to risk that cleanup will not be cost-effective because such burden would hinder rapid action).

139. *See id.* at 213 (cost-effectiveness should be affirmative defense).

140. *See* New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985)(courts hold and Congress understood it to be strict liability standard); United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 844 (W.D. Mo. 1984)(strict liability standard applies to CERCLA action); City of Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135, 1140 n.4 (E.D. Pa. 1982)(CERCLA adopts Clean Water Act standard of strict liability); *see also* 42 U.S.C. § 9601(32) (Supp. IV 1986)(CERCLA adopts standard of liability found in § 1321 of Clean Water Act). The Act does not specifically state that PRPs are subject to a standard of strict liability, but it does cross-reference liability to the standard described in section 311 of the Clean Water Act [33 U.S.C. § 1321 (1982)] which is strict liability. *Id.*

141. 42 U.S.C. § 9607(b) (1982)(act of God, act of war, third party defense).

142. CERCLA defines "act of God" as "an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight." *Id.* § 9601(1) (Supp. IV 1986). In *United States v. Stringfellow*, the court ruled that heavy rainfall was not an act of God because it was foreseeable and the damage to the facility which occurred could have been prevented by better drainage design. United States v. Stringfellow, 661 F. Supp. 1053, 1061 (C.D. Cal. 1987).

143. 42 U.S.C. § 9607(b)(2) (1982).

liable.[144] The third defense requires the defendant to show that the release or threatened release was caused by a third party who was neither an employee of nor in contractual privity with the covered person.[145] The defendant carries a heavy burden of showing he acted responsibly and in good faith when dealing with the hazardous substance, and that he took precautions against all foreseeable situations involving the third party.[146] The statute also permits the defendant to plead a defense based upon any combination of these situations.[147]

The 1986 amendments to CERCLA[148] added a definition of "contractual relationship" which creates an "innocent purchaser" defense.[149] If a party acquires the site subsequent to the disposal activity, he will not be liable under CERCLA if he can establish either (1) that he had no knowledge or reason to know of any hazardous substances;[150] (2) that the defendant is a governmental entity which acquired the site through an involuntary transfer; or (3) that the de-

---

144. *Id.* § 9607(b)(1), (2).

145. *Id.* § 9607(b)(3).

> There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—
>
> . . .
>
> (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions . . . .

Id.; *see also* United States v. Argent Corp., 21 Env't Rep. Cas. (BNA) 1354, 1356 (D.N.M. 1984)(lease agreement constitutes contractual relationship as defined by CERCLA so third party defense rejected).

146. *See, e.g.*, State of New York v. Shore Realty Corp., 759 F.2d 1032, 1048 (2d Cir. 1985)(knowledge of tenant release deprives owner of third-party defense); United States v. Bliss, 667 F. Supp. 1298, 1304-05 n.3 (E.D. Mo. 1987)(contractual relationship negated defense).

147. 42 U.S.C. § 9607(b)(4) (1982).

148. 42 U.S.C. §§ 9601-9675 (Supp. IV 1986).

149. *Id.* § 9601(35)(A).

150. *Id.* There is a duty to inquire at the time of acquisition, and it is intended that commercial transactions be scrutinized under a higher standard than residential transactions. *See* H.R. Rep. No. 99-962, 99th Cong. 2d Sess. 187 (1986).

fendant acquired the property by inheritance or bequest.[151]

A lender, however, will find it almost impossible to utilize the innocent purchaser defense, because loan documents are expressly included in the CERCLA's definition of contractual relationships[152] and the act of foreclosure is pursuant to that relationship. Further, a lender must establish it had no knowledge of the disposal of hazardous substances at the time of acquisition.[153] One commentator asserts that "the intent behind [the definition of contractual relationship] is to limit the third-party defense to only the most innocent of subsequent purchasers, such as a person acquiring property by inheritance."[154]

Although not specifically incorporated into the statute, courts have consistently construed CERCLA to provide for joint and several liability, particularly in cases where the damages are indivisible.[155] States such as Texas which apply comparative causation in strict liability cases[156] permit the defendant PRP to seek contribution from other PRPs, including the plaintiff and third parties.[157] In such cases, a great deal of the discovery will focus on identifying the relative volumes of waste each PRP generated as well as the degree of toxicity and corresponding response each requires.[158]

---

151. 42 U.S.C. § 9601(35)(A) (Supp. IV 1986).

152. *Id.*

153. *See* Vollman, *Double Jeopardy: Lender Liability Under Superfund*, 16 REAL EST. L.J. 3, 13 (1987)(intent behind section 9601(35)(A) to limit to most innocent purchasers only).

154. *Id.* at 13.

155. *See, e.g.*, United States v. Stringfellow, 661 F. Supp. 1053, 1060 (C.D. Cal. 1987) (indivisible damages); United States v. Bliss, 667 F. Supp. 1298, 1313 (E.D. Mo. 1987)(joint and several liability determined on case by case basis); Sand Springs Home v. Interplastic Corp., 670 F. Supp. 913, 915-16 (N.D. Okla. 1987)(scope of liability determined under common law principles); United States v. Shell Oil Co., 605 F. Supp. 1064, 1083 n.9 (D. Colo. 1985)(joint and several liability not mandated); United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 844-45 (W.D. Mo. 1984)(Act allows joint and several liability); United States v. Wade, 577 F. Supp. 1326, 1138 (E.D. Pa. 1983)(Act permitted joint and several liability).

156. *See* Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 428 (Tex. 1986)(court adopts standard of comparative causation for strict liability in tort); TEX. CIV. PRAC. & REM. CODE ANN. § 33.001 (Vernon Supp. 1988)(statute adopts comparative causation for strict liability).

157. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 33.001 (Vernon Supp. 1988)(parties may send contributions based on comparative responsibility from co-defendants and plaintiff in strict liability actions); *accord* State of Colorado v. Asarco, Inc., 608 F. Supp. 1484, 1491 (D. Colo. 1985)(contribution consistent with CERCLA's purpose).

158. *See* United States v. A & F Materials Co., 578 F. Supp. 1249, 1256 (S.D. Ill. 1984) (Congress did not want small contributor to pay equally for entire injury); Gaba, *Recovering Hazardous Waste Cleanup Costs: The Private Cause of Action Under CERCLA*, 13 ECOLOGY L.Q. 181, 229 n.225 (1986).

F. *Damages Under CERCLA*

Potentially responsible parties under CERCLA are liable to federal or state agencies for all costs of removal or remedial action taken by the agencies which are "not inconsistent with the national contingency plan."[159] PRPs are also liable in private causes of action for "any other necessary costs of response incurred by any other person consistent with the national contingency plan."[160] In addition, there is liability for injury to natural resources, such as the water supply, which is the result of any release of hazardous substances.[161] The reasonable costs of assessing any damage to the environment are also recoverable under section 9607 of CERCLA.[162]

V. REMEDIES UNDER TEXAS ENVIRONMENTAL STATUTES

The Texas legislature's response to the concerns of dumping hazardous wastes and chemicals resulted in three different statutes. First, the Texas Solid Waste Disposal Act (TSWDA) as amended allows either the Department of Health or the Department of Water Resources by administrative order or by court action to enjoin and/or order the PRP to take remedial action to eliminate the release of the solid waste.[163] Second, the Texas Hazardous Substance Spill Prevention and Control Act (THSSPCA) gives the State a cause of action against any PRP for monies paid out of the Texas Spill Response

---

159. 42 U.S.C. § 9607(a)(4)(A) (Supp. IV 1986).

160. *Id.* § 9607(a)(4)(B). Word "other" in the statute distinguishes between governmental response costs and private response costs. Wickland Oil Terminal v. Asarco, Inc., 792 F.2d 887, 890-92 (9th Cir. 1986).

161. 42 U.S.C. § 9607(a)(4)(C) (Supp. IV 1986). The measure of damages under this section is the diminution of value caused by toxic waste contamination. State of Idaho v. Bunker Hill, 635 F. Supp. 665, 676 (D. Idaho 1986). Since response costs almost always exceed the value of the land, this claim for damages is rarely used.

162. *See* 42 U.S.C. § 9607(a)(4)(C) (Supp. IV 1986). In 1986, Congress amended section 9607 to permit recovery for the cost of conducting a health assessment or health effects study in connection with a cleanup response. 42 U.S.C. § 9607(a)(4)(D) (Supp. IV 1986). The damages recovered by a governmental plaintiff for each release at most facilities may not exceed the sum of all costs of response plus $50,000,000.00 under subchapter (c). *Id.* § 9607(c). This provides a considerable strong-arm tactic to encourage cooperative response as liability for the total cost of response as well as punitive damages may be assessed against a recalcitrant or grossly negligent responsible party. *Id.* In most cases, such recoveries go to the Superfund. *Id.* § 9607(c)(3). The 1986 amendment permits successful plaintiffs, both public and private, to recover interest on their damages. *Id.* § 9607(a)(4).

163. TEX. REV. CIV. STAT. ANN. art. 4477-7, § 8(g) (Vernon Supp. 1988).

Fund[164] and for costs that would have been incurred by the PRP had that party taken all reasonable action to abate and remove the spill.[165] Third, the legislature recently passed a statute which makes the owner or operator of underground storage tanks liable to the State for all corrective and enforcement actions regarding a release of regulated substances from the tanks.[166]

A. *Texas Solid Waste Disposal Act*

The Texas Solid Waste Disposal Act, like CERCLA, created a two-fold approach to the cleaning up of hazardous wastes.[167] Like CERCLA, it created an available funding source to be used for remedial actions[168] and a provision for liability of potentially responsible parties.[169] The liability provision of TSWDA mirrors CERCLA in the four classes of persons covered: 1) any owner or operator of a solid waste facility; 2) the owner or operator of the facility at the time of the processing, storage or disposal of any solid waste; 3) the person who arranged for the disposal or transportation of the solid waste; and 4) a transporter of the solid waste.[170] The TSWDA imposes strict liability subject only to the defenses of an act of God, an act of war, an act or omission of a third party, or any combination of the three.[171]

Unlike CERCLA, if a release is divisible, the TSWDA allows a PRP to limit his liability to only the elimination of a release attributable to him.[172] To do so, the PRP must establish by a preponderance of the evidence that his release is divisible.[173] However, if a PRP cannot prove that the release is divisible, then liability for eliminating the release is joint and severable.[174]

The TSWDA permits a PRP to join any other persons who are or

---

164. TEX. WATER CODE ANN. § 26.265 (Vernon 1988).

165. *Id.* §§ 26.261-26.268.

166. *Id.* §§ 26.341-26.359 (policy of Act to maintain and preserve groundwater resources).

167. TEX. REV. CIV. STAT. ANN. art. 4477-7, §§ 8(g)(1)(2), 11(a) (Vernon Supp. 1988).

168. *Id.* § 11a.

169. *Id.* § 8(g)(1)(2).

170. *Id.* § 8(g)(2)(A),(B),(C),(D).

171. *Id.* § 8(g)(3). These defenses are identical to those provided in CERCLA; however, the innocent purchaser defense has not been included.

172. TEX. REV. CIV. STAT. ANN. art. 4477-7, § 8(g)(4) (Vernon Supp. 1988).

173. *Id.* Divisible is defined as meaning that the waste released has been and is capable of being managed separately under a remedial action plan. *Id.*

174. *Id.*

may be liable for the elimination of the release.[175] The joinder can occur in either the appeal of an administrative order or in a cause of action brought directly against the PRP by the State.[176] The TSWDA provides that apportionment of costs between PRPs for the elimination of the release shall be in accordance with four factors: 1) the relationship between the PRP's actions regarding the waste and remedy required; 2) the volume of waste for which each party is responsible to the extent that the costs of the remedy are based on volume of waste; 3) the toxicity or other characteristics of the waste if these characteristics affect the cost of the remedy; and 4) the PRP's cooperation with state agencies, its cooperation with pending efforts to remedy, its actions regarding the waste, and the degree of care exercised.[177] In addition to permitting the joinder of other parties, the apportionment of costs, and recovery by contribution or indemnification, the Solid Waste Disposal Act creates an independent cause of action for cost recovery by private parties.[178] While similar to the private cause of action granted by CERCLA, the remedy is more limited and a PRP has additional elements of proof.[179] First, the class of PRPs is limited to only those persons subject to a court injunction or an administrative order or persons who have contracted with the Department of Water Resources to conduct the cleanup.[180] Thus, the first step for cost recovery will be that there was state agency action which in some manner directed a PRP to conduct a cleanup.

The second element for a cause of action is that the PRP took action to eliminate the release.[181] The TSWDA states that private party cleanup of facilities shall be coordinated with the federal and state waste programs and the private parties shall obtain the necessary approval for cleanup action.[182] While not yet litigated, the TSWDA indicates that a cost recovery cause of action would be limited to only

175. *Id.* § 8(g)(5).

176. *Id.* §§ (9)(d), 10(a).

177. TEX. REV. CIV. STAT. ANN. art. 4477-7, § 11(a) (Vernon Supp. 1988).

178. *Id.* § 11(b).

179. *Id.* (notice requirements and steps to remedy are required in contrast to CERCLA).

180. TEX. REV. CIV. STAT. ANN. art. 4477-7, § 11(b) (Vernon Supp. 1988). Independent third parties who contract with the department of water resources to conduct a cleanup may bring suit under section 13(g). *Id.* § 13(g). They are permitted to seek cost recovery from those liable who do not participate in the cleanup. *Id.* § 11(b).

181. *Id.*

182. *Id.* § 13(g)(9).

those cleanup actions approved of by the appropriate agency.[183]

The PRP may seek cost recovery against any other person who is or may be responsible.[184] While CERCLA does not require a demand letter, the TSWDA requires that a PRP make reasonable attempts to notify other PRPs that the release exists and that steps will be taken to eliminate the release.[185] Issues such as what constitutes reasonable effort, the time for notice, and the content of the notice have all yet to be litigated. While TSWDA provides for a private cause of action for cost recovery,[186] unlike its federal counterpart, the Texas statute requires that the person seeking recovery be subject to a court injunction or an administrative order.[187] Because a PRP must give notice to other PRPs and must be acting pursuant to a court or agency directive before cleanup costs incurred are recoverable, it does not provide for the same expediency in cleanup as does CERCLA.

Finally, the TSWDA provides that the court shall determine the amount of cost recovery and that the recovery will be based upon the four factors listed in section 11(a) of TSWDA to apportion the costs of a cleanup.[188] The costs that are recoverable include the cost incurred in eliminating the release and such other costs as the court in its discretion may deem reasonable to award.[189] Since the TSWDA appears to require voluntary cleanup pursuant to or supervised by a governmental agency, it is unlikely that any costs incurred would be deemed unreasonable by the government. The focus of any cost recovery suit should be on the notice provision and the four delineated factors.[190]

B. *Texas Hazardous Substances Spill Prevention Control Act*

The Texas Hazardous Substances Spill Prevention and Control Act (THSSPCA)[191] creates liability for potentially responsible persons for the spill or discharge of hazardous substances into the waters of

183. TEX. REV. CIV. STAT. ANN. art. 4477-7, § 11(b) (Vernon Supp. 1988).
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. TEX. REV. CIV. STAT. ANN. art. 4477-7, § 11(c)(1) (Vernon Supp. 1988).
189. *Id.* § 11(c)(2).
190. *Id.* § 11(a)(b).
191. TEX. WATER CODE ANN. §§ 26.261-26.268 (Vernon 1988).

Texas.[192] The potentially responsible person is defined as 1) the owner, operator, or demise charterer of a vessel from which a spill emanates; 2) the owner or operator of a facility from which a spill emanates; and 3) any other person who causes, suffers, allows or permits a spill or discharge.[193]

The liability of the PRP is limited to five million dollars.[194] Liability under THSSPCA does not affect any rights that the responsible party has against a third party whose acts caused or contributed to the spill or discharge.[195] THSSPCA specifically grants a person held liable under THSSPCA the right to recover indemnity or contribution from any third party who caused, suffered, allowed or permitted the spill.[196] While THSSPCA allows for contribution or indemnity, it does not provide a new vehicle by which a PRP can undertake a voluntary cleanup and look to others for response costs.

C. *Texas Water Code: Underground Storage Tanks*

In 1987, the legislature established a subchapter in the Texas Water Code to maintain and protect groundwater resources from hazardous substances released from underground storage tanks.[197] The Act provides that an owner or operator of an underground storage tank may be liable to the state for expenses incurred by the state in taking "corrective action" to prevent or cleanup a release.[198] The statute fails to define "owner" or "operator" and fails to expressly state whether an owner or operator found liable may seek reimbursement from any other person. The statute does, however, state that the owner or oper-

---

192. *Id.* § 26.265(d).

193. *Id.* § 26.263(6)(A), (B), (C).

194. *See id.* § 26.265(d). If the State sues PRPs to recover its costs of response, those damages recoverable are extensive. The statute provides a list of damages which include:

(1) expenditures out of the fund; and

(2) costs that would have been incurred or paid by the responsible person if the responsible person had fully carried out the duties under Section 26.266 of this code, including reasonable costs of reasonable and necessary scientific studies to determine impacts of the spill on the environment and natural resources and to determine the manner in which to respond to spill impacts; costs of attorney services; out-of-pocket costs associated with state agency actions; and costs of remediating injuries proximately caused by reasonable cleanup activities.

Id. § 26.265(d).

195. *Id.* § 26.265(g).

196. TEX. WATER CODE ANN. § 26.265(g) (Vernon 1988).

197. *Id.* §§ 26.341-26.359.

198. *Id.* § 26.355(a).

ator cannot transfer liability by conveyance or by an indemnification or hold harmless agreement.[199] Although no cause of action is provided an owner or operator by the terms of the provision, the statute does not bar a cause of action that they might have against any person.[200] Under section 26.355(e) of the Texas Water Code, the PRP must seek recovery for the expenses of any remedial or corrective action under traditional common law causes of action or contribution or indemnification.[201] For example, actions for negligence, tortious interference, and breach of contract remain available to the PRP.[202]

VI. INJUNCTIVE RELIEF

CERCLA does not provide for injunctive relief for private parties.[203] Under certain circumstances, however, private parties may seek an injunction under the Resource Conservation and Recovery Act (RCRA).[204] Section 6972 of RCRA authorizes citizen suits against violators of certain provisions of the Act.[205] In 1984, Congress amended RCRA to authorize private party litigation against PRPs where there is "an imminent and substantial endangerment" from toxic waste disposal.[206] The amendment now grants jurisdiction

---

199. *Id.* § 26.355(d). However, the section states that agreements to insure or indemnify parties to an agreement for liability are not barred. *Id.*

200. *Id.* § 26.355(e).

201. *Id.*

202. *Id.* (section does not bar any cause of action person may have).

203. *See* State of New York v. Shore Realty Corp., 759 F.2d 1032, 1049 (2d Cir. 1985) (injunctive relief authorized only when public welfare substantially endangered); Utah State Dept. of Health v. Ng, 649 F. Supp. 1102, 1105-06 (D. Utah 1986)(no implied authority to seek injunctions under section).

204. 42 U.S.C. § 6972(a) (Supp. IV 1986). The Resource Conservation and Recovery Act, first enacted in 1976, defines and regulates the treatment, storage and disposal of solid waste, including hazardous substances. *See id.* §§ 6901-6987.

205. *Id.* § 6972(a). RCRA permits one to sue "any person," including any government entity, for "violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter . . . ." *Id.* § 6972(1)(A). The Act also authorizes citizens to sue the state or federal administrator charged with the responsibility of enforcing environmental regulations. *See* City of Gallatin v. Cherokee County, 563 F. Supp. 940, 946-48 (E.D. Tex. 1983)("citizen suits" against EPA administrator or state official are means of enforcement). Similar provisions for "citizen suits" are authorized in section 304 of the Clean Air Act (42 U.S.C. § 7604 (1982)) and section 505 of the Clean Water Act (33 U.S.C. § 1365 (1982)).

206. 42 U.S.C. § 6972(a)(1)(B) (Supp. IV 1986). The new provision specifically targets as defendants

> any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is con-

to federal district courts to enjoin PRPs whose past or present activities endanger the health or environment of the movant.[207] Under RCRA, the court is empowered to order PRPs "to take such action as may be necessary . . . ."[208] Injunctive relief under RCRA may not be used to interfere with ongoing cleanup operations[209] or to prevent the issuance of permits to develop a toxic waste facility.[210]

VII. CONCLUSION

The current and potential need for hazardous waste cleanup is an increasingly significant factor in commercial real estate matters. Federal and Texas law and their respective environmental agencies encourage private cleanup in order to address the damage to public health and natural resources as quickly and economically as possible. For the first time within the Fifth Circuit, a trial court has recognized that a current landowner has a right to recover from a responsible party the cost of cleaning up hazardous substances. Nonetheless, the CERCLA plaintiff shoulders a heavy burden of proving that its response costs are necessary and consistent with the national contingency plan. Texas statutory and common law provide some additional and overlapping remedies.

Likely PRPs, in addition to the current owner, include owners and operators during the period of toxic waste generation and disposal, developers, lenders, insurers, transporters, managing shareholders, lessors, and tenants. PRPs are subject to strict liability with extremely limited defenses. Injunctive relief and findings of comparative fault are available to place the burden of cleaning up the environment on the appropriate parties.

Voluntary cleanup can be accomplished more quickly and cost-effectively than if parties wait for government action. Recalcitrant

---

tributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment . . . .

Id.

207. *Id.* § 6972(a). The amendment gives the district court the power to enforce compliance with the particular requirement being violated, restrain any acts which contribute to the disposal of hazardous waste, or both. *Id.*; *see* Jones v. Inmont Corp., 584 F. Supp. 1425, 1430 (S.D. Ohio 1984)("citizen suit" provision utilized to halt violation of statute).

208. 42 U.S.C. § 6972(a) (Supp. IV 1986).

209. *Id.*

210. *Id.* § 6972(b)(2)(D). The court has discretion to award attorneys' fees and costs to the successful movant and may also require the movant to post a bond. *Id.* § 6972(e).

PRPs will find that the Piper will add a multiplier to the government's cost of response. Forward-looking private parties will contract the allocation of hazardous waste liability. Where no such contractual agreements have been drawn, however, courts should encourage voluntary cleanup efforts by giving swift attention to declaratory judgment actions.