Recovering Hazardous Waste Cleanup Costs: The Private Cause of Action Under CERCLA

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TABLE OF CONTENTS

Introduction ................................................... 182
I. Overview of CERCLA .................................... 184
   A. Hazardous Substances ................................ 185
   B. Government Cleanup Options ....................... 186
   C. Potentially Responsible Parties ..................... 188
   D. National Contingency Plan ......................... 189
   E. National Priorities List ............................. 191
   F. Development of a Final Cleanup Plan ............. 195
   G. Private Claims Against Superfund ............... 195

II. Availability of a Private Cause of Action Under CERCLA . 196

III. Conditions for Assertion of a Cause of Action Under Section 107(a)(4)(B) ................................ 199
   A. Consistency with the National Contingency Plan ... 199
      1. Listing on the National Priorities List .......... 200
      2. Prior Government Approval ....................... 201
      3. Notice to Responsible Parties .................... 205
      4. Development of an Appropriate Cleanup Plan ... 206
         a. Identification of Environmentally Acceptable Alternatives ................................ 207
            i. Applicability of Federal Environmental Standards .................................. 208
            ii. Level of Cleanup in the Absence of Federal Standards ............................ 210

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INTRODUCTION

The question is, what do they mean when they allowed recovery of these costs of response by any person, consistent with the National Contingency Plan? And I looked at it and, frankly, I would not say that this is the most clear language that Congress has ever enacted. It is not easy to make some sense out of it . . . .

Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), a broadly defined group of landowners, transporters, and generators of hazardous waste are liable for the costs of cleaning up hazardous waste sites. CERCLA provides the government with powerful tools to impose this liability. The United States Environmental Protection Agency (EPA) has the authority to compel responsible parties to clean up the site, or the government may clean up the site itself and recover its expenses from these parties.

The government is not the only party, however, that can impose

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3. See infra notes 13-20 and accompanying text.
liability for hazardous waste cleanup costs. Section 107(a)(4)(B) of CERCLA provides that responsible parties are also "liable for . . . any other necessary costs of response incurred by any other person consistent with the national contingency plan." This new cause of action creates a significant role for private parties in the national hazardous waste cleanup effort. Private individuals, ranging from owners of sites with hazardous wastes, to neighbors of such sites, to parties potentially subject to government cleanup orders, now have a powerful incentive to respond to hazardous waste problems without prior government action. Private parties who voluntarily undertake hazardous waste cleanups may be able to recoup their expenses.

The stakes involved in implementing section 107(a)(4)(B) are high. Section 107(a)(4)(B) will have significant economic consequences for any commercial activity involving hazardous substances. The new cause of action, for example, has the potential to redefine, independent of contract or common law, established liabilities between such groups as real estate vendors and purchasers. Additionally, section 107(a)(4)(B) may have significant environmental consequences. A broad right of recovery may encourage private hazardous waste cleanup activity, but inadequately supervised cleanups may in fact be environmentally damaging.

Although the courts have begun to resolve difficult questions regarding liability under CERCLA, it is the Environmental Protection Agency that has primary responsibility for defining the private cleanup requirements under section 107(a)(4)(B). Section 107(a)(4)(B) requires that all private party cleanups be "consistent with" the National Contingency Plan (NCP) as a prerequisite to cost recovery. EPA is responsible for publishing this plan, which identifies the requirements for a proper hazardous waste cleanup. In recently published revisions of the NCP, EPA has specified the conditions that private parties must satisfy in order for their cleanups to be found consistent with the NCP.

Court decisions and the revisions of the NCP are making the requirements for private party cleanups under section 107(a)(4)(B) more certain, but the future of such cleanups remains in some doubt. A review of EPA decisions indicates that the Agency has selected a questionable course in its attempts to balance the dual goals of encouraging private cleanup activity and ensuring adequate supervision of the difficult and

5. The courts' role in resolving liability issues such as joint and several liability, an issue Congress left to "traditional and evolving principles" of tort law (see infra note 7, and notes 24-29 and accompanying text), has led some commentators to refer to CERCLA as a "return to common law." See, e.g., J. BONNIE & T. MCFARITY, THE LAW OF ENVIRONMENTAL PROTECTION: CASES-LEGISLATION-POLICIES ch. 8.e (1984). As these questions are resolved, however, EPA's role in defining the requirements for hazardous waste cleanup, through promulgation of the National Contingency Plan, should increasingly focus attention on the regulatory aspects of CERCLA.
controversial process of hazardous waste removal. Additionally, several practical constraints on the use of section 107(a)(4)(B), such as procedural obstacles to an early determination of whether private cleanup plans are consistent with the NCP, may unnecessarily discourage private cleanup efforts.

This Article examines issues raised by the section 107(a)(4)(B) private cause of action. Section I provides an overview of the provisions of CERCLA that are essential to understanding the issues under section 107(a)(4)(B). Section II addresses the threshold question of whether section 107(a)(4)(B) does, in fact, provide an independent cause of action for recovery of hazardous waste cleanup costs. Almost without exception, courts have concluded that it does. Section III examines the requirements for asserting the cause of action. Issues examined range from standing requirements to questions of ripeness. The most difficult questions, however, may involve the requirement that private cleanups be "consistent with the national contingency plan." EPA's recent revisions to this national cleanup plan attempt to provide some control over private cleanup efforts. Section IV discusses significant problems that may constrain parties from undertaking private hazardous waste cleanups.

I
OVERVIEW OF CERCLA

The Comprehensive Environmental Response, Compensation, and Liability Act was adopted in 1980, during the closing days of the 96th Congress. In many respects the product of compromise and confusion, as might be expected with such a history, the provisions of CERCLA leave open as many questions as they answer. In many cases, Congress deliberately chose ambiguity as the price of adopting any legislation. One court described CERCLA as "a severely diminished piece of compromise legislation from which a number of significant features were deleted." City of Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135, 1142 (E.D. Pa. 1982). The standard of liability, for example, is not explicitly defined. Citing the legisla-
CERCLA nonetheless has evolved into an extraordinarily powerful tool to ensure the cleanup of hazardous waste sites. Although the actual cleanup effort has been slower than many would have hoped, CERCLA remains a basic component of the government’s efforts to clean up hazardous waste sites.

CERCLA contains a number of closely interrelated provisions, which together provide a comprehensive series of options for the cleanup of hazardous waste. The Act is far from a model of clarity, and courts and EPA have been struggling to interpret and integrate the separate elements of CERCLA. Because of the close relationship among the various elements of CERCLA, it is impossible to understand the private cause of action under section 107(a)(4)(B) without understanding other basic aspects of the Act as well.

A. Hazardous Substances

Section 107 of CERCLA imposes liability for cleanup costs associated with the release of a “hazardous substance.” A substance may be designated as a “hazardous substance” under CERCLA in one of two ways. First, the Act provides that substances designated as toxic or hazardous under certain other environmental statutes, including the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act, and the Toxic Substance Control Act, are also hazardous substances.

[tentative history, courts have construed liability under section 107 to be joint and several, even though an explicit provision calling for joint and several liability was deleted from the final Act. This history indicates that Congress intended the courts to fill in many of the gaps by utilizing “traditional and evolving principles of common law.” United States v. Chem-Dyne Corp., 572 F. Supp. 802, 806-07 (S.D. Ohio 1983). See also Dore, The Standard of Civil Liability for Hazardous Waste Disposal Activity: Some Quirks in Superfund, 57 Notre Dame Law. 260 (1981).]


9. 42 U.S.C. § 9607. Additionally (as discussed infra notes 13-15 and accompanying text), section 104 authorizes the government to undertake cleanup efforts financed by Superfund not only when there is a release or threat of release of a “hazardous substance,” but also when there is a release or threat of release of “any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare.” CERCLA § 104(a)(1)(B), 42 U.S.C. § 9604(a)(1)(B). Although the government may be authorized to clean up such pollutants, section 107 appears to authorize the recovery of private response costs only for the cleanup of previously designated “hazardous substances.” Cf. CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4).
under CERCLA. Second, EPA may directly designate a substance as hazardous if it "may present a substantial danger to the public health or welfare or the environment." Although this Article refers to the cleanup of hazardous wastes and hazardous waste sites, it is important to note that, unlike the Resource Conservation and Recovery Act, CERCLA applies to hazardous substances even if they are not "wastes."

B. Government Cleanup Options

Under CERCLA, the government has two options to ensure the cleanup of hazardous wastes. First, pursuant to section 104, the government may itself undertake the cleanup of a site in cases where there has been a release or threat of release of a hazardous substance, or where there has been a release of other pollutants or contaminants that may present an "imminent and substantial danger to public health or welfare." Subject to certain constraints, these section 104 cleanup efforts...
are financed by Superfund. Under the Act, the government can recoup its expenses, and hence replenish Superfund, through an action to recover these response costs from responsible parties.

Alternatively, the government can, under section 106 of the Act, compel private parties to clean up the site themselves. These orders may be issued in cases where there is an "imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance," and they are normally issued by EPA as administrative orders. The Act does not specify to whom these orders may be issued. Although persons who are "responsible parties" under section 107(a) are the primary target for such orders, the government has asserted the authority to issue these orders to virtually anyone where necessary to protect the public or the environment.

CERCLA does not expressly provide private parties with the right to a hearing on the administrative order before compliance is required, and penalties for failure to comply with a government cleanup order are substantial. As might be expected, the section 106 order has

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14. Superfund, more properly called the Hazardous Substance Response Fund, was a $1.6 billion fund created to finance the cleanup of hazardous substances. Section 111 of CERCLA specifies the uses of the Fund, including financing government cleanups and, in some cases, reimbursing private cleanups. 42 U.S.C. § 9611. See infra notes 65-71 and accompanying text.

Title II of CERCLA amended the Internal Revenue Code to impose a tax on petroleum and 42 listed chemicals. Hazardous Substance Response Revenue Act of 1980, Pub. L. No. 96-510, §§ 201-232, 94 Stat. 2767, 2796-804 (1980). These taxes provided 87.5% of the Fund; the remainder came from general revenues. Additionally, money recovered by the government under CERCLA and section 311 of the Clean Water Act, and penalties collected under CERCLA, were added to the Fund. CERCLA § 221(b)(1), 42 U.S.C. § 9631(b)(1). As of this writing, authorization for the Fund has expired, and Congress still has not reauthorized the Act. See [17 Current Developments] ENV'T REP. (BNA) 139 (June 6, 1986).

Among other limitations on the use of Superfund, the government cannot undertake a Fund-financed remedial action under section 104 unless the state in which the release occurred has agreed with the federal government that the state will ensure long-term maintenance of the response action, ensure availability of approved hazardous waste disposal facilities, and pay at least 10% of the cost of the action. CERCLA § 104(c)(3), 42 U.S.C. § 9604(c)(3).


17. CERCLA § 106(a). Federal district courts can also issue cleanup orders. Id.

18. In its memorandum on use and issuance of section 106 orders, the Agency stated: "In addition, in appropriate cases, it may be possible to issue orders to parties other than those listed in Section 107(a), if actions by such parties are necessary to protect the public or the environment." Section 106 Memo, supra note 16, at 2933.

19. If a party fails to comply with an administrative order, it is potentially liable for fines...
become the major tool in the government's cleanup efforts.20

C. Potentially Responsible Parties

Section 107 of CERCLA defines the group of people who are potentially liable for government and private party cleanup costs.21 Liability extends to: (1) current owners of hazardous waste sites; (2) prior owners who owned the site at the time of hazardous waste disposal; (3) generators of hazardous waste who arranged for disposal of their wastes at the site; and (4) transporters of hazardous waste who selected the site for disposal.22 These parties are potentially liable for government and private cleanup costs and for damages to natural resources.23

Under the Act, these "potentially responsible parties" or "PRP's" are subject to a standard of strict liability. Although the Act does not specifically provide for strict liability, it does provide that the term "liable" shall be construed the same as the standard of liability under section 311 of the Clean Water Act.24 Courts had previously construed section

of up to $5000 per day pursuant to section 106(b) and treble the amount of the actual cleanup costs under section 107(c)(3). As EPA noted with its characteristic humor: "In view of the magnitude of these cases, the Agency expects that the regulated community will comply with administrative Orders." Section 106 Memo, supra note 16, at 2931. Some questions have, however, been raised about the constitutionality of imposing such penalties in the absence of pre-enforcement review. See infra note 213.

In its memorandum on use and issuance of section 106 orders, the Agency observed: "The administrative order authority which the Environmental Protection Agency (EPA) exercises under 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) . . . is one of the most potent administrative remedies available to the Agency under any existing environmental statute." Section 106 Memo, supra note 16, at 2931. See also 47 Fed. Reg. 20,663, 20,664 (1982) (government policy on the use of imminent and substantial endangerment authority).


22. CERCLA § 107(a). See W. FRANK & T. ATKESON, supra note 8, at 34-37; 1984 CERCLA Update, supra note 8. See also New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985). In United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 846 (W.D. Mo. 1984), a transporter of hazardous waste was held liable under section 107(a)(4). Liability was also imposed on the corporate defendant because of its status as an "owner and operator" under section 107(a)(1). Id. at 849. And, finally, a defendant corporate vice president was held liable under section 107(a)(3) for his direct responsibility in arranging for waste disposal. Id. at 847.


311 to impose a standard of strict liability, and this standard has been applied to liability under CERCLA. The Act itself provides only a limited number of statutory defenses to liability, including that the release was caused solely by an act of God, by an act of war, or, in narrow circumstances, by a third party.

Virtually every court that has considered the issue has also concluded that the Act provides for some form of joint and several liability among responsible parties. Thus, each of the PRP's may be liable for the entire cost of cleaning up a site notwithstanding that the party contributed a relatively small amount of waste to the site or, in the case of a current owner, contributed no waste at all. Indeed, at least one court has concluded that a generator of waste who disposes of some hazardous waste at a site is liable for all cleanup costs at the site if there is a release of any hazardous substance placed there by any generator. Suffice it to say that liability under CERCLA is broad and stringent.

D. National Contingency Plan

A basic element of CERCLA is the National Contingency Plan (NCP). Section 105 of the Act requires EPA to promulgate the NCP in order to "establish procedures and standards for responding to releases


The legislative history clearly establishes Congress’ understanding that it was incorporating a standard of strict liability into CERCLA. See, e.g., 126 Cong. Rec. S14964 (daily ed. Nov. 24, 1980) (remarks of Sen. Randolph) ("[w]e have kept strict liability in the compromise, specifying the standard of liability under section 311 of the Clean Water Act . . ."); 126 Cong. Rec. H1787 (daily ed. Dec. 3, 1980) (remarks of Rep. Florio) ("[t]he standard of liability in these amendments is intended to be the same as that provided in section 311 of the [Clean Water Act]; that is, strict liability").

Id. at 1140 n.4. See also Shore Realty Corp., 759 F.2d at 1042; Northeastern Pharmaceutical, 579 F. Supp. at 843.
of hazardous substances, pollutants and contaminants. The NCP is intended to provide guidance for implementation of cleanup actions; virtually all activities undertaken pursuant to the Act must be consistent with the plan. The provisions of the NCP dealing with CERCLA were first promulgated in July 1982. In November 1985, EPA promulgated a major set of revisions to the NCP; these revisions address a number of key issues relating to hazardous waste cleanups under CERCLA and simplify some of the procedural requirements for undertaking a cleanup effort.

Subpart F of the NCP, the "National Hazardous Substance Response Plan," specifies the basic requirements for the cleanup of hazardous waste sites under CERCLA. This subpart identifies the steps that government and private parties are to take when responding to the release of hazardous substances. These steps include study of the site, development of alternative cleanup strategies, and selection of a cleanup plan from among those alternatives. Although the decision on every cleanup is site-specific, the NCP mandates that certain procedural and substantive factors be addressed in developing and implementing the final plan.


31. EPA has described the NCP as the "blueprint" for implementing cleanup authority under CERCLA. W. FRANK & T. ATKESON, supra note 8, at 10. Section 105 provides that following publication of the NCP, "the response to and actions to minimize damage from hazardous substance releases shall, to the greatest extent possible, be in accordance with the provisions of the plan." 42 U.S.C. § 9605.

32. The National Contingency Plan was first established in 1968 as an interagency agreement and was subsequently codified in the Code of Federal Regulations, pursuant to the Water Quality Improvement Act of 1979. In 1972, Congress gave the President the responsibility for preparing the NCP, in section 311 of what is now called the Clean Water Act. See 45 Fed. Reg. 17,832, 17,833 (1980). Section 311 specifies liability for the discharge of oil and hazardous substances, and the NCP was designed to provide guidance for the cleanup of these substances. See supra note 24. In section 105 of CERCLA, Congress required EPA to revise the NCP to deal also with the release of hazardous substances subject to the Act. 42 U.S.C. § 9605.

The Agency was somewhat slow in revising the NCP after the adoption of CERCLA, but spurred on by litigation, the Agency promulgated the first revision of the NCP pursuant to CERCLA in July 1982; it has been amended several times since then. See 40 C.F.R. Part 300 (1985); 47 Fed. Reg. 31,180, 31,202 (1982); 48 Fed. Reg. 40,668, 40,669 (1983); 49 Fed. Reg. 19,480, 19,482 (1984); 49 Fed. Reg. 29,192, 29,197 (1984); 49 Fed. Reg. 37,066, 37,082 (1984).

33. National Oil and Hazardous Substances Pollution Contingency Plan, 50 Fed. Reg. 47,912 (1985) [hereinafter cited as Revised NCP]. The Agency has stated that the purpose of the revisions is "to streamline the response mechanisms; to ensure prompt, cost-effective response; to respond to issues raised in litigation; and to clarify responsibilities and authorities contained in the NCP." Id.

34. Id. at 47,969-78 (to be codified at 40 C.F.R. § 300.61-71) (Subpart F-Hazardous Substance Response). Section 105 of CERCLA provides that the revised NCP "shall include a section of the plan to be known as the national hazardous substance response plan." 42 U.S.C. § 9605.
The NCP also contains a "National Priorities List" (NPL) that identifies the worst hazardous waste sites in the country.\textsuperscript{35} EPA has established procedures for the listing of sites on the NPL; this "National Hazard Ranking System" uses a mathematical ranking of sites based on such factors as the toxicity of the hazardous substances and the extent of the population exposed.\textsuperscript{36} The Act itself requires the listing of at least 400 sites with at least one site in each state.\textsuperscript{37} As of May 1986, the NPL contained 835 final and proposed sites.\textsuperscript{38} Estimates of the potential number of hazardous waste sites range into the thousands.\textsuperscript{39}

Although listing of a site on the NPL may have political and practical effects, the basic legal significance of this listing is to authorize the government to undertake long-term and potentially expensive permanent cleanup actions.\textsuperscript{40} If a site is not listed on the NPL, the government is limited to relatively inexpensive short-term cleanup efforts.\textsuperscript{41}

\section{F. Development of a Final Cleanup Plan}

The ultimate objective of CERCLA is the cleanup of hazardous substances. The Act contemplates two types of "response actions" to deal with the release of these substances. Under the Act, short-term efforts are called "removal" actions and are intended to be relatively rapid re-

\begin{thebibliography}{9}


\bibitem{37} CERCLA § 105(8)(B).

\bibitem{38} As of this writing, the NPL contains 703 sites, and EPA has proposed the addition of 132 sites. \textit{[17 Current Developments] ENV'T REP. (BNA) 85 (May 23, 1986).}


\bibitem{40} These potentially long-term actions are called "remedial actions." \textit{See infra} notes 45-47 and accompanying text. The National Contingency Plan expressly provides that "[f]und-financed remedial action, excluding remedial planning activities pursuant to CERCLA section 104(b), may be taken only at sites listed on the NPL." \textit{Revised NCP, supra} note 33, at 47,973 (to be codified at 40 C.F.R. § 300.68(a)(1)).

\bibitem{41} Listing a site on the NPL does not mean that remedial action will be taken, only that it may be taken. Indeed, EPA has stated that the purpose of the list is primarily to serve as an informational tool for use by EPA in identifying sites that appear to present a significant risk to public health or the environment. The initial identification of a site in the NPL is intended primarily to guide EPA in determining which sites warrant further investigation designed to assess the nature and extent of the public health and environmental risks associated with the site and to determine what response action, if any, may be appropriate. Inclusion of a site on the NPL does not establish that EPA necessarily will undertake response actions.


\bibitem{41} These short-term actions are called "removal actions." \textit{See infra} notes 42-44 and accompanying text.
sponses to immediate threats to human health and the environment.\textsuperscript{42} CERCLA provides that a "removal" action may not in most cases cost more than one million dollars or last more than six months.\textsuperscript{43} Section 300.65(b) of the revised NCP identifies the factors to be considered in determining whether a removal action is warranted. These include factors such as the potential exposure of the local population, potential contamination of drinking water supplies, and the possibility that high levels of hazardous substances may migrate.\textsuperscript{44}

A long-term cleanup effort is called a "remedial" action and "means those actions consistent with permanent remedy taken instead of or in addition to removal actions."\textsuperscript{45} Remedial actions may include permanent containment of wastes onsite or transportation of the wastes for offsite disposal. In some cases, it may even include permanent relocation of residents.\textsuperscript{46} Government remedial actions for which Superfund money is

\begin{itemize}
  \item \textsuperscript{42} CERCLA defines "remove" or "removal" as the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release 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.
  \item \textsuperscript{43} Revised NCP, supra note 33, at 47,971 (to be codified at 40 C.F.R. § 300.65(a)(3)).
  \item \textsuperscript{44} Revised NCP, supra note 33, at 47,971 (to be codified at 40 C.F.R. § 300.65(b)).
  \item \textsuperscript{45} CERCLA § 101(24), 42 U.S.C. § 9601(24). CERCLA defines "remedy" or "remedial action" 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, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the costs of permanent relocation of residents and businesses and community facilities [under certain circumstances]. . . . The term does not include offsite transport of hazardous substances, or the storage, treatment, destruction, or secure disposition offsite of such hazardous substances or contaminated materials [unless the President makes certain findings about cost effectiveness, the availability of offsite storage capacity and offsite storage is necessary to protect public health welfare and the environment].
\end{itemize}

\textit{Id.}

\textit{Id.}
to be spent ("Fund-financed" actions) may be undertaken only at sites listed on the NPL.\(^{47}\)

The National Contingency Plan provides for a series of steps to determine the appropriate content of removal or remedial plans. When a release of hazardous substances is first identified, the government undertakes a preliminary assessment to determine if either a removal or remedial action is warranted.\(^ {48}\) If immediate action is necessary, a removal action may be undertaken pursuant to section 300.65 of the NCP.\(^ {49}\)

Where a remedial action appears to be warranted, either the government or private parties conduct a "Remedial Investigation/Feasibility Study" (RI/FS) in which the site is further categorized, cleanup alternatives are identified, and a final plan for cleanup is determined.\(^ {50}\) Section 300.68 of the revised NCP specifies factors that should be assessed in conducting the RI/FS and developing the final cleanup plan.\(^ {51}\)

There are three basic issues that must be addressed in determining the content of the final cleanup plan. First, the Act and the NCP require that Fund-financed remedial actions be selected only after balancing the need for and cost of cleanup at the site against the availability of Superfund money for the cleanup of other sites.\(^ {52}\) This process is called "Fund balancing," and it is intended to ensure that the limited resources of Superfund are used in the most productive manner.

Second, the NCP requires that the "cost effective" alternative be chosen from among those identified in the feasibility study.\(^ {53}\) The cost effectiveness criterion is applied only to those alternatives that satisfy a minimum standard of protection of human health and welfare and the environment. Among equally protective alternatives, the cost effectiveness criterion would require selection of the cheapest. Among incrementally more protective alternatives (all of which satisfy some minimum standard), the cost effectiveness criterion would involve some balancing of increased protection with increased cost.\(^ {54}\)

Third, the final level of cleanup achieved by the remedial plan must protect human health and welfare and the environment. Determining

47. See supra note 40.
48. See Revised NCP, supra note 33, at 47,970 (to be codified at 40 C.F.R. § 300.64(a)).
49. Id. at 47,971 (to be codified at 40 C.F.R. § 300.65).
50. Id. at 47,973 (to be codified at 40 C.F.R. § 300.68(d)). As part of the early assessment, the government will also conduct a site evaluation to determine if the site should be added to the National Priorities List. Id. at 47,972 (to be codified at 40 C.F.R. § 300.66).
51. Id. at 47,973-76 (to be codified at 40 C.F.R. § 300.68).
52. CERCLA § 104(c)(4), 42 U.S.C. § 9604(c)(4); see also Revised NCP, supra note 33, at 47,975 (to be codified at 40 C.F.R. § 300.68(i)(5)(ii)).
53. See CERCLA § 104(c)(4); CERCLA § 105(7), 42 U.S.C. § 9605(7). See also Revised NCP, supra note 33, at 47,975 (to be codified at 40 C.F.R. § 300.68(i)(1)).
54. See Revised NCP, supra note 33, at 47,921-22 (preamble discussion of cost effectiveness criterion).
this final level is often called the “how clean is clean” issue.\textsuperscript{55} The Act is silent on the resolution of this issue other than to suggest a basic standard of protection of health and welfare and the environment.\textsuperscript{56} The revised NCP attempts to answer this question by specifying when environmental standards contained in other statutes must be met at a CERCLA site.\textsuperscript{57}

Although EPA claims that it has no legal obligation to comply with other federal or state standards when undertaking a CERCLA cleanup,\textsuperscript{58} the NCP provides that in government-supervised cleanups, a cleanup plan should ensure in most cases the attainment of: (1) “applicable” requirements of other federal statutes; or (2) “relevant and appropriate” requirements of other statutes.\textsuperscript{59} “Applicable” requirements are “those

\textsuperscript{55} See generally Comment, Superfund and the National Contingency Plan: How Dirty is “Dirty”? How Clean is “Clean”??, 12 ECOLOGY L.Q. 89 (1984).

\textsuperscript{56} The Act does not expressly state what the final level of cleanup should be. However, the designation of a “hazardous substance” under section 102, the implementation of section 104 actions for pollutants or contaminants, and the exercise of section 106 authority are all keyed to a determination of a threat to “the public health or welfare or the environment.”

In its memorandum on “CERCLA Compliance with Other Environmental Statutes,” the Agency states that in developing remedial and removal actions:

- EPA will give primary consideration to the selection of those response actions that are effective in preventing or, where prevention is not practicable, minimizing the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health, welfare or the environment. As a general rule, this can be accomplished by pursuing remedies that attain or exceed the requirements of applicable or relevant and appropriate Federal public health or environmental laws. However, because of unique circumstances at particular sites, there may be alternatives that do not meet the standards of other laws, but that still provide protection of public health and welfare and the environment.

Revised NCP, supra note 33, at 47,946.

\textsuperscript{57} EPA developed this guidance in response to a lawsuit brought by environmentalists and the State of New Jersey. In its preamble to the proposed revisions to the NCP, the Agency wrote:

some of the revisions reflect agreements reached in settlement of a lawsuit brought by the Environmental Defense Fund (EDF) and the State of New Jersey (EDF v. U.S. EPA, No. 82-2234, D.C. Cir. February 1, 1984; State of New Jersey v. U.S. EPA, No. 82-2238, D.C. Cir., Feb. 1, 1984.) The Agency agreed to the following in the settlement.

- EPA will propose amendments to the NCP to require that (1) relevant quantitative health and environmental standards and criteria developed by EPA under other programs be used in determining the extent of remedy, and (2) if such standard or criteria are substantially adjusted (e.g., for risk level or exposure factors), then the lead agency must explain the basis for this adjustment.


\textsuperscript{58} In the preamble to the revisions of Subpart F of the NCP, the Agency wrote:

As explained in the preamble to the proposed NCP revisions (50 FR 5861, February 12, 1985), EPA has determined that the requirements of other Federal environmental and other public health laws, while not legally applicable to CERCLA response actions, will generally guide EPA in determining the appropriate extent of cleanup at CERCLA sites as a matter of policy.

Revised NCP, supra note 33, at 47,917. See infra notes 128-46 and accompanying text.

\textsuperscript{59} 40 C.F.R. § 300.68(f) (1985). See also EPA Memorandum, “CERCLA Compliance with Other Environmental Statutes,” Revised NCP, supra note 33, at 47,946 [hereinafter cited as CERCLA Compliance Memo].
Federal requirements that would be legally applicable, whether directly, or as incorporated by a federally authorized State program, if the response actions were not undertaken pursuant to CERCLA section 104 or 106. 60 "Relevant and appropriate" requirements, in contrast, are "those requirements that, while not 'applicable,' are designed to apply to problems sufficiently similar to those encountered at CERCLA sites that their application is appropriate." 61 In a memorandum entitled "CERCLA Compliance with Other Environmental Statutes," EPA has provided examples of such statutes and guidance on their application. 62

The NCP provides five exceptions to the requirement that the cleanup attain "applicable" and "relevant and appropriate" standards. These standards need not be attained: (1) in interim cleanups; (2) if the "Fund balancing" analysis indicates that the need to attain the standards is outweighed by the need to conserve Superfund money; (3) where attainment is technologically impractical; (4) where attainment would result in other "unacceptable environmental impacts"; and (5) in those section 106 actions in which "the Fund is unavailable, there is a strong public interest in expedited cleanup, and the litigation probably would not result in the desired remedy." 63 For government-supervised cleanups, the NCP provides that compliance with state laws and the procedural requirements (including permitting procedures) of other federal laws is not necessary. 64

G. Private Claims Against Superfund

Private parties may in some cases be able to recover their cleanup expenses from Superfund. 65 There are, however, significant limitations

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60. Revised NCP, supra note 33, at 47,951 (to be codified at 40 C.F.R. § 300.6) (definition of "applicable requirements"). These requirements might, for example, include groundwater standards applicable to hazardous waste disposal facilities. See id. at 47,922.

61. Id. at 47,954 (to be codified at 40 C.F.R. § 300.6) (definition of "relevant and appropriate requirements"). "Relevant and appropriate" requirements might include drinking water standards under the Safe Drinking Water Act that normally apply only to water provided through public drinking water supplies. Id. at 47,922.

62. See CERCLA Compliance Memo, supra note 59.

63. Revised NCP, supra note 33, at 47,975 (to be codified at 40 C.F.R. § 300.68(i)(5)). See CERCLA Compliance Memo, supra note 59, at 47,947.

64. See Revised NCP, supra note 33, at 47,923 (1985); see also id. at 47,973 (to be codified at 40 C.F.R. § 300.68(a)(3)).


Section 111 of CERCLA authorizes use of Superfund not only for government response actions, but also for

the payment of any claim for necessary response costs incurred by any other person as a result of carrying out the national contingency plan under section 311 of Title 33 and amended by section 105 of this title: Provided, however, That such costs must be approved under said plan and certified by the responsible Federal official.

CERCLA § 101(a)(2), 42 U.S.C. § 9601(a)(2) (emphasis in original). The NCP provides a mechanism called "preauthorization" for those persons seeking to have their actions approved
on such recovery. Among other requirements, private parties seeking recovery from the Fund must first present their claim to responsible parties. If they do not receive compensation from these parties, then they may either commence an action against such parties or present the claim to the Fund for payment.\(^6^6\)

For a claim to be compensable from the Fund, the cleanup costs must have been both incurred as a result of carrying out the National Contingency Plan and certified by the responsible federal official.\(^6^7\) The NCP provides that no private claim against the Fund will be allowed unless the party obtains EPA approval prior to undertaking the cleanup action.\(^6^8\) This "preauthorization" will be granted only if the plan satisfies a range of requirements generally applicable to government Fund-financed cleanups.\(^6^9\) One basic limitation is that Fund compensation for a "remedial" action is only authorized if the site is on the NPL.\(^7^0\) Additionally, to be preauthorized, a plan must satisfy a number of requirements, including selection of a proper level of cleanup, selection of a "cost effective" level of cleanup, assurance that "Fund balancing" has been performed, and satisfaction of certain other procedural obligations.\(^7^1\)

II

AVAILABILITY OF A PRIVATE CAUSE OF ACTION UNDER CERCLA

In addition to providing Superfund financing for public and private cleanups, CERCLA appears to have created a new, direct federal cause of action authorizing private recovery of cleanup costs from responsible parties.\(^7^2\) Section 107(a)(4)(B) of CERCLA provides that potentially responsible parties shall be liable for "any other necessary costs of response incurred by any other person consistent with the national contingency plan." Courts, faced with a series of private actions seeking recovery for purposes of claims against Superfund. Revised NCP, \textit{supra} note 33, at 47,958 (to be codified at 40 C.F.R. § 300.25(d)(1)).

68. Revised NCP, \textit{supra} note 33, at 47,958 (to be codified at 40 C.F.R. § 300.25(d)(1)).
69. \textit{See id.} at 47,958 (to be codified at 40 C.F.R. § 300.25(d)(2)); \textit{id.} at 47,971-72 (to be codified at 40 C.F.R. § 300.68).
70. \textit{Id.} at 47,958 (to be codified at 40 C.F.R. § 300.25(d)(2)(iii)).
71. \textit{Id.} at 47,976 (to be codified at 40 C.F.R. § 300.68(i)). In contrast, private parties who do not seek recovery from the Fund, but seek compensation instead from responsible parties under section 107(a)(4)(B), are not limited to NPL sites (\textit{see infra} notes 93-99 and accompanying text), need not obtain prior government approval of their plan (\textit{see infra} notes 100-112 and accompanying text), and need not engage in Fund balancing (\textit{see infra} note 138).
under this section, have had to resolve the threshold question of whether CERCLA does indeed establish this new cause of action.

The courts have been nearly unanimous on this issue. Every court that has engaged in any substantive analysis of the question has concluded that section 107(a)(4)(B) does provide a private cause of action for recovery of hazardous waste cleanup costs.\(^7\) Although the legislative history is silent on this specific issue,\(^7\) courts have held that the broad remedial purpose of CERCLA and the plain language of the section compel a conclusion that a private action is available.\(^7\)

At least two arguments have been advanced that section 107(a)(4)(B) does not create a private cause of action. The district court in Walls v. Waste Resources Corp. concluded that because CERCLA, unlike most other federal environmental statutes, does not directly provide for citizen suits, Congress must not have authorized private recovery actions.\(^7\) This conclusion was reversed by the Sixth Circuit Court of Appeals based on the plain language of section 107(a)(4)(B) and congressional intent in adopting CERCLA.\(^7\)


\(^7\) As one court noted: "Neither the Senate debate nor the House Reports on earlier versions of CERCLA . . . reveal congressional intent with respect to the private right of action under section 9607(a)(4)(B)." Walls v. Waste Resource Corp., 761 F.2d 311, 318 n.6 (6th Cir. 1985).


\(^7\) Walls v. Waste Resources Corp., 22 Env't Rep. Cas. (BNA) 1039. The district court adopted a Magistrate's Report which stated, in reference to the plaintiffs' claims for recovery of cleanup costs under section 107 of CERCLA:

There is no citizen's suit provision under CERCLA. Apparently such actions are to be brought pursuant to other citizen suit provisions such as those found in the FWPCA and the RCRA. The undersigned is of the opinion that Congress did not intend to create a private right of action under CERCLA.

\(^7\) 761 F.2d 311. The court noted:

Although the legislative history of CERCLA is vague, reflecting the compromise nature of the legislation eventually enacted, it is clear that the statute was designed primarily to facilitate the prompt cleanup of hazardous waste sites by placing the ultimate financial responsibility for cleanup on those responsible for the hazardous wastes. . . . Allowing a private action to recover response costs from responsible parties under section 9607(a)(4)(B) is thus consistent with both the language of section 9607(a)(4)(B) and with the congressional purpose underlying CERCLA as a whole.

\(^7\) Id. at 318 (footnote and citation omitted).
Additionally, some defendants have asserted a more complex argument that section 107(a)(4)(B) does not in itself state a cause of action. Defendants have noted that under sections 111 and 112 of CERCLA, Fund money will not be paid unless the claim is first presented to a party who "may be liable under 107." If the responsible party does not pay, an action may be brought against that person or against the Fund. Section 107, it has been argued, merely defines the group of responsible parties for purposes of claims against Superfund under 111 and 112. Under this argument, responsible parties would be liable only for costs which are otherwise recoverable from Superfund, and, as discussed above, there are numerous prerequisites for recovery from the Fund that are not contained in section 107 itself. Although this is a clever argument, courts have rejected it as to recovery of both government and private party cleanup expenses. As one court stated, "section 107 and sections 111 and 112 provide causes of action that are distinct and independent."

In concluding that section 107(a)(4)(B) establishes a direct cause of action, courts have relied on several factors. First, courts have focused on the plain language of section 107(a)(4)(B), which specifically provides that parties are liable. Second, courts have noted that section 107(a) states that liability under the section exists "notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section." Third, courts have concluded that a private right of action is consistent with Congress' objective of assuring the rapid cleanup of hazardous waste sites. Finally, courts have been

80. For example, section 111 contains an explicit provision that costs cannot be recovered from the Fund unless they have been previously approved by the federal government. CERCLA § 111(a)(3), 42 U.S.C. § 9611(a)(3); see CERCLA § 112, 42 U.S.C. § 9612. See supra notes 65-71 and accompanying text.
84. See, e.g., id. ("The language of section 107(a)(4)(B) is extremely broad and inclusive. . . . It is difficult for the court to imagine statutory language that would more clearly grant a private cause of action"); Jones v. Inmont Corp., 584 F. Supp. at 1428.
86. In Stepan Chem. Co., 544 F. Supp. at 1142-43, the court wrote:

It is clear from the discussions which preceded the passage of CERCLA that the statute is designed to achieve one key objective - to facilitate the prompt clean up of hazardous dumpsites by providing a means of financing both governmental and private responses and by placing the ultimate financial burden upon those responsible for the danger. The liability provision is an integral part of the statute's method of achieving this goal for it gives a private party the right to recover its response costs from responsible third parties which it may choose to pursue rather than claiming against the fund.

Id. at 1142-43.
concerned about the consequences, such as the need for federal approval of response costs, if section 107 were construed simply to define liability for purposes of Fund recovery.\footnote{87}

The virtually unanimous conclusion of the courts, that CERCLA does create a new private cause of action, is consistent with both the language of the Act and congressional intent to promote, through a broad array of mechanisms, the rapid cleanup of hazardous wastes in the United States. There is little doubt that this private cause of action now exists under CERCLA.

III
CONDITIONS FOR ASSERTION OF A CAUSE OF ACTION UNDER SECTION 107(a)(4)(B)

Although courts have concluded that section 107 provides a direct cause of action independent of other provisions of CERCLA, section 107(a) itself establishes some prerequisites to recovery of response costs from responsible parties. Some of these prerequisites are common to all liability under section 107(a). Responsible parties are only liable for government or private cleanup costs if there has been a “release or threatened release”\footnote{88} of a “hazardous substance”\footnote{89} from a “facility.”\footnote{90}

In addition, section 107(a)(4)(B) imposes extra requirements for private parties seeking to recover response costs. Such costs must be: (1) “consistent with the national contingency plan”; (2) “necessary”; and (3) “incurred by any other party.” It is these latter requirements, specific to the cause of action under section 107(a)(4)(B), that have raised the most difficult questions involving the private cause of action.

A. Consistency with the National Contingency Plan

CERCLA provides that private parties can only recover costs incurred “consistent with the National Contingency Plan.” Thus EPA, through promulgation of the NCP, has the authority to define the basic

\footnote{87. See, e.g., Pinole Point Properties, 596 F. Supp. at 290.}
\footnote{89. See supra notes 9-12 and accompanying text.}
\footnote{90. “Facility” is broadly defined in CERCLA to include (A) any building, structure, installation, equipment, pipe or pipeline . . . 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. CERCLA § 101(9), 42 U.S.C. § 9601(9). See New York v. General Elec. Co., 592 F. Supp. 291, 295-97 (N.D.N.Y. 1984).}
requirements for private party cleanups. These requirements have been unclear, however, because early versions of the NCP were ambiguous about what private parties were required to do, and courts had split on a number of issues relating to the consistency requirement. The Agency's revised NCP now explicitly defines the requirements applicable to private parties seeking recovery under section 107(a)(4)(B). These new regulations should resolve most of the basic issues associated with the private cause of action under section 107(a)(4)(B). They do, however, raise new concerns.

1. Listing on the National Priorities List

A basic issue under section 107(a)(4)(B) was whether private parties could recover expenses for cleanup of sites not listed on the National Priorities List. Because the NCP provided that the government could undertake "remedial actions" only at NPL sites, defendants had argued that private party expenses at non-NPL sites could not be consistent with the NCP. Although earlier versions of the NCP were not explicit, virtually every court that addressed this issue concluded that listing of the cleanup site on the NPL was not necessary for recovery of expenses under section 107(a)(4)(B). In the revised NCP, the Agency appears to have resolved this issue; there is no requirement that a site be on the NPL for a party to undertake a cleanup consistent with the NCP.

There would be little justification for making the listing of a site on the NPL a prerequisite for private party cost recovery. Under the NCP,
listing a site on the NPL is used to authorize the expenditure of Superfund money on remedial actions; this restriction ensures that limited funds will be used for the cleanup of the worst hazardous waste sites. Other actions can be taken at non-NPL sites where Superfund money is not expended. In the case of short-term removal actions, for example, where in most cases there is a statutory limit on expenditures, Fund money can be spent on sites not on the NPL. Further, in cases where the government issues a section 106 order, which does not require expenditures from Superfund, the restriction to NPL sites does not apply.

A limitation under section 107(a)(4)(B) to recovery of expenses at NPL sites would make sense only if it served to conserve Superfund money. This logic simply does not apply to private parties seeking recovery, not from the Fund, but directly from responsible parties. EPA's decision to reject any requirement limiting 107(a)(4)(B) cost recoveries to the cleanup of NPL sites is thus perfectly consistent with other provisions of CERCLA.

2. Prior Government Approval

Perhaps the single most difficult issue under section 107(a)(4)(B) is the role that the government should play in approval of private cleanup plans. Early versions of the NCP were somewhat ambiguous, and courts had split over the need for government approval. In the revised National Contingency Plan, EPA has stated that prior government approval

96. In the proposed revisions to the NPL, the Agency noted:

CERCLA does not require that a site be on the NPL to be eligible for Fund-financed remedial responses. That restriction is one EPA voluntarily imposed in the existing NCP, for reasons of Fund management and to alert the public to the significance of a site being included among the priority releases.

Proposed NCP Revisions, supra note 57, at 5869. See also Pinole Point Properties, 596 F. Supp. at 290.

97. Compare Revised NCP, supra note 33, at 47,971-72 (to be codified at 40 C.F.R. § 300.65(b)(1)) (requirements for removal action do not include listing on the NPL) with id. at 47,973 (to be codified at 40 C.F.R. § 300.68(a)(1)) (requirements for remedial action, including limitation to sites on the NPL).

98. See Section 106 Memo, supra note 16. Cf. Revised NCP, supra note 33, at 47,976 (to be codified at 40 C.F.R. § 300.68(1)) (requirements for response actions pursuant to a section 106 order).

99. As one court noted: "The priority list serves to allocate scarce government resources, a purpose not served by curtailing the remedial actions undertaken by private persons who later seek to recover from those responsible for the release of the hazardous waste disposal." Pinole Point Properties, 596 F. Supp. at 290.

100. Some courts had construed the NCP as requiring government approval. See, e.g., Artesian Water Co., 605 F. Supp. at 1361; Wickland Oil Terminals, 590 F. Supp. at 78 (requires government supervision); Cadillac Fairview/California, 21 Env't Rep. Cas. (BNA) at 1114 (site must be on NPL to commence suit); Bulk Distribution Centers, 589 F. Supp. at 1446-47.

Other courts had concluded that such prior approval was not necessary. See, e.g., Shore Realty Corp., 759 F.2d at 1048; Fishel v. Westinghouse Elec. Corp., 617 F. Supp. 1531, 1534-35.
of private party cleanup expenses is not a prerequisite to private party recovery under section 107(a)(4)(B).¹⁰¹

This is an issue of tremendous significance. If prior approval were to be required, the speed and number of private party cleanups could be diminished. However, without prior approval, the specter is raised that private parties will inadequately remedy a situation and perhaps even make it worse.

There is little statutory basis for arguing that Congress intended government approval to be a prerequisite to a section 107(a)(4)(B) action. Although recovery from Superfund is expressly conditioned on prior approval, no such requirement is contained in section 107(a)(4)(B) for recovery from responsible parties.¹⁰² Some courts have suggested that the provision of section 107(a)(4)(B) that limits private recovery to "other" expenses implies that there must first have been some expenditure of government funds under section 107(a)(4)(A).¹⁰³ Most courts, however, have not found a specific statutory requirement of prior government action or authorization.¹⁰⁴

In the revised NCP, EPA has rejected the requirement of prior government approval for private cleanup actions under section 107(a)(4)(B). The NCP now provides that prior government approval of private cleanup efforts is required only if the government has issued a section 106 order compelling cleanup or if the private party intends to seek reimbursement of expenses from Superfund.¹⁰⁵ Although these revisions should resolve the question whether governmental approval is necessary for consistency with the NCP, the question remains whether it is a good idea to encourage private party cleanup without such approval.

Prior government approval is a mechanism that would help safeguard the public from improper or inadequate private cleanups. In the

¹⁰¹ In the preamble to the revised NCP, the Agency noted:
Section 300.71 requires the lead agency to approve in advance the adequacy of a response by a responsible party or other person when an action is undertaken in compliance with an administrative order or consent decree under CERCLA section 106 or when reimbursement from the Fund is to be sought under section 112 of CERCLA. . . . Otherwise, government approval of response actions is not required.
Revised NCP, supra note 33, at 47,934.

¹⁰² Compare section 111(a)(2) of CERCLA (payment from the Fund of necessary response costs by any other person is authorized "Provided, however, That such costs must be approved under said plan and certified by the responsible Federal official"); with section 107 (responsible parties are liable for "any other necessary costs of response incurred by any other person consistent with the National Contingency Plan."). 42 U.S.C. §§ 9611(a)(2), 9607.

¹⁰³ See, e.g., Wickland Oil Terminals, 590 F. Supp. at 77; Bulk Distribution Centers, 589 F. Supp. at 1447.


¹⁰⁵ See supra note 101.
absence of government approval, it is the private party that decides the content of a response plan. As one judge noted: "I believe that the public is generally better protected by a system in which the government bears the ultimate responsibility for balancing competing interests to arrive at environmentally sound and cost-effective remedial actions." This policy concern influenced the courts that construed the old NCP as requiring prior government approval of private response plans.

In the preamble to the NCP, the Agency responded to this issue:

The costs and delays of prior approval by EPA of private party responses could significantly reduce the number and scope of those responses. . . . EPA believes that the requirement that private party responses comply with all applicable Federal, State and local requirements, including permit requirements, as appropriate, is sufficient to deter poorly planned cleanup proposals and minimize the possibility of independent private party and government responses.

Thus, the Agency is relying on private party compliance with the NCP to assure protection of the public and the environment.

Additional supervision of private cleanup efforts may be appropriate. EPA is placing considerable weight on the requirement that private parties comply with applicable or appropriate and relevant environmental statutes when developing response plans. As discussed below, interpretation of this requirement is far from straightforward and entails the exercise of a considerable amount of judgment and environmental expertise. Furthermore, a site may have environmental problems that existing statutes do not address. Decisionmaking is being placed in the hands of private parties who have a great incentive to minimize cleanup costs. Subsequent evaluation by judges who lack specific environmental expertise may not provide adequate supervision.

The government, of course, does not have the resources to review

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106. *Artesian Water Co.*, 605 F. Supp. at 1361. See also *Bulk Distribution Centers*, where the court stated:

In this court's view, the only practical way to safeguard the public's interest, while fairly mediating the competing concerns of the parties potentially responsible for cleaning up the release, is for the government to approve the clean-up proposal before it is implemented by the private parties. The government certainly is in a better position than are private parties to pass judgment on the efficacy of a clean-up proposal. To begin with, state or federal environmental agencies possess scientific and technological sophistication, along with an appreciation of the problems arising from hypertechnical environmental standards. Additionally, the clean-up proposal must comply with laws that the state or federal governments enforce, so it follows that their approval of a plan would be desirable to reduce a party's exposure to liability.

589 F. Supp. at 1446.

107. See supra note 106.

108. Revised NCP, supra note 33, at 47,934.

109. The government does, of course, retain the power to control the cleanup process. Under the NCP, prior approval is necessary when section 106 orders have been issued. See id. at 47,934. By exercising its section 106 authority, the government can assure proper cleanup at hazardous waste sites.

110. See infra notes 141-42 and accompanying text.
cleanup plans for every site where hazardous substances are being removed. Some mechanism is needed to separate those cleanups that should be subject to government supervision from those that need not be. Perhaps the answer lies in the NPL. For the worst sites, those creating the greatest threat to public health and the environment, prior approval of any cleanup efforts should be mandatory. For non-NPL sites, where there is less concern and little likelihood of direct government action, subsequent court assessment of the cleanup may be an adequate safeguard. Currently, however, parties may undertake cleanup at NPL and non-NPL sites without prior government approval, if the government has not yet issued a section 106 order or if Fund reimbursement is not sought.

EPA should consider revising both its criteria for listing sites on the NPL and the requirements for government approval of private cleanups. A revised ranking system could be developed creating a "second tier" of sites not serious enough to warrant immediate government cleanup but significant enough to warrant government supervision of private cleanups. The NCP should be revised to provide that, for purposes of consistency with the NCP, prior government approval is necessary for private party cleanups at these sites. EPA has such authority pursuant to its responsibility to develop the NCP.111

Requiring government approval of cleanups at these "second tier" sites would allow government supervision of cleanup where necessary, but without obligating the government to institute the cleanup effort itself or review every cleanup action taken by a private party.112 This would focus government efforts on those sites that require more complex cleanup decisions. Simpler sites, not on the "second tier" list, would presumably involve easier cleanups with less need to consider the discretionary application of vague cleanup standards. Further, government approval, as discussed infra Section IV, would extend the protection for damage claims contained in section 107(d) of CERCLA, and thus further encourage private cleanups.113 Finally, increased government supervision and an expansion of the NPL would provide the public with additional information and promote public confidence in private hazardous waste cleanups. Considerable benefits would accrue if the government

111. As the court noted in Artesian Water Co., 605 F. Supp. at 1357: "[The] provisions of Section 105 provide ample authority for EPA to include in its revisions of the NCP a requirement that governmental approval of response actions be a prerequisite to recovery of the costs thereof from responsible parties."

112. This proposal would have some interesting consequences. I must confess I would love to see a responsible party petitioning EPA to get a site on the NPL in order to prevent the property owner from suing him after cleaning up the site. I would also like to see the government explain to the neighbors that the government has listed the site, not to clean it up, but to inhibit private cleanup of the site.

113. See infra note 231 and accompanying text.
extended its supervisory function on a selective basis through revision of the NPL.

3. Notice to Responsible Parties

CERCLA requires that, before it can remedy a site through a section 104 cleanup action, the government must determine whether responsible parties will properly undertake a response action.\textsuperscript{114} EPA’s policy is to notify PRP’s and request that they undertake cleanup before the government itself commences a cleanup action.\textsuperscript{115} Similarly, the Act requires that private parties seeking compensation from Superfund first present their claims to the responsible parties.\textsuperscript{116} The logic of this requirement is obvious. Limited Superfund money should not be spent if a private party will undertake the cleanup itself.

Although at least one court has suggested that the precleanup "notification" requirement is applicable to private party cleanups as well,\textsuperscript{117} EPA, in the revised NCP, has stated that notification of responsible parties prior to cleanup is not a prerequisite for compensation under section

\textsuperscript{114} CERCLA § 104(a)(1), 42 U.S.C. § 9604(a)(1).


\textsuperscript{116} CERCLA § 112(a), 42 U.S.C. § 9612(a).

\textsuperscript{117} See Bulk Distribution Centers, 589 F. Supp. at 1448-50. Other courts have indicated that private parties must notify responsible parties of their intention to file suit under section 107(a)(4)(B) at least 60 days prior to filing such a suit. See United States v. Allied Chem. Corp., 587 F. Supp. 1205, 1207-08 (N.D. Cal. 1984); Dedham Water Co. v. Cumberland Farms Dairy, Inc., 588 F. Supp. 515, 517 (D. Mass. 1983). Such a procedural requirement, although itself questionable, would be a relatively minor aspect of the process.

Although the court in Bulk Distribution Centers, supra, indicated that notification prior to cleanup is compelled by CERCLA, the court's analysis seems flawed. The court found this requirement by interpreting sections 101(4), 107, and 112. Section 112, the court noted, requires presentation of a claim to a responsible party before reimbursement from Superfund can be sought. Section 101(4) defines "claim" as a demand in writing for a sum certain. Thus, the court concluded: "Reading these sections together with 9607(a)(4)(B), it appears that before a private claimant can commence a cost recovery action against other private parties, it must first serve a letter demanding a 'sum certain' to cover the costs of the clean-up operation." Id. at 1448. Apparently this letter would not merely be a formality after the cleanup is completed. The court stated that the purpose of the demand letter is to allow the responsible party to determine "whether it is financially practicable to participate in the clean-up effort." Id. at 1449. A basic element of the court's reasoning was its conclusion that the private plan must first have been approved by the government. With such approval, the letter could reasonably state what the subsequent cleanup would entail. The court also relied on the Agency's procedures for its notification of responsible parties prior to cleanup.

A few of the errors in this analysis include: (1) reading the requirement under section 112 that a claim be presented to a responsible party prior to recovery from the Fund as a requirement that the claim be presented prior to cleanup; (2) linking the cause of action under section 107 with that under section 112; and (3) relying on the procedures for government notification of private parties prior to cleanup, because section 104(a) expressly imposes this requirement on the government prior to undertaking a section 104 cleanup. To the extent that the court acknowledges that the purpose of prior notification would be defeated without a requirement of prior government approval, its conclusion is also suspect. Most courts and the EPA reject any such requirement.
107(a)(4)(B). The preamble to the NCP states that “EPA has not required that private parties try and locate responsible parties and encourage them to undertake the response.”118 The Agency rather cryptically adds, however, that notification of responsible parties “will be helpful if the private party contemplates attempting to recover response costs from the responsible party.”119

EPA has chosen the proper course in rejecting notification as an absolute prerequisite for compensation. The government notice requirement helps ensure that Superfund money is not spent unnecessarily; because private party cleanups are not drawing upon Superfund money, prior notice does not further any Fund conservation objective.

Notwithstanding EPA’s position that notification is not an absolute prerequisite for compensation under section 107(a)(4)(B), private parties should attempt to notify PRP’s at the time the cleanup plan is developed. First, the NCP does require “public participation,” including in many cases public hearings and a public comment period, during plan development.120 PRP’s, if known, may be among the group that must be notified as part of the public participation requirement. Thus, the Agency has in fact required notification of PRP’s in many cases. Second, even if notification were not accomplished though the public participation process, a private party who contemplated recouping expenses under section 107(a)(4)(B) would be well-advised to involve the PRP’s in development of the cleanup plan. Section 107(a)(4)(B) requires that a party seeking to recover the costs of cleanup demonstrate that the cleanup was executed in a manner consistent with the NCP. As discussed below, a private party will undoubtedly be in a better position to establish consistency, especially in demonstrating that the cleanup was cost-effective, if the PRP has had an opportunity to comment on the plan.121 Perhaps this is why EPA believes that PRP notification will be “helpful.”

4. Development of an Appropriate Cleanup Plan

The ultimate purpose of the NCP is to aid in developing a cleanup plan that will assure protection of human health and welfare and the environment. To accomplish this purpose, the NCP contains provisions detailing how the government is to prepare appropriate removal and remedial plans.122 Additionally, section 300.71 of the NCP now contains requirements for private parties seeking recovery of their cleanup ex-

118. Revised NCP, supra note 33, at 47,935.
119. Id.
120. See infra notes 155-61 and accompanying text.
121. See infra notes 153-54 and accompanying text.
122. See supra notes 42-64 and accompanying text. Furthermore, the NCP identifies those factors that must be considered by parties developing a response plan pursuant to a section 106 order or private parties seeking to recover their expenses from Superfund. Revised NCP, supra note 33, at 47,958 (to be codified at 40 C.F.R. § 300.25(d)).
To be "consistent with the NCP," response plans developed by private parties must comply with these new requirements.

The NCP mandates neither a specific form nor level of site cleanup. Given the number of hazardous substances and the variety of site conditions, such specificity would be impossible. Rather, the NCP provisions establish a process for decisionmaking and a series of factors and standards that must be considered in arriving at a final cleanup plan. Section 300.71 provides that for "removal" actions, private parties must act in circumstances warranting a removal action and implement removal "consistent with" the requirements governing federal cleanup actions. For the more significant long-term "remedial" actions, the regulations require that a private party: (1) undertake proper site analysis and investigation; (2) identify environmentally acceptable cleanup alternatives that meet or exceed "applicable or appropriate and relevant" federal standards and comply with state substantive requirements; (3) select the cost-effective response from among these alternatives; and (4) provide an opportunity for public comment on the plan.

The requirements for development of environmentally acceptable cleanup alternatives and selection of the cost-effective response are the core of this process. The approach adopted by EPA, however, raises troubling questions as to whether private parties will have adequate guidance and be assured that their cleanup plans will in fact be "consistent with" the NCP. Even more troubling is whether these requirements will ensure that private cleanup plans, unchecked by any requirement for prior government approval, will promote CERCLA's objectives of protecting human health and the environment.

a. Identification of Environmentally Acceptable Alternatives

One of the most difficult questions under CERCLA is determining the final level of cleanup that should be achieved at a hazardous waste site—the so-called "how clean is clean" issue. With respect to government cleanups, the NCP addresses this issue by requiring that the government cleanup plan be chosen from among alternatives that meet or exceed "applicable" or "appropriate and relevant" requirements of other environmental statutes, unless one of five exemptions applies. The provisions of section 300.71 that deal with development of private cleanup plans basically incorporate the provisions applicable to the fed-

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123. Revised NCP, supra note 33, at 47,977 (to be codified at 40 C.F.R. § 300.71(a)(2)).
124. Id. (to be codified at 40 C.F.R. § 300.71(a)(2)(i)).
125. Id. (to be codified at 40 C.F.R. § 300.71(a)(2)(ii)).
126. See supra notes 55-64 and accompanying text.
127. See supra notes 59-64 and accompanying text.
eral government. The requirements for private parties, however, contain provisions which differ in significant aspects from the federal requirements. These provisions rely in large part on the unsupervised judgment of private parties to implement vague guidance on the proper standards to apply. The unarticulated consequence of this approach may be federal reliance on substantive state requirements to assure that private cleanups are environmentally acceptable.

i. Applicability of Federal Environmental Standards

EPA, as discussed above, claims that environmental standards from other statutes are not legally applicable to government-approved cleanup actions under CERCLA, but that the government, as a matter of policy, will assure attainment of all "applicable or relevant and appropriate" requirements unless one of a number of exceptions applies. The revised NCP takes a different position on this issue in relation to private party cleanup efforts. The NCP provides that for purposes of section 107(a)(4)(B) recovery, private parties "shall comply with all otherwise legally applicable or relevant and appropriate Federal, State, and local requirements, including permit requirements."

Notwithstanding the straightforward language, this provision contains a number of significant ambiguities. First, the provision seems to make compliance with non-applicable but "relevant and appropriate" environmental standards an absolute requirement for private parties who wish to recover their cleanup costs under section 107(a)(4)(B). Thus, EPA is imposing specific substantive requirements in situations where Congress has either explicitly or implicitly declined to apply them. Presumably, the Agency has the authority to impose such a requirement under its CERCLA authority.

Assuming EPA has the authority under CERCLA to require compliance with the standards of other environmental statutes, the problem remains of how to identify those requirements. EPA's guidance on ap-

128. 40 C.F.R. section 300.71(a)(2)(B)(ii) (1985) requires that private parties comply with the provisions of section 300.68(e) through (i), which specify the requirements for development of a cleanup plan by the government.
129. Id.
130. Revised NCP, supra note 33, at 47,977 (to be codified at 40 C.F.R. § 300.71(a)(4)).
131. Indeed, the regulations also require that cleanups "attain" or "exceed" applicable requirements where necessary to protect public health and the environment. See id. at 47,975 (to be codified at 40 C.F.R. § 300.68(j)(1)). See also id. at 47,919. Of course, the Agency is not mandating compliance with non-applicable environmental requirements. It is merely stating that compliance is necessary if the party wishes to assert a cost-recovery action under section 107.
132. The Agency does have authority under section 105 to specify contents of the NCP that will insure that public health, welfare, and the environment are protected. 42 U.S.C. § 9605. For EPA's assertion of its authority to promulgate regulations dealing with private party cleanups under 107, see supra note 91.
plying these "non-applicable" requirements acknowledges the site-specific nature of the problem. The NCP preamble notes: "Although applicability is determined objectively, the determination of what requirements are relevant and appropriate is more flexible. This determination may require the exercise of the lead agency's best professional judgment." 133 Under the NCP, this judgment must be made by private parties who hope later to claim consistency with the NCP. As will be discussed below, a private party may not be able to assure that it has made the correct decision until after the cleanup money is spent. 134

The NCP is also unclear about whether the exemptions to compliance with other environmental standards that apply to government cleanups also apply to private party cleanups. The NCP requires that private party remedial plans include an assessment of factors specified in section 300.68(e)-(i). 135 This includes the requirement that a final cleanup plan meet or exceed "applicable" or "appropriate and relevant" standards. 136 Section 300.68(i), however, contains the five exemptions to compliance with applicable environmental requirements. 137 Thus, the question arises whether private parties can take advantage of these exemptions when developing a remedial plan consistent with the NCP. For two exemptions the answer is clear. The "Fund balancing" exemption is not applicable to a section 107(a)(4)(B) cleanup. 138 Further, the exemption that applies where "there is a strong public interest in expedited cleanup" is by its own terms applicable only to cleanups taken pursuant to a section 106 order. 139

The status of the remaining exemptions is somewhat uncertain. Although the NCP expressly requires that private parties comply with other environmental requirements, the NCP also seems to provide an exemption for interim cleanup measures, where final compliance is technologically infeasible, or where there would be other unacceptable environmental impacts. Such exemptions may make sense and may be appropriate. The NCP is simply unclear, however, as to what the government intended on this issue. Because the Agency disclaims any authority to waive the requirements of other environmental statutes for

133. Revised NCP, supra note 33, at 47,919.
134. See infra notes 210-17 and accompanying text.
135. Revised NCP, supra note 33, at 47,977 (to be codified at 40 C.F.R. § 300.71(a)(2)(ii)(B)).
136. Id. at 47,974 (to be codified at 40 C.F.R. § 300.68(e)(i)).
137. Id. at 47,975 (to be codified at 40 C.F.R. § 300.68(i)).
138. Fund balancing is only applicable for actions in which Superfund money is sought. The preamble to the revised NCP expressly states: "Responses pursuant to section 106 of CERCLA and other private responses are not subject to the Fund balancing requirements of 300.68(1)." Revised NCP, supra note 33, at 47,935. Because a private cost recovery action under section 107(a)(4)(B) will not involve a claim on the Fund, a "Fund balancing" consideration would be inappropriate.
139. Id. at 47,975 (to be codified at 40 C.F.R. § 300.68(i)(5)(v)).
private parties, it probably really intended "applicable" statutes to apply regardless of whether these requirements are "technologically infeasible" or would produce "unacceptable environmental impacts" or are part of interim actions that are regulated under other laws. For "relevant and appropriate requirements" the answer is much less clear.

ii. Level of Cleanup in the Absence of Federal Standards

The NCP largely relies on other federal environmental standards to define the level of cleanup that should be attained at a site. Where other standards do not exist, the NCP requires the exercise of considerable judgment. In such cases, the private party must "select that cost-effective alternative that effectively mitigates and minimizes threats to and provides adequate protection of public health and welfare and the environment, considering cost, technology, and the reliability of the remedy." In the preamble, the agency indicates that this requirement is implemented through a "risk assessment."

iii. Applicability of Federal Procedural and State Substantive Standards

Although EPA claims that neither state nor federal requirements legally apply to federally approved CERCLA cleanups, the NCP specifically provides that both federal procedural and state substantive requirements apply to private cleanup actions other than those taken pursuant to section 106 order or "Fund-financed" response action. Thus, private parties seeking recovery under section 107(a)(4)(B) must comply with all state environmental laws governing the cleanup and obtain all federal and state permits in order to assure that their action is "consistent with the NCP."

The Agency has expressly denied that it has authority to exempt private parties from these requirements. The preamble to the revised NCP states: "EPA cannot exempt privately financed cleanups not taken pursuant to CERCLA 106 from permitting requirements. EPA does not believe that private responses, unlike section 104 and 106 responses, are exempt from compliance with State (or other Federal) laws."

The Agency also claims that application of state law to private cleanups is warranted because states do not participate in private cleanup plan devel-

140. See infra note 144 and accompanying text.
141. Revised NCP, supra note 33, at 47,975 (to be codified at 40 C.F.R. § 300.08(i)(3)). This provision expressly applies to the "lead agency," but under section 300.71(a)(3), all actions to be taken by the lead agency may be taken by the private party carrying out the response.
142. Id. at 47,920. Chapter 5 of EPA's "Guidance on Feasibility Studies under CERCLA" (Apr. 1985) describes EPA's approach to risk assessment. See id.
143. Id. at 47,977 (to be codified at 40 C.F.R. § 300.71(a)(4)).
144. Id. at 47,924.
opment as they do with plans that are federally supervised under sections 104 and 106.\textsuperscript{145}

Given the difficulties in identifying "appropriate and relevant" federal standards, and the uncertainty in undertaking "risk assessments" to establish cleanup plans in the absence of federal standards, substantive state environmental laws may be the most direct and certain control over private hazardous waste cleanups. The NCP may, in effect, delegate to states the responsibility to ensure the adequacy of private cleanups. Delegation of authority to states is a common element of general environmental statutes.\textsuperscript{146} Unlike other federal environmental statutes, however, the NCP provisions are not accompanied by any requirement that states adopt some minimum level of environmental standards.

Although the states play an important role in hazardous waste cleanups, Congress adopted CERCLA in response to the perceived inadequacy of state control over hazardous waste. State laws dealing with hazardous waste cleanup vary widely in their stringency. Relying upon state laws to define the requirements for cleanups under CERCLA means that cleanup levels will be determined not by environmental conditions existing at the site, but by the happenstance of the state in which the cleanup is undertaken. This seems inconsistent with congressional intent in adopting CERCLA.

\textit{b. Cost Effectiveness}

Section 104(c)(4) requires that the government select a "cost effective response" when undertaking a remedial action.\textsuperscript{147} The NCP also provides that for purposes of a cost recovery action under section 107(a)(4)(B), a response action will be consistent with the NCP if a private party selects the "cost effective response."\textsuperscript{148} Under EPA's interpretation of this requirement, cost effectiveness is used only to select from among a group of alternatives that all satisfy some minimum level

\textsuperscript{145} Id. Whatever the merits of this position, there is one somewhat confusing element of the Agency's rule. The revised NCP provides that actions which are "Fund financed" are not subject to these federal and state requirements. Private parties may, subject to prior approval of their plan by the government, recover their cleanup expenses from Superfund. Are these private party cleanups for which future Fund recovery is to be sought exempt from state law or is the exemption limited to section 104 cleanups undertaken by the federal government itself? If the former is the case, then federal approval acts as a waiver of state law. Perhaps this makes sense; such approval at least helps assure that the cleanup is consistent with the requirements of the NCP. In the absence of such approval, only the intention to recover costs under section 107(a)(4)(B) acts as an incentive to assure that cleanup is consistent with the NCP.


\textsuperscript{147} 42 U.S.C. \textsection 9604(c)(4).

\textsuperscript{148} Revised NCP, \textit{supra} note 33, at 47,977 (to be codified at 40 C.F.R. \textsection 300.71(a)(2)(ii)(C)).
of environmental protection. 149

In the preamble to the proposed NCP, although not in the final revision, the Agency indicated that selection of a “cost effective remedy” was not an absolute prerequisite to cost recovery under section 107(a)(4)(B). Rather, the preamble to the proposal states that recovery will be limited to the cost of the cost effective remedy. 150 The language of the final NCP is identical to the proposal on this issue, and there is no indication in the revised NCP that the Agency intended a change from the proposal. Thus, one can assume that the Agency has adopted this position in the final NCP as well.

If it is the Agency’s view that recovery under section 107(a)(4)(B) is limited to the “cost effective” response, interesting litigation will result. Under the Agency’s position, there will inevitably be after-the-fact disputes, not about what the cleanup actually cost, but rather about what the cost-effective method would have been. Indeed, the actual cleanup selected may be largely irrelevant, and parties will be disputing what the proper cost-effective alternative should have been.

The plaintiff in a cost-recovery action has the burden of proving that its response was consistent with the NCP. 151 The plaintiff will presumably have the initial burden of showing that it complied with applicable

149. See supra notes 53-54 and accompanying text. In the preamble to the revised NCP, the Agency notes: “The approach embodied in today’s rule is to select a cost-effective alternative from a range of remedies that protect the public health and welfare and the environment.” Revised NCP, supra note 33, at 47,921.

Notably, the cost effectiveness requirement involves the actual selection of a method of cleanup; it does not merely preclude spending an excessive amount on the selected cleanup. Presumably, the statutory requirement that limits recovery to “necessary” costs of response would prevent recovery of an amount in excess of what the selected cleanup should have cost if done properly.

The cost effectiveness requirement also differs significantly from the “Fund balancing” requirement, which does not apply to section 107(a)(4)(B) actions (see supra note 138), and is designed to ensure that the limited amount of Superfund money is allocated reasonably.

150. The preamble to the proposal states: “The private party may choose a more costly response, but the responsible party is only responsible for the costs of the ‘cost effective’ remedy.” Proposed NCP Revisions, supra note 57, at 5870.

151. In United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823 (W.D. Mo. 1984), the court in dictum indicated that the plaintiff in a private cost recovery action under section 107(a)(4)(B) had the burden of proving consistency with the NCP. Id. at 850. The case involved a cost recovery action by the government under section 107(a)(4)(A), and the court specifically held that in this type of action the defendant had the burden of proof on the consistency issue. Id. The court based this conclusion on the language of section 107(a)(4)(A), which authorizes compensation for government costs which are “not inconsistent with the NCP.” Id. The court stated that it read “the insertion of the word ‘not’ immediately prior to ‘inconsistent’ to mean that the defendants are presumed liable for all response costs incurred unless they can overcome this presumption by presenting evidence of inconsistency.” Id. In contrast, section 107(a)(4)(B) provides that costs are recoverable if “consistent with the NCP.” Noting this difference, the court indicated that in section 107(a)(4)(B) actions, plaintiffs had the burden of proving that their costs were consistent with the NCP. Id. See also Pinole Point Properties, Inc. v. Bethlehem Steel Corp., 596 F. Supp. 283 (N.D. Cal. 1984).
procedures for development of a cost effective plan.\textsuperscript{152} Thus, it appears that the plaintiff, which after all has the best information on selection of the cleanup alternative, will have the burden of proving that its cleanup plan was cost effective. As discussed above, EPA has not required private parties to notify responsible parties of their intention to clean up a site, but has stated that such notice might be “helpful” where cost recovery is sought.\textsuperscript{153} Perhaps it is in this context that such notice will be helpful. A plaintiff might have an easier time proving that its action was cost effective if it notified and discussed a proposed response plan with the defendant prior to undertaking the cleanup.

It is questionable, however, whether the plaintiff in a section 107(a)(4)(B) action should bear the ultimate burden of proof on the cost effectiveness issue. Section 107(a)(4)(B) actions do not involve Fund-financed cleanups, in which there is a need to develop a plan that will conserve the Superfund. Although cost-effective hazardous waste cleanup is a goal of CERCLA and should be promoted as a national policy, that does not mean that the person who undertakes the cleanup should bear the risk that the cleanup was not cost effective. A private party might be deterred from cleanup by the prospect that post hoc judicial review might conclude that the alternative it selected was not cost effective.

Rather than placing the burden of proof on the plaintiff, perhaps failure to undertake a cost-effective response should be an affirmative defense to be pleaded and proved by the defendant.\textsuperscript{154} This would place the burden of producing evidence and the risk of nonpersuasion not on the person who actually cleaned up the hazardous wastes, but on the responsible party who failed to respond to the release of the hazardous substance.

5. \textit{Public Participation}

The revised NCP contains a significant procedural requirement that applies to private parties who are developing cleanup plans and seeking to recover costs pursuant to section 107(a)(4)(B). To act consistently with the NCP, these parties must provide for public participation in their selection of a remedial action.\textsuperscript{155} Such public participation must be “consistent” with the requirements of section 300.67(d), which specifies the public participation requirements for section 106 actions. These re-

\textsuperscript{152} At a minimum, this should involve compliance with EPA procedures for documentation of and public participation in the response plan process. \textit{See Revised NCP, supra} note 33, at 47,976 (to be codified at 40 C.F.R. § 300.69).

\textsuperscript{153} \textit{See supra} notes 114-21 and accompanying text.

\textsuperscript{154} \textit{See infra} note 222 for a discussion of possible nonstatutory affirmative defenses to liability under section 107.

\textsuperscript{155} Revised NCP, \textit{supra} note 33, at 47,977 (to be codified at 40 C.F.R. § 300.71(a)(2)(ii)(D)).
requirements include providing the public with “feasibility studies which outline alternative remedial measures” for review and comment.\textsuperscript{156} This must be done at least twenty-one days prior to selection of the remedial response.\textsuperscript{157} Additionally, public meetings may be required during this period.\textsuperscript{158} The only exemption from this public participation requirement is if compliance with state or local requirements “provides a substantially equivalent opportunity for public involvement in the choice of remedy.”\textsuperscript{159}

Failure to provide adequate public participation in a cleanup will presumably preclude recovery of expenses under section 107(a)(4)(B), and thus public participation is a significant aspect of the new requirements. As discussed, the public participation requirement may serve to notify PRP’s of the existence of the private cleanup effort,\textsuperscript{160} and considering and responding to public comments may also aid private parties in subsequently proving that their actions were otherwise consistent with the NCP.\textsuperscript{161} Many federal environmental statutes provide for public participation; an open process is presumed to result in better decisions. On the other hand, this requirement will also undoubtedly discourage cleanup by private parties who do not want the notoriety and delay associated with public participation. Whether the benefits of this participation will outweigh these burdens remains to be seen.

\textbf{B. “Necessary Costs of Response” Under Section 107(a)(4)(B)}

In addition to the requirement of “consistency with the NCP,” section 107(a)(4)(B) also provides that compensation is limited to “necessary costs of response.”\textsuperscript{162} CERCLA defines “response” to include remedial and removal actions,\textsuperscript{163} and the definitions of remedial and removal actions in CERCLA indicate that a broad array of expenses are included, ranging from constructing fences, to monitoring, to providing alternate drinking water supplies.\textsuperscript{164}

Courts have liberally construed specific expenses as “costs of response.”\textsuperscript{165} One conflict that has arisen is whether preliminary expenses

\begin{itemize}
  \item \textsuperscript{156} \textit{Id.} at 47,973 (to be codified at 40 C.F.R. § 300.67(d)).
  \item \textsuperscript{157} \textit{Id.}
  \item \textsuperscript{158} \textit{Id.}
  \item \textsuperscript{159} \textit{Id.} at 47,977 (to be codified at 40 C.F.R. § 300.71(a)(2)(ii)(D)).
  \item \textsuperscript{160} \textit{See supra} note 120 and accompanying text.
  \item \textsuperscript{161} \textit{See supra} notes 152-53 and accompanying text.
  \item \textsuperscript{162} 42 U.S.C. § 9607(a)(4)(B).
  \item \textsuperscript{163} CERCLA § 101(25), 42 U.S.C. § 9601(25).
  \item \textsuperscript{164} \textit{See supra} notes 42-47 and accompanying text.
  \item \textsuperscript{165} \textit{See, e.g., Northeastern Pharmaceutical, 579 F. Supp. at 850 (response costs include government litigation costs and attorneys' fees, government salaries, and other expenses associated with monitoring and evaluating releases, costs of planning and implementing the response action, future costs of response, and prejudgment interest); Velsicol Chem. Corp. v. Reilly Tar & Chem. Corp., 21 Env't Rep. Cas. (BNA) 2118 (E.D. Tenn. 1984) (response costs include

involving on-site investigation and planning of cleanup efforts constitute response costs. Because expenditure of some response costs is itself a prerequisite to bringing a section 107(a)(4)(B) action, the question of the coverage of preliminary expenses is closely tied to the procedural question of when an action can be brought. Parties obviously want to bring an action, and hence determine who is ultimately liable, as early and with as little money expended as possible. A determination that preliminary expenses constituted response costs would open the door to earlier determinations of liability.

The definition of "response" in CERCLA seems broad enough to include preliminary site investigation expenses. Most courts have concluded that preliminary expenses, such as investigation and sampling, do constitute response costs, but several courts have held that they do not. At least one court has suggested that expenditures on preliminary investigation, although ultimately recoverable after money is spent on actual cleanup, are not alone sufficient to satisfy the prerequisites for bringing a section 107(a)(4)(B) action.

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.

The resolution of when and whether a private party may obtain a declaratory judgment is central to the future of private party cleanups. As discussed below, if the courts decline to provide plaintiffs with early determinations regarding both PRP liability and the NCP consistency of cleanup plans, they will be placing a serious practical barrier in the path of private parties attempting to use section 107(a)(4)(B) to clean up haz-

costs of evaluating how to deal with problem of hazardous wastes); Mardan Corp. v. C.G.C. Music, Ltd., 600 F. Supp. 1049 (D. Ariz. 1984) (response costs include costs of complying with RCRA).

166. See infra notes 196-97 and accompanying text.

167. "Response" is defined to include the "removal" of hazardous wastes. CERCLA § 101(25), 42 U.S.C. § 9601(25). "Removal" includes "such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances." CERCLA § 101(23), 42 U.S.C. § 9601(23).


ardous waste sites. For courts to cloud this issue by making fine distinctions on the question of what constitutes "necessary costs of response" would be a mistake.

C. Standing To Assert the Cause of Action

Section 107 seems to provide a cause of action to anyone who has expended money on a hazardous waste cleanup. Section 107(a)(4)(A) authorizes recovery by the federal government and the states; section 107(a)(4)(B) authorizes recovery by "any other person." "Person" is broadly defined in the Act to include virtually any individual, corporation, association, or government body. The identities of parties who have brought recovery actions confirm the apparent scope of section 107(a)(4)(B). These parties have ranged from municipalities, to neighbors of a hazardous waste site, to water supply companies, to purchasers of real estate suing prior owners who had originally disposed of wastes on the property.

1. Potentially Responsible Parties

One of the basic issues addressed by the courts has been whether "potentially responsible parties," who are themselves liable for cleanup costs, have standing to seek reimbursement. This issue is significant because in most cases the parties who have cleaned up the site and are seeking reimbursement had a sufficient connection to the site to be classed as responsible parties under section 107.

This issue was first considered in City of Philadelphia v. Stepan Chemical Co. In that case, a municipality sued for recovery of expenses for the cleanup of hazardous wastes illegally dumped at a municipal landfill. The city, as owner of the landfill, was a responsible party

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171. See infra notes 210-18 and accompanying text.
177. Because real estate purchasers will in almost all cases be responsible parties, a ruling that they lacked standing for this reason would eliminate much of the potential litigation under section 107(a)(4)(B). See infra notes 190-92 and accompanying text. Cf. New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985) (property owner responsible for state's response costs).
under section 107(a), and therefore potentially liable for the costs of cleanup. The defendants argued that responsible parties should not be allowed to bring such an action because, if recovery were available, this would also allow responsible parties to claim against Superfund under sections 111 and 112, with potentially disastrous results.

The court rejected the defendants' arguments and held that responsible parties were not per se precluded from bringing section 107(a)(4)(B) actions. The court observed that "although not a model of clarity, the provision [section 107(a)(4)(B)] does not specifically exclude parties who may be liable for the costs of governmental action nor does its language necessarily support such a construction."179 The court premised its conclusion in part upon the Act's purpose to encourage prompt cleanup of sites.180 The court also noted, however, that the city had not in this case actually operated a hazardous waste landfill and did not authorize the dumping of wastes on its property.181 The court added that the city had undertaken to clean up the site without a government order and that no Superfund money had been expended at the site.182

To the extent that the court suggests that only responsible parties with very clean hands may bring a section 107(a)(4)(B) action, its holding may be rather narrow.183 Although some courts have cited Stepan

179. Id. at 1142.
180. Id. at 1142-43.
181. Id. at 1143. The court did conclude that the city "might have been liable" for the governments' response costs under section 107(a)(4)(B), and stated that "[t]he City has not seriously taken exception to the defendants' characterization of its potential liability under 42 U.S.C. § 9607(a)." Id. at 1143 n.10. There is some question, however, whether the city would have been liable. See infra note 183.
182. Id. at 1143.
183. The court stated that while the City might be liable, "the dispositive consideration is that the City did not operate a hazardous waste disposal facility on the premises and it asserts that it did not voluntarily permit the placement of the hazardous substances on its property." 544 F. Supp. at 1143. Under these circumstances, the city may have been able to take advantage of the affirmative defense to liability provided in section 107(b)(3) relating to acts of third persons. The defense requires that the responsible party must have taken reasonable steps to prevent foreseeable acts and that the parties must not have had either a direct or indirect contractual relationship. If the court impliedly limited the cause of action under section 107(a)(4)(B) to responsible parties who have an affirmative defense to liability, then the opinion is more limited than it might at first appear.

In most cases, however, parties who own sites where hazardous wastes are found will clearly be liable under section 107(a). In Shore Realty Corp., the court considered the question of whether the purchaser of property where hazardous waste was found was a "responsible person" under section 107(a). Holding that such a person may be subject to liability, the court wrote:

"It is quite clear that if the current owner of a site could avoid liability merely by having purchased the site after chemical dumping had ceased, waste sites certainly would be sold, following the cessation of dumping, to new owners who could avoid the liability otherwise required by CERCLA. Congress had well in mind that persons who dump or store hazardous waste sometimes cannot be located or may be deceased or judgment proof. We will not interpret section 9607(a) in any way that apparently frustrates the statute's goals, in the absence of a specific congressional intention otherwise."
Chemical for the simple proposition that section 107(a)(4)(B) allows recovery actions to be brought by responsible parties,\textsuperscript{184} others have indicated that a party responsible for generating wastes may be prevented from suing under section 107(a)(4)(B).\textsuperscript{185} One court has, in fact, barred a claim for recovery of response costs because the plaintiff had participated in the generation of the hazardous wastes.\textsuperscript{186}

Preventing potentially responsible parties, even those with "unclean hands," from seeking compensation under section 107(a)(4)(B) would unnecessarily limit private cleanups of hazardous wastes. First, and most obviously, it is simply not necessary to conclude that because a responsible party may bring an action for cost recovery against another responsible party under section 107(a)(4)(B), that party is also entitled to recover against the Fund. Most courts have concluded that the cause of action under section 107 is distinct from that under sections 111 and 112.\textsuperscript{187} Although section 111 uses language similar to that of section 107, it need not be construed in the same manner.\textsuperscript{188}

Second, recovery under section 107(a)(4)(B) will presumably be an occasion for allocation of costs among responsible parties based in part on the relative cleanliness of their hands. As discussed below, courts are generally finding a right of contribution among responsible parties who are jointly and severally liable under CERCLA. Therefore, a section 107(a)(4)(B) action may be the appropriate point to allocate costs

\textsuperscript{759} F. Supp. at 1045 (citations omitted). The court also rejected an affirmative defense to liability under section 107(b). The court noted that the waste was placed on the site while the defendant owned the property and that the defendant knew of the waste placement. In addition, the court suggested that the defendant could not assert a defense even for wastes deposited by the former owner of the site because the defendant had a "contractual relationship" by which it "assumed at least some of the environmental liability of the previous owners." Id. at 1048 n.23. If the fact of purchase establishes sufficient connection with the former owner, it will never be possible to assert a "third party" affirmative defense that it was the former owner's conduct that caused the release of a hazardous substance.

\textsuperscript{184} See, e.g., Pinole Point Properties, 596 F. Supp. at 291.


\textsuperscript{186} See Mardan Corp., 600 F. Supp. 1049. The court found that the plaintiff's claim for response costs under section 107(a)(4)(B) was barred, not only by the doctrine of clean hands, but also by a purchase agreement in which the defendant had disclaimed any warranty of merchantability or fitness for use, and had obtained a release from the plaintiff of any claims based upon the purchase agreement or transaction pursuant to any agreement. Id. at 1058.

\textsuperscript{187} See supra notes 81-83 and accompanying text.

\textsuperscript{188} For example, the Ninth Circuit Court of Appeals construed the term "emission standard or limitation" for purposes of defining the requirements for State Implementation Plans under section 110 of the Clean Air Act differently than it did for purposes of citizen suits under section 304 of that Act. Kennecott Copper Corp. v. Train, 526 F.2d 1149 (9th Cir. 1975). As the court noted: "if the overall purpose of Congress would be better served by construing the term to include intermittent controls and tall stacks in [304(a)(1)] and to exclude them in [110(a)(2)(B)], there is no reason this reading cannot be adopted." Id. at 1154 n.20.
through a procedural device such as a counterclaim by the defendant. Thus, a responsible party plaintiff may not be entitled to recover an inequitable portion of expenses for which it is also liable.\textsuperscript{189}

2. \textit{Real Estate Purchasers}

The availability of actions by real estate purchasers raises significant questions about the structuring of real estate transactions.\textsuperscript{190} One commentator has suggested that purchasers will get a windfall by paying reduced prices for property with wastes and then suing the seller for recovery of cleanup expenses.\textsuperscript{191} Although this is a potential short-term consequence of section 107(a)(4)(B) actions, it should not constitute a significant long-term problem. First, the marketplace will presumably respond to the altered liability rules created by section 107(a)(4)(B) by reflecting the possible liability of the seller in the sale price of the property. Second, as discussed below, any recovery of expenses will presumably also take into account some offset for contribution by the plaintiff if it is a responsible party. To the extent that such contribution allows for an equitable distribution of expenses, a court might well consider the reduced purchase price by the buyer to be relevant to the issue of the buyer's amount of the recovery in a section 107(a)(4)(B) action.

Finally, once the state of liability under section 107(a)(4)(B) is clarified, parties, if they are smart, will insist upon some form of indemnification agreement for cleanup expenses.\textsuperscript{192} Indeed, 107(a)(4)(B) will almost

\textsuperscript{189}. \textit{See infra} notes 219-27 and accompanying text.


\textsuperscript{191}. \textit{See} Speech by Michele Corash Before the American Bar Association Section on Natural Resources Law (Mar. 2, 1985) (on file with author).

\textsuperscript{192}. Although CERCLA does not allow parties to transfer their liability to others, it does provide that nothing in the Act “shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement from any liability under this section.” § 107(e)(1), 42 U.S.C. § 9607(e)(1) (1982).

Perhaps parties should be dealing with rights of indemnity and contribution under section 107(a)(4)(B). In \textit{Mardan}, the plaintiff, the current owner of a site, sued the defendant, the party from whom it had purchased the site, for recovery under section 107(a)(4)(B) for costs it would incur to properly dispose of hazardous wastes found there. The defendant asserted as a defense a provision of the purchase agreement between it and the plaintiff which disclaimed any warranty of merchantability or fitness for use of the property. The court first concluded that such a disclaimer, although it might affect an action for breach of contract, would not preclude an action under a statutory cause of action. 600 F. Supp. at 1055. The court also addressed the issue of whether a settlement agreement and release could be construed as preventing the plaintiff from asserting any cause of action it might have under CERCLA. Reviewing the language of the settlement agreement and the intention of the parties, the court concluded that it did in fact bar assertion of the cause of action by the plaintiff. \textit{Id.} at 1057. The court also noted that the plaintiff had participated in the production of the hazardous wastes and was barred by the doctrine of unclean hands. \textit{Id.} at 1058. \textit{See supra} note 183.

Although section 107(a) specifically provides that liability is subject only to the statutory
certainly force parties engaged in commercial activities to define contractually their respective liabilities. Contracts for sale of real estate and other commercial agreements should increasingly contain provisions dealing with liability for both government and private hazardous waste cleanups. These private agreements will help avoid the problems of judicial allocation of liability in suits for contribution. Private negotiation and allocation of financial responsibility is certainly preferable to subsequent court-imposed obligations.

3. Neighbors

The issue of recovery actions by neighbors also raises interesting questions. Unlike all the other major environmental statutes, CERCLA has no express citizen suit provision. Under CERCLA, a citizen may not sue for an injunction compelling a responsible party to undertake cleanup activities. The ability to compel cleanup is limited to the government, primarily through section 106 orders. Section 107(a)(4)(B), by authorizing private recovery of cleanup expenses, may, however, be thought of as a form of citizen suit. At least for those citizens who are willing to bear the initial cost of cleanup, section 107(a)(4)(B) allows them to clean up a site, without any government intervention or order, and attempt to recover costs from the responsible party.

D. When May the Cause of Action Be Asserted?

An issue of considerable importance to the fate of private recovery actions concerns the point in the cleanup effort at which the action is ripe for adjudication. Obviously, parties wishing to obtain recovery of cleanup expenses want a determination of liability as early as possible; parties will be more willing to undertake the expense of cleanup if the issue of ultimate liability has been resolved.

Courts generally have been willing to allow a section 107(a)(4)(B) action to be commenced before the entire cleanup has been completed. Courts have held that a section 107(a)(4)(B) action is ripe for adjudication after "some" cleanup expenses have been "incurred." As defenses specified in section 107(b), the court concluded that these statutory defenses were not exclusive and that CERCLA did not preclude the use of such a contractual agreement as an affirmative defense to liability. See infra note 222.


195. Indeed, the district court in Walls v. Waste Resources Corp. relied on the lack of any citizen suit provision in CERCLA to conclude that section 107(a)(4)(B) does not authorize a private right of action. See supra notes 76-77 and accompanying text.

196. See, e.g., Bulk Distribution Centers, 589 F. Supp. at 1450-53; Jones v. Inmont Corp.,
CERCLA'S PRIVATE CAUSE OF ACTION

In its Cost Recovery Memo, supra note 15, EPA stated that “a cost recovery action need not be delayed where the Agency establishes a multiphase response action (e.g., surface clean up, groundwater clean up). A cost recovery action can begin before completion of the last phase of response activity for costs expended to date and also for calculable future costs.” Id. at 2865. See infra note 200.

Although courts have stated that section 107(a)(4)(B) actions are ripe for a declaration of liability after some costs are incurred, it is unclear if the cases involved requests for early payments of those costs. Only one reported case has involved actual recovery of early expenses. Northeastern Pharmaceutical, 579 F. Supp. 823. Northeastern Pharmaceutical concerned an action for recovery of response costs by the government under section 107(a)(4)(A). Not only did the court in that case allow for recovery of a broadly defined group of past response costs, see supra note 165, but it also gave a declaratory judgment that defendants were liable for all future costs of removal or remedial action incurred by the plaintiff that were not inconsistent with the national contingency plan. The court did not, however, make a specific determination that planned future expenses were not inconsistent with the NCP.

Virtually every reported case has involved a defendant’s motion to dismiss for failure to state a claim. It is not clear at what stage plaintiffs would be able to recover their expenses. See,
Another question not yet faced by the courts is whether parties can obtain a declaratory judgment, after expending "some" money, that the remaining unexpended portions of their remedial plan are consistent with the NCP. If courts only provide a determination of consistency after the money is expended, parties will be obligated to clean up a site without knowing whether their expenses satisfy the requirements of section 107(a)(4)(B). As discussed below, plaintiffs' inability to obtain a declaratory judgment that their remedial plan is consistent with the NCP is one of the significant constraints on the use of section 107(a)(4)(B).201

E. Relationship to Citizen Suits for Injunctive Relief

Private parties must actually spend money on hazardous waste cleanup before a right of cost recovery arises under 107(a)(4)(B).202 A provision that authorized private parties to obtain court-ordered injunctive relief to compel cleanup would obviously affect the use of 107(a)(4)(B). Neighbors or environmental groups, and even responsible parties under CERCLA, might be able to compel a cleanup without having to expend large amounts of money.

Virtually every major federal environmental statute has some provision for "citizen suits" to compel government to perform nondiscretionary duties and to obtain injunctions against private parties that have violated the statute.203 CERCLA does not currently have a provision authorizing citizen suits for injunctive relief. Although both the Senate and House have proposed bills authorizing citizen suits against persons alleged to be in violation of CERCLA requirements, neither proposal contains provisions for citizen suits to abate "imminent and substantial endangerment" of human health and the environment.204 Thus, apparently neither bill will authorize citizen suits to compel cleanup of existing hazardous waste sites or releases of hazardous substances.

There is, however, another statute that in effect provides the citizen suit provision which CERCLA lacks. The Resource Conservation and Recovery Act now provides for citizen suits against past or present generators, transporters, and owner/operators of hazardous waste disposal facilities where there is an imminent and substantial endangerment from

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201. See infra notes 210-18 and accompanying text.

202. See supra note 196 and accompanying text.

203. See supra note 193.

disposal of such wastes.\textsuperscript{205} Section 7002(a)(1)(B) of RCRA now authorizes courts to order these persons to take such action "as may be necessary."\textsuperscript{206} Thus, under RCRA, citizens may sue for court-ordered cleanup where the release of a "hazardous waste" produces an imminent and substantial endangerment. This provision authorizes citizen actions in many situations where the government could compel cleanup under section 106 of CERCLA.

The "imminent and substantial endangerment" citizen suit provision of section 7002(a)(1)(B) of RCRA was only recently adopted and has not yet been interpreted by the courts. Significant questions must be answered before the full importance of this provision is known. First, section 7002(a)(1)(B) authorizes actions against past and present generators, transporters, and owners of "treatment storage or disposal facilities" which, under RCRA, are approved and permitted hazardous waste facilities. Will section 7002 be interpreted to allow citizens to seek to abate releases from any site where there is a release of hazardous wastes, or will relief only be given with respect to sites that are seeking permit status under RCRA as a "treatment storage or disposal facility"? If the latter holds true, then the citizen suit provision of RCRA is substantially narrower than the scope of CERCLA. CERCLA section 106 orders may, of course, be issued to virtually any person, and CERCLA liability clearly extends to any person who currently owns a site where hazardous waste is found.

Second, section 7002 authorizes a citizen suit by any "person." Whether courts will interpret section 7002 as granting to potentially responsible parties the right to bring abatement actions remains to be seen. Courts have had to address a similar issue with respect to section 107(a)(4)(B) of CERCLA. Most of these courts have concluded that potentially responsible parties may bring such actions; it is clear, however, from the decisions that the courts acted in reliance upon specific language in CERCLA.\textsuperscript{207} Section 7002 contains no language addressing this issue, and there is no indication that PRP's are not "persons" entitled to bring abatement actions. Nonetheless, the relief to be provided by the court is discretionary, and courts might deny the equitable relief of injunction to parties who themselves have "unclean hands" and are liable for injunctive relief.

Finally, although section 7002 authorizes a court to issue an order compelling cleanup of a hazardous waste site, the section does not define the requirements for cleanup. There may be a direct relationship here

\textsuperscript{205} RCRA § 7002(a)(1)(B), 42 U.S.C. 6972(a) (Supp. II 1984). This provision was added by the 1984 RCRA amendments.

\textsuperscript{206} Id.

\textsuperscript{207} At least some courts have precluded cost recovery actions under section 107(a)(4)(B) by PRP's with "unclean hands." See supra notes 183-88 and accompanying text.
between section 7002 and section 107(a)(4)(B). Undoubtedly, parties subject to an abatement order under section 7002 will attempt to recover all or some of their expenses from other PRP's. To successfully recover their expenses, however, parties will have to show that the cleanup was "consistent with" the NCP. Thus, parties to an abatement action under RCRA will certainly attempt to use the requirements for private party cleanups under CERCLA to shape any cleanup order. How relevant the fact that the cleanup plan was court-ordered under section 7002 will be to a determination that the plan was consistent with the NCP is unclear.

One thing, however, does seem clear. Whether courts construe section 7002 of RCRA to provide a broad right for citizens to compel cleanup of hazardous wastes or whether such a provision is added to CERCLA, it will not eliminate the significance of section 107(a)(4)(B). Any abatement order will probably only lead to a subsequent action under section 107(a)(4)(B) for compensation from other PRP's not subject to the order. Increased availability of injunctive relief may in fact increase the use of section 107(a)(4)(B).

IV
CONSTRAINTS ON PRIVATE PARTY CLEANUPS UNDER SECTION 107(a)(4)(B)

Even though courts are finding a fairly broad right to bring section 107(a)(4)(B) actions, at least three major practical constraints limit section 107(a)(4)(B) as an incentive to private party cleanups. Private parties who undertake hazardous waste cleanups in the expectation of reimbursement under section 107(a)(4)(B) run the risk that: (1) a court may subsequently determine that their actions were not consistent with the NCP; (2) a defendant may be able to seek contribution from a responsible party plaintiff; and (3) private parties will incur significant civil and even criminal liability if the cleanup is not carried out properly.

A. Uncertainty that Expenses Are "Consistent with the NCP"

As discussed above, even when a defendant's liability is clear under section 107(a)(4)(B), the plaintiff's recovery is limited to "necessary" expenses that are "consistent with the NCP." Although current litigation under section 107(a)(4)(B) has reached the stage at which liability has been determined and some determinations of the scope of "necessary" expenses have been made, no court has apparently yet ruled that specific

208. See, e.g., Mardan Corp., 600 F. Supp. 1049 (action under section 107(a)(4)(B) to recover costs of complying with government order under RCRA to close interim status disposal facility).

209. See id. at 1054.
expenses were, in fact, incurred consistent with the NCP.\textsuperscript{210} Courts have merely said that they will be able to make the necessary determinations when the time comes.\textsuperscript{211} No court has issued a declaratory judgment that proposed, but unexpended, funds are consistent with the NCP. In the absence of such a judgment, private parties run the risk that expenses they have incurred will subsequently be found not to satisfy the requirements of CERCLA.\textsuperscript{212}

In the context of government 106 cleanup orders, courts have been unwilling to give declaratory judgments that the government’s order is “consistent with the NCP.”\textsuperscript{213} The courts’ reluctance is understandable in this context. Congress’ intent in adopting CERCLA was to expedite cleanup of hazardous waste sites. Courts have been concerned that the ability to litigate the government order prior to cleanup could frustrate

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\item \textsuperscript{211} As the court in \textit{Pinole Point Properties, Inc. v. Bethlehem Steel Corp.} observed: the question of consistency is a factual determination that turns on the efficacy and cost-effectiveness of clean-up action. This factual determination cannot be made on the basis of the pleadings but must await development of a factual record. Thus at this time the Court expresses no opinion about the ultimate question of whether plaintiff’s response was consistent with the National Contingency Plan. 596 F. Supp. at 290 (citation omitted). \textit{See also} Homart Dev. Co. v. Bethlehem Steel Corp., 22 Envt’l Rep. Cas. (BNA) 1357 (N.D. Cal. 1984).
\item \textsuperscript{212} One commentator has noted that the revised NCP does provide one mechanism to minimize this uncertainty. \textit{See Corash, supra} note 191. Under the NCP, responsible private organizations that can demonstrate cleanup expertise can obtain “certification.” The new regulations provide that such certification is relevant for determination of consistency with the NCP when parties seek to claim against Superfund. Revised NCP, \textit{supra} note 33, at 47,978 (to be codified at 40 C.F.R. § 300.71(c)). The regulations do not address the relationship between certification and a finding of consistency in the context of a section 107(a)(4)(B) action not involving a Superfund claim. However, when action is by a certified private group it presumably will be easier to show consistency with the NCP, and this should operate as a strong incentive to act through responsible groups.
\item \textsuperscript{213} Courts have been reluctant to allow pre-enforcement review of section 106 orders issued by the government. \textit{See, e.g., United States v. Reilly Tar & Chem. Corp.}, 606 F. Supp. 412 (D. Minn. 1985); Aminoil Inc. v. Environmental Protection Agency, 599 F. Supp. 69 (C.D. Cal. 1984). The court in Aminoil stated: This Court finds, however, that the structure of the statute, its legislative history and cases construing it, demonstrate that Congress did not intend to allow judicial review of such orders prior to the commencement of either an enforcement action under 106(b), or a recovery action under 107(c)(3). Congress plainly gave the President authority to address situations endangering 'public health and welfare and the environment,' and such authority necessitates broad flexibility in promptly and effectively responding to the emergency. Allowing an alleged responsible party to challenge the merits of a 106(a) administrative order prior to an enforcement or recovery action would handcuff the Environmental Protection Agency (EPA) by delaying effective responses to emergency situations. \textit{Id.} at 71 (citations omitted). The court in Aminoil did hold, however, that in the absence of pre-enforcement review, the imposition of substantial penalties for violation of section 106 orders contravened due process. \textit{Id.} at 76.
\end{itemize}
this objective. Under section 106, the government has the authority to compel immediate cleanup, and responsible parties can subsequently litigate the propriety of the order either in an enforcement proceeding or in an action to seek reimbursement from Superfund. For similar reasons, courts have also generally concluded that the government's response plans under section 104 are unreviewable until the government institutes a cost-recovery action.

This reluctance to provide a prior declaration of consistency should not be extended to plaintiffs in private party actions under section 107(a)(4)(B). An early declaratory judgment at the plaintiffs' request would probably promote rather than frustrate the purposes of CERCLA. First, unlike the situation with section 106 orders, private parties are under no obligation to undertake hazardous waste cleanups. CERCLA provides the incentive for these private cleanups, among other ways, by providing for reimbursement from responsible parties under section 107(a)(4)(B). In the absence of an early declaratory judgment, however, private parties would be forced to expend money without the certainty that their expenses would be found consistent with the NCP and hence

214. See Aminoil, 599 F. Supp. 69.
215. Id.
216. In several cases, parties who were potentially responsible for the costs of government cleanups undertaken pursuant to section 104 have sought declaratory judgments that the government's response action was inconsistent with the NCP. In virtually every case, the courts have held that review of the government's action could not be obtained until the government sued to recover its expenses. The courts' logic in all these cases arises from the underlying objective of CERCLA to promote rapid cleanup of hazardous wastes. Litigation before cleanup, the courts have concluded, would frustrate this intent. See Lone Pine Steering Comm. v. Environmental Protection Agency, 600 F. Supp. 1487 (D.N.J. 1985), aff'd, 16 EnvTL. L. REP. (ENVTL. L. INST.) 20,009 (3d Cir. Nov. 22, 1985); United States v. Midwest Solvent Recovery, No. H-79-556, slip op. (N.D. Ind. Dec. 21, 1985); United States v. Outboard Marine Corp., 104 F.R.D. 405 (N.D. Ill. 1984). Courts have also rejected requests for declaratory judgments that parties would not be liable for the government's expenses. Levin Metals Corp. v. Parr-Richmond Terminal Co., 608 F. Supp. 1272 (N.D. Cal. 1985); Cotter Corp. v. Environmental Protection Agency, 21 Env't Rep. Cas. (BNA) 2231 (D. Colo. 1984); D'Imperio v. United States, 575 F. Supp. 248 (D.N.J. 1983). In only one case has a court indicated that parties potentially responsible for government costs incurred under section 104 are entitled to pre-expenditure review. J.V. Peters & Co. v. Ruckelshaus, 584 F. Supp. 1005 (N.D. Ohio 1984). See generally Clewett, Judicial Review of CERCLA 104 Cleanup Activities Prior to Cost-Recovery Actions, 9 CHEM. & RADIATION WASTE LITIG. REP. 165 (1985).

217. Perhaps the right to obtain a declaratory judgment should be limited to the plaintiff. It is the plaintiff who may be discouraged from undertaking a cleanup if there is no mechanism for ensuring that its plan will be found consistent with the NCP. The defendant runs no such risk. If a plaintiff expends money and a court determines that the expenses were not consistent with the NCP, the defendant is not liable. Although a defendant may prefer an early determination, it would not be prejudiced by a later determination. This is especially true if a defendant can argue that portions of the plan were not "cost effective." A right to a declaratory judgment by the defendant could only unnecessarily delay a cleanup. Limiting a right of declaratory judgment to the plaintiff and not the defendant essentially makes the defendant's situation under section 107(a)(4)(B) comparable to the situation under section 106 in which a defendant is precluded from obtaining pre-enforcement review.
be recoverable. Rather than encouraging cleanups, such a construction of section 107(a)(4)(B) could "chill" private parties from undertaking cleanups.

Second, because EPA has provided that no prior government approval is necessary for consistency with the NCP, the court may be the only body that will assess the propriety of a private party's remedial plan. An early declaratory judgment on the plan will at least ensure that the court has reviewed the plan prior to the cleanup of the site.

At some point after the plaintiff fulfills the requirement that "some" costs have been incurred, courts should consider granting declaratory judgments that subsequent cleanup plans are consistent with the NCP. Although provision of a declaratory judgment for private parties may, in some cases, slow down the cleanup of a site, the government is always free to issue a section 106 order to ensure expedited cleanup.

B. Apportionment of Liability

A fundamental question under CERCLA is whether liability for cleanup expenses can be apportioned among responsible parties. Although every court that has considered the question has concluded that the basic standard of liability under CERCLA is joint and several, some courts have also concluded that CERCLA authorizes a right of contribution by a party who has paid more than its equitable share. Thus, some courts have been willing to allow parties who have paid for a cleanup under government order to bring an action against other responsible parties for contribution for that portion of expenses that exceeded

218. See supra notes 105-12 and accompanying text.
219. See, e.g., Northeastern Pharmaceutical, 579 F. Supp. 823; United States v. Wade, 577 F. Supp. 1326 (E.D. Pa. 1983); United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983). See generally 1984 CERCLA Update, supra note 8. Following the Restatement's position on joint and several liability, these courts have suggested that apportionment of liability may be authorized if there is an appropriate basis for allocating liability among responsible parties. See, e.g., Wade at 1338 (citing RESTATEMENT (SECOND) OF TORTS § 433A (1964)). Thus, the possibility exists that when the government sues for reimbursement of expenses, responsible parties may in some cases be able to limit their liability to their appropriate allocated share.

Some courts have also suggested that apportionment of liability may be possible even when the defendants are unable to prove what portion of the wastes they contributed. See United States v. A & F Materials Co., 578 F. Supp. 1249 (S.D. Ill. 1984); United States v. Stringfellow, 20 Env't Rep. Cas. (BNA) 1905 (C.D. Cal. 1984).

their equitable share.221

The availability of a right of contribution raises interesting questions when a potentially responsible party voluntarily undertakes a cleanup and seeks reimbursement under section 107(a)(4)(B). A responsible party plaintiff will probably not be able to recover the entire cost of cleanup simply because that party was the one who commenced the cleanup and was the first to get to court seeking compensation. If a right of contribution does exist, then a responsible party plaintiff may be faced with a counterclaim for contribution from the defendant.222

Section 221. As Judge Carrigan noted in Colorado v. ASARCO, contribution among joint tortfeasors is premised on allowing a party to recover money paid in excess of its equitable share. 608 F. Supp. at 1491. The Supreme Court in Northwest Airlines v. Transport Workers Union, 451 U.S. 77 (1981), stated:

Recognition of the right [of contribution] reflects the view that when two or more persons share responsibility for a wrong, it is inequitable to require one to pay the entire cost of reparation, and it is sound policy to deter all wrongdoers by reducing the likelihood that any will entirely escape liability.

Id. at 88.

222. The right to contribution also raises some interesting procedural questions. Certainly a responsible party may bring a separate action for contribution against other potentially responsible parties after it has been subjected to liability. Additionally, a defendant may implead other PRP's and file cross-claims for contribution. See, e.g., Colorado v. ASARCO, 608 F. Supp. 1484.

In the context of a section 107(a)(4)(B) action, where the plaintiff is the other PRP, the logical procedural mechanism available to the defendant is a counterclaim for contribution under Rule 13 of the Federal Rules of Civil Procedure. A possible problem exists, however, because the defendant's claim for contribution does not arise until after it is found liable on the underlying section 107(a)(4)(B) action. Thus, the counterclaim is contingent upon the outcome of plaintiff's action. Perhaps surprisingly, some courts have held that such "contingent counterclaims" may not be asserted under the Federal Rules. See, e.g., Stahl v. Ohio River Co., 424 F.2d 52, 55 (3d Cir. 1970); Goldlawr, Inc. v. Schubert, 268 F. Supp. 965, 971 (E.D. Pa.1967); Slavics v. Wood, 36 F.R.D. 47 (E.D. Pa. 1964); Hartford Acc. & Indem. Co. v. Levitt & Sons, Inc., 24 F.R.D. 230, 232 (E.D. Pa. 1959); Slaff v. Staff, 151 F. Supp. 124, 125 (S.D.N.Y. 1957).


While it is true that courts have held that, the right to contribution does not mature unless and until one has been compelled to pay damages in excess of his proportionate share under a comparative negligence theory, . . . the recent trend, and more pragmatic approach, has been to permit counterclaims for contribution. In re Oil Spill, 491 F. Supp. at 165 (citations omitted). As Wright and Miller have noted, a rule authorizing counterclaims "seems sound when the counterclaim is based on pre-action events and only the right to relief depends upon the outcome of the main action." C. WRIGHT & A. MILLER, supra, at 57.

Alternatively, "contribution" or some form of allocation of responsibility might be assertable as an affirmative defense under Rule 8 of the Federal Rules of Civil Procedure. This rule permits pleading such matters as "contributory negligence" or "any other matter constituting an avoidance or affirmative defense." One problem with this approach is that section 107(a) specifically provides that the statutory defenses listed in section 107(a) are the exclusive de-
107(a)(4)(B) may entitle the responsible party plaintiff to recover only that portion which exceeds its equitable share.

How will expenses be allocated if contribution is allowed?223 This problem has plagued the field and bedeviled the complex multiparty settlements in which the government has participated.224 Bases for allocation have included the relative volumes of waste disposed of by the parties and the relative toxicity of the wastes.225 Due to its simplicity, relative volume has been preferred as a basis for allocating liability.226

senses to liability under section 107. One court has already addressed a similar issue under section 107(a)(4)(B). In Mardan Corp. v. C.G.C. Music, Ltd., 600 F. Supp. 1049 (D. Ariz. 1984), defendants asserted that a provision in the Purchase Agreement entered into by the parties released them from liability and constituted a defense under section 107(a)(4)(B). The court, in response to plaintiff's argument that such a defense was not authorized under section 107(a)(4)(B), wrote:

Mardan's argument does not withstand close analysis. As defendants have suggested, Mardan's interpretation would result in defendants being liable even if they had already paid Mardan's Section 107(a) claim in a prior lawsuit since res judicata, payment, and accord and satisfaction are not listed as defenses in subsection (b). Similarly under Mardan's interpretation of the statute, defendants would not be able to raise such defenses as statute of limitations, waiver, laches, etc. For the foregoing reasons, the defenses listed in subsection (b) cannot be considered as exclusive. 600 F. Supp. at 1056 n.9.

Fortunately, it may not be necessary to sort out the proper procedural device, because Rule 8(c) provides that "[w]hen a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there were a proper designation." FED. R. CIV. P. 8(c).


225. See J. CASLER & S. RAMSEY, supra note 8; Pain, supra note 224, at 15,055-56. The Gore Amendment, passed by the House in September 1980, would have authorized courts to apportion liability among responsible parties based on several factors, including:

(1) the ability of parties to demonstrate that their contribution to a discharge release or disposal of a hazardous waste can be distinguished;

(2) the amount of hazardous waste involved;

(3) the degree of toxicity of the hazardous waste involved;

(4) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous wastes;

(5) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous wastes involved;

(6) the degree of cooperation by the parties with the federal, state, or local officials to prevent any harm to the public health or the environment. H.R. 7020, 96th Cong., 2d Sess. § 3091, 126 Cong. Rec. 26,779, 26,781 (1980). Although the amendment was not adopted by Congress, at least one court has relied upon the Gore Amendment as an indication of congressional intent regarding the apportionment issue. See United States v. A & F Materials Co., 578 F. Supp. 1249, 1256 (S.D. Ill. 1984).

226. As one commentator noted: "In recent settlements and current settlement negotiations involving numerous generators, the percent of waste volume contributed by the individual PRPs is the most important and often exclusive criterion in determining the PRP's 'fair share' settlement contribution." Pain, supra note 224, at 15,055. See also J. CASLER & S. RAMSEY, supra note 8, at 75 ("[m]easuring and assessing toxicity is a complex technical task. As a result, volume has historically been the major factor in apportioning liability.")
Most attempts at allocation have involved parties who each contributed wastes to a site. A particular problem arises when reimbursement is sought by a real estate purchaser who is a responsible party by virtue of owning the land, but was not responsible for disposal of any wastes at the site. Should the owner receive 100% of cleanup expenses? Should the extent of recovery reflect any discount in the purchase price due to the presence of the wastes on the property? Total recovery of cleanup expenses could operate as a windfall to the purchaser who obtained the property for a reduced purchase price. To the extent that contribution represents an equitable apportionment of costs, these factors will undoubtedly be taken into account.

Whatever the answers to these questions may be, responsible parties contemplating recovery under section 107(a)(4)(B) must consider the possibility that a court will limit their recovery after allocating responsibility among responsible parties.

C. Potential Liability for Improper Cleanup

Finally, a potentially significant constraint on the role of private party cleanups is the possibility that cleanup efforts will subject the party to liability under environmental laws such as RCRA or CERCLA. As the revised NCP makes clear, private parties undertaking cleanups without government approval are subject to all applicable federal and state environmental statutes. A party that violates these statutes during a cleanup is subject to possible civil and criminal penalties. For example, a party removing wastes from a site is likely to be classified as a "generator" under RCRA, and thus would be subject to the full RCRA requirements, including manifesting and responsibility for disposal at a permitted Treatment Storage Disposal Facility (TSDF). Similarly, private parties are not exempt from permit requirements under federal law, and onsite disposal of wastes would presumably require that the party obtain a disposal permit under RCRA. A party that failed to comply with permitting requirements would be subject to liability under RCRA and CERCLA—and costs would not be recoverable because the action was not consistent with the NCP. This is a significant problem; it is hard to keep clean hands when handling hazardous wastes.

227. One possible resolution of this particular issue is a properly drafted provision in the contract for sale, allocating liability. See supra note 192.
228. Revised NCP, supra note 33, at 47,977 (to be codified at 40 C.F.R. § 300.71(a)(2)(ii)(D)). See supra notes 126-46 and accompanying text.
229. Any remedial action that involves the offsite transport of waste, for example, must assure that such wastes are disposed of only in a permitted treatment facility which is in compliance with subtitle C of RCRA. See CERCLA Compliance Memo, supra note 59. See also J. ARBUCKLE, supra note 8, at 75 (discussion of requirements under RCRA applicable to generators of hazardous wastes).
230. See J. ARBUCKLE, supra note 8, at 82.
Additionally, private parties undertaking cleanups may subject themselves to liability for damages. Section 107(d) of CERCLA is a "good samaritan" provision relieving parties from liability for damages resulting from actions taken "in accordance" with the NCP or at the direction of the government official directing the cleanup. However, as discussed above, the revised NCP permits section 107(a)(4)(B) actions to be undertaken without government approval. Thus, if a private party violates any applicable federal or state environmental statute, or otherwise acts in a manner that is inconsistent with the NCP, there is no insulation from liability under section 107(d) for any damage claims.

These problems alone may suffice to resolve the problem of prior government approval; parties may be reluctant to act in the absence of a government order because they are otherwise subject to all applicable environmental laws and are not entitled to the protection from damage claims contained in section 107(d).

CONCLUSION

The broad cause of action established by EPA and the courts under section 107(a)(4)(B) makes private cleanups a significant new factor in both commercial and environmental law. Considering the number of existing hazardous waste sites and the potential for future problems with hazardous wastes, no one involved in commercial or real estate activity can safely ignore the possibility of liability under CERCLA. As EPA and the courts increasingly exercise their authority to compel hazardous waste cleanups, private parties will be encouraged to act before the axe falls. And, in every case of private cleanup, the parties will be looking for someone to whom they can pass the costs.

In most respects, the incentive to private cleanups provided by section 107(a)(4)(B) is salutary. Private parties can undertake hazardous waste cleanups with greater speed and at lower cost than can the government. And, there are simply more private parties than there are government officials. Encouraging private cleanups will certainly help resolve the present and future problems of hazardous wastes more quickly than if the nation were forced to rely on the resources of the government alone.

This incentive for private cleanup is not, however, without its costs. Unchaining private forces to begin digging up and moving hazardous wastes does, of course, raise concerns about the environmental conse-

231. CERCLA § 107(d), 42 U.S.C. § 9607(d) (1982). The extent of protection afforded by section 107(d) is, however, open to question. Section 107(d) only provides an exemption from liability under "this subchapter." 42 U.S.C. § 9607(d). Thus, it does not seem to be a defense to tort liability based on negligence or strict liability, for example. More remarkably, section 107(d) only provides a defense to liability for "damages." CERCLA defines damages as damages to natural resources only. CERCLA § 101(6), 42 U.S.C. § 9601(6).
quences of section 107(a)(4)(B). The new revisions to the NCP rely almost exclusively on private judgments about complex and ambiguous environmental standards.

Private parties, the courts, and EPA retain the power to remedy some of the problems in implementing section 107(a)(4)(B). Private parties should begin to include provisions for allocating hazardous waste liability in contracts for the sale of land. Through these indemnification agreements, parties will be able to negotiate with respect to liability and thereby gain some certainty. The courts can provide for early declaratory judgments of the consistency of private plans with the NCP. This will not only encourage private cleanups by relieving some uncertainty as to subsequent recovery, and minimize potential liability for damages, but also provide some prior supervision of cleanup efforts. EPA, the agency responsible for environmental protection and having the greatest expertise in this area, can extend its control over the cleanup process by expanding requirements for government approval of cleanup plans. This can be done under the existing NCP or by aggressive use of EPA's section 106 authority. EPA should also consider enlarging the National Priorities List to include a "second tier" of sites for which government approval of cleanup plans must be sought.

Private hazardous waste cleanups and private liability for those cleanups are now facts of commercial life. EPA, through the National Contingency Plan, and the courts, through resolution of the early cases under section 107(a)(4)(B), have established what those facts are. Whether the proper balance has been struck between the need to encourage private responses to hazardous waste problems and the need for proper supervision of those responses remains to be seen.