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Cost Recovery for CERCLA Response Actions at DOD Facilities

By
Paul McDonald Barzler

B.A. May 1981, Miami Christian College
J.D. May 1985, University of Florida College of Law

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Thesis directed by
Laurent R. Hourclé
Professor of Law

Cost Recovery for CERCLA Response Actions at DOD Facilities

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Cost Recovery for CERCLA Response Actions at DOD Facilities

I. Introduction.

Literally thousands of sites throughout the United States are contaminated with hazardous wastes. In order to prioritize the cleanup of the sites posing the greatest threat to the public, Congress directed the President to establish a National Priorities List (NPL) under COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT.[1] Hazardous waste sites are evaluated and ranked according to the risks posed to the public health and the environment.[2] Those sites with the highest ranking represent priority response targets and are placed on the NPL. There are 1,286 such polluted sites included on the NPL[3] with another 12,800 candidates for addition to the list.[4] The Environmental Protection Agency estimates that as many as 3,000 sites will eventually be a federal cleanup priority.[5]

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[1] COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980, Pub. L. No. 96-510, 94 Stat. 2767 ("CERCLA"), as amended by the SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT OF 1986, Pub. L. No. 99-499 ("SARA"), 42 U.S.C. §§ 9601 to 9675 (West 1994). Statutory authority for the NPL is found at CERCLA § 105(a), 42 U.S.C. § 9605(a) (West 1994), and the actual list is found at 40 C.F.R. Part 300 app. B (1992).

[2] 40 C.F.R. § 300.425 and 40 C.F.R. Part 300 app. A (1992) list specific criteria for inclusion on the NPL.

[3] Melissa Healy, *Administration to Ask for Reform of Superfund*, LOS ANGELES TIMES, Feb. 3, 1994, at A9.

[4] Emily S. Plishner, *Environmental Financial Disclosure: What to Say and Where to Say It*, CHEMICAL WEEK, Dec. 8, 1993, (Reasonable Care) at 49.

[5] Statement of Carol M. Browner, Administrator, U.S. Environmental Protection Agency, before the Subcommittee on Transportation and Hazardous Materials of the Committee on Energy and Commerce, U.S. House of Representatives (February 3, 1994), at 3 (on file with E.P.A.).

According to recent estimates by the Congressional Budget Office, the average cost to clean up an NPL site is $21 million and total estimated cost to Superfund in "discounted present-worth dollars" after 1992 is between $42 and $120 billion.[6]

Congress' intention in 1980 when it passed CERCLA to deal with the problem of contaminated property was for the expense of cleanup to be funded primarily by those who were responsible for the creation of the environmental harm and their successors.[7] Unfortunately, the financial burden for the cleanup of both NPL and non-NPL sites frequently falls on the present owners. The present owners must then pursue other responsible parties. However, for many sites identification of solvent potentially responsible parties (PRPs) with the resources necessary to remediate the environmental harm is difficult if not impossible.

At many federal facilities, and DOD facilities in particular, embroiled in CERCLA response activities, structuring cleanup actions in a manner that preserves the agency's ability to pursue successful cost recovery actions against other responsible parties has received little attention. This is primarily so because all too frequently such PRPs are defense contractors for whom the federal agency will ultimately bear the financial burden of any cleanup costs

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[6] *CBO Report Shrinks Average Superfund Cleanup Cost*, PESTICIDE & TOXIC CHEMICAL NEWS, No. 15, Vol. 22, Feb. 9, 1994.

[7] Smith Land & Imp. Corp. v. Celotex Corp., 851 F.2d 86, 92 (3rd Cir. 1988) *reh'g denied*, Aug 1, 1988, *cert. denied*, Celotex Corp. v. Smith Land and Imp. Corp., 488 U.S. 1029 (1989) ("Expenses can be borne by two sources: the entities which had a specific role in the production or continuation of the hazardous condition, or the taxpayers through federal funds. CERCLA leaves no doubt that Congress intended the burden to fall on the latter only when the responsible parties lacked the wherewithal to meet their obligations. Congressional intent supports the conclusion that, when choosing between the taxpayers or a successor corporation, the successor should bear the cost.").

incurred by such contractors.[8] There are, however, instances where truly liable PRPs are inescapably responsible for environmental harm at DOD facilities and should—*must*—be pursued. Consider the following scenario currently facing the National Guard Bureau.

At some time prior to 1965, the U.S. Air Force granted an easement to Standard Transmission Corp., a subsidiary of W.R. Grace & Co., for the installation of a fuel pipeline through the property of Otis Air Force Base in Massachusetts. Although the pipeline was used to deliver aircraft fuel (JP4) to the fuel facility at the installation owned by the Air Force, Standard Transmission Corp. owned and operated the pipeline itself. The company ceased to operate the fuel line and it was abandoned in 1973. However, Standard Transmission Corp. either did not purge the pipeline or did so improperly. Eventually, the entire installation was turned over by the Air Force to the state of Massachusetts in 1974 for use as an Air National Guard base. Today it is known as the Massachusetts Military Reservation or Otis Air National Guard Base. In the early 1980s, a preliminary assessment indicated a CERCLA response action was necessary to cleanup two sites contaminated by fuel spills from the pipeline that occurred either during its operation from 1965 to 1973 or from the fuel remaining in the pipeline after its abandonment.[9] The facility was subsequently listed on the National Priorities

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[8] *See generally* Major Michele McAninch Miller, *Defense Department Pursuit of Insurers for Superfund Cost Recovery*, 138 MIL. L. REV. 1 (Fall, 1992); Margaret O. Steinbeck, *Liability of Defense Contractors for Hazardous Waste Cleanup Costs*, 125 MIL. L. REV. 55 (Summer, 1989).

[9] CERCLA specifically exempts petroleum, "including crude oil or any fraction thereof" from the definition of "hazardous substance." CERCLA § 101(14) and (33), 42 U.S.C. § 9601(14) and (33) (West 1994). This exclusion applies to hazardous substances indigenous to petroleum (e.g., benzene, toluene). However, contaminants or substances otherwise considered CERCLA hazardous substances that are not usually found in petroleum are not excepted and such mixtures are outside CERCLA's petroleum exclusion. United

List. The cost of cleanup activities have already exceeded $5 million and are expected to climb further. The National Guard Bureau is working with the Environment and Natural Resources Division of the Department of Justice to recover past and future response costs from the successors of Standard Transmission Corp. and other PRPs.

Although situations such as that at Otis ANG Base are few, federal agencies should be sensitive to the potential liability of other PRPs for environmental harm at their facilities and be prepared to structure their cleanup activities—whether performed under CERCLA, some other federal law, or state law—such that the government's ability to recover those costs under federal or state law is preserved.

The first section of this paper examines the basic requirements of CERCLA, RCRA, and DERP, the primary federal environmental statutes applicable to remediation of environmental damage at DOD installations and how they facilitate cleanup and cost recovery actions. The second section discusses the DOD's status under CERCLA for cost recovery actions at NPL sites and the impact of *United States v. Allied-Signal Corp.*[10] The third section surveys the requirements of the National Contingency Plan and considers what is necessary to meet CERCLA's "consistency" requirement, a prerequisite to a successful cost recovery action. The forth and final section briefly examines the importance of state and common law

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States v. Western Processing Company, Inc., 761 F. Supp. 713 (W.D. Wash. 1991); Washington v. Time Oil Co., 687 F. Supp. 529 (W.D. Wash. 1988). The contamination at the Otis ANG Base contains constituents that officials believe, at least at this point in time, will place it outside the petroleum exclusion.

[10] 736 F. Supp. 1553 (N.D. Cal. 1990).

as alternatives to CERCLA and how these alternatives may permit cost recovery instead of or beyond what is otherwise available under federal law.

II. Federal Statutory Authorities: CERCLA, RCRA, and DERP.

A. *COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT.* Congress passed the COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA) late in 1980 to deal with the well-publicized environmental threat posed by an estimated 30,000-50,000 improperly managed or abandoned waste sites that existed nationwide.[11] In 1979, the EPA estimated that between 1,200 and 2,000 of the sites were deemed to pose a serious risk to public health.[12] CERCLA has been criticized as a piece of compromise legislation based on three competing bills which was hastily passed by a lame-duck Congress after limited debate.[13] As such, it has acquired a "well-deserved notoriety for vaguely-drafted provisions and an indefinite, if not contradictory, legislative history."[14]

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[11] H.R. REP. NO. 1016, 96th Cong., 2nd Sess., at 17-18 (1980).

[12] H.R. REP. NO. 1016, 96th Cong., 2nd Sess., at 18 (1980). This estimate has since climbed to 3,000. *See* Statement of Carol M. Browner, Administrator, U.S. Environmental Protection Agency before the Subcommittee on Transportation and Hazardous Materials of the Committee on Energy and Commerce, U.S. House of Representatives (February 3, 1994), at 3 (on file with the E.P.A.).

[13] Amoco Oil Company v. Borden, Inc., 889 F.2d 664, 677 (5th Cir. 1989); Violet v. Picillo, 648 F. Supp. 1283, 1288 (D. R.I. 1986); U.S. v. Mottolo, 605 F. Supp. 898, 902 (D. N.H. 1985).

[14] U.S. v. Mottolo, 605 F. Supp. 898, 902 (D. N.H. 1985). *See also* Amoco Oil Company v. Borden, Inc., 889 F.2d 664, 677 (5th Cir. 1989); Violet v. Picillo, 648 F. Supp. 1283, 1288 (D. R.I. 1986).

1. *The basic elements of CERCLA.* CERCLA contains four basic independent, but complementary, elements. First, it established a system to enable the EPA and state governments to gather and analyze information about hazardous substance releases, characterize inactive waste sites, and establish priorities for investigation and response.[15] Owners of inactive hazardous waste storage, treatment, or disposal sites were responsible to identify the location of such sites and to specify the amounts and types of hazardous substances located therein as well as any known or suspected or likely releases.[16] Based on this notification data, the EPA was to develop inactive site inventories and a National Priorities Lists (NPL) for response action.[17] The NPL is a list of those hazardous waste sites that the EPA has evaluated and determined to pose the greatest threat to human health or the environment.[18] Such hazardous wastes sites are evaluated and ranked under the Hazardous Ranking System (HRS);[19] sites that rank sufficiently high (i.e., 28.5 or higher) are included on the NPL.[20]

Second, CERCLA established the authority of the federal government to respond to hazardous waste emergencies and to cleanup inactive waste sites.[21] Federal response actions

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[15] 126 CONG. REC. 9,155 (1980).

[16] CERCLA § 103(c), 42 U.S.C. § 9603(c) (West 1994).

[17] CERCLA § 105(a), 42 U.S.C. § 9605(a) (West 1994).

[18] The NPL is found at 40 C.F.R. Part 300, app. B (1992).

[19] 40 C.F.R. Part 300, app. A (1992).

[20] 40 C.F.R. § 300.425 (1992).

[21] CERCLA § 104(a), 42 U.S.C. § 9604(a) (West 1994).

are limited to sites listed on the NPL where the responsible party is insolvent, cannot be found, or fails to take the proper action.[22] Response actions include removal actions[23] as well as remedial actions.[24] Cleanup procedures at NPL sites must be consistent with EPA's National Contingency Plan (NCP).[25]

Third, through CERCLA Congress created a revolving "Superfund" of monies on which the EPA can draw to fund the clean up of hazardous waste sites which have been listed by EPA on the National Priorities List (NPL).[26] The Superfund is financed from surtaxes on specified industries, petroleum and chemical feedstock taxes, general revenues, interest on

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[22] Waste sites not listed on the NPL may receive Superfund money only for removal actions. 40 C.F.R. § 300.425(b)(1) (1992); CERCLA § 104(c)(1), 42 U.S.C. § 9604(c)(1) (West 1994).

[23] Removal actions are short-term actions necessary to promptly protect public health or welfare or the environment from a release or threat of release of a hazardous substance. There are temporal and monetary restrictions on removal actions but inclusion on the NPL is not a prerequisite. CERCLA §§ 101(23), 104(a) and (c)(1), 42 U.S.C. §§ 9601(23), 9604(a) and (c)(1) (West 1994).

[24] Remedial actions entail long-term, permanent actions necessary to restore environmental quality and abate a release and contamination. For sites listed on the NPL, monies from the Superfund may be used. CERCLA §§ 101(24), 104(a), 42 U.S.C. §§ 9601(24), 9604(a) (West 1994).

[25] CERCLA § 104(a)(1), 42 U.S.C. § 9604(a)(1) (West 1994). The National Oil and Hazardous Substances Pollution Contingency Plan, known more simply as the National Contingency Plan or NCP, is found at 40 C.F.R. Part 300 and provides the organizational structure and procedures for preparing for and responding to discharges of oil and releases of hazardous substances, pollutants, and contaminants.

[26] "Hazardous Substance Superfund" (Superfund), as established by CERCLA in 1980, is found at 26 U.S.C. § 9507 (West 1994) of the Internal Revenue Code. Statutory authority for the NPL is found at CERCLA § 105(a), 42 U.S.C. § 9605(a) (West 1994). Waste sites not listed on the NPL may receive Superfund money only for removal actions. 40 C.F.R. § 300.425(b)(1) (1992); CERCLA § 104(c)(1), 42 U.S.C. § 9604(c)(1) (West 1994).

money in the fund, and costs recovered from responsible parties for government-conducted cleanup.[27]

Fourth, CERCLA established a scheme of liability which makes those persons who cause or contribute to hazardous waste releases at inactive sites strictly liable for cleanup costs.[28] Liability includes response costs incurred for actions taken by the United States government not inconsistent with the National Contingency Plan (NCP), response costs for actions taken by other parties that are consistent with the NCP, and damages to natural resources.[29] The liability provision of CERCLA accomplishes three objectives: "It assures that the costs of chemical poison releases are borne by those responsible for the releases. It creates a strong incentive both for prevention of releases and voluntary cleanup of releases by responsible parties. Finally, it replenishes the fund so that additional emergencies may be responded to and additional sites cleaned up, if necessary."[30]

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[27] 26 U.S.C. §§ 59A, 4611-12, 4661-62, 4671-72, 4681-82 and 9507 (West 1994).

[28] 126 CONG. REC. 9,155 (1980); CERCLA § 107(a), 42 U.S.C. § 9607(a) (West 1994).

[29] CERCLA § 107(a), 42 U.S.C. § 9607(a) (West 1994).

[30] 126 CONG. REC. 9,155 (1980). *See also* 126 CONG. REC. 30934 (1980) (Senator Mitchell stated that the "guiding principle of [CERCLA]... was that those found responsible for harm caused by chemical contamination should pay for the costs of that harm."); Mardan Corp. v. C.G.C. Music Ltd., 804 F.2d 1454, 1455 (9th Cir. 1986) (CERCLA was designed to "ensure the prompt and effective cleanup of waste disposal sites, and to assure that parties responsible for hazardous substances bore the cost of remedying the conditions they created." summarizing Rep. Florio's statement, 126 CONG. REC. 31964 (1980)); Wiegmann & Rose Int'l Corp. v. NL Indus., 735 F. Supp. 957, 959 (N.D. Cal. 1990); United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982) ("Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created.").

2. *The SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT.* There was Congressional dissatisfaction in the early 1980s with the administration and implementation of CERCLA.[31] In 1986, CERCLA was substantially amended by the SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT (SARA).[32] Although a review of the legislative history

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[31] *See* H.R. REP. NO. 253(I), 99th Cong., 1st Sess. at 257 (1985) *reprinted in* 1986 U.S.C.C.A.N. 2835, 2931:

> Reauthorization of the Superfund program is one of the most important tasks facing the 99th Congress. Funding for the first five-year installment of the program will expire on October 1, 1985 with *cleanup work begun at less than 10 percent of the 800 worst sites* included on the Environmental Protection Agency's (EPA) National Priorities List. The List is expected to grow to between 2,000-4,000 sites over the next few years. Estimates of the federal costs for the cleanup job that still lies ahead of us range from $23 to $39 billion. This crucial environmental program clearly must be both extended and expanded.
>
> But money alone cannot rescue what has been to date a *tragically disappointing and ineffective cleanup effort.* Limitations on financial resources have not crippled EPA's implementation of Superfund; rather, *the problem lies in the fundamentally misguided policies* which have shaped the program throughout much of its history. These misguided policies include both the failure to establish clear internal deadlines and standards for the agency's cleanup activities *and the agency's propensity to let private parties escape their fair legal liability* for the damages caused by Superfund sites. On July 25, 1985 the Committee on Energy and Commerce voted to report H.R. 2817, a bill reauthorizing the Superfund program at a funding level of $10 billion for the next five years. While we support the legislation's funding level and some aspects of the programmatic changes it contains, we were compelled to oppose adoption of many of its key provisions. In our view, the legislation contains several fatal flaws which must be addressed if it is to both accomplish the effective reauthorization of the program and justify the commitment of $10 billion in federal funds to a renewed cleanup effort. (*emphasis added*)

[32] Pub. L. No. 99-499, 100 Stat. 1613 (1986), 42 U.S.C. §§ 9601 to 9675 (West 1994).

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[31] *See* H.R. REP. NO. 253(I), 99th Cong., 1st Sess. at 257 (1985) *reprinted in* 1986 U.S.C.C.A.N. 2835, 2931:

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[32] Pub. L. No. 99-499, 100 Stat. 1613 (1986), 42 U.S.C. §§ 9601 to 9675 (West 1994).

imposes on each department, agency, and instrumentality of the federal government—including the executive, legislative, and judicial branches—an obligation to perform response actions at federal facilities "in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity."[36] Additionally, federal entities are liable under CERCLA § 107 just as nongovernmental landowners and other responsible parties.[37]

Under this section, EPA was required to establish a special Federal Agency Hazardous Waste Compliance Docket listing all of the federal facilities at which hazardous waste activities are conducted or where there has been a release of a reportable quantity of a hazardous substance.[38] This docket is updated every six months and published in the federal register.[39] Thereafter, the EPA ensures that a preliminary assessment (PA)[40] is conducted for each facility on the docket and that each PA is evaluated under the Hazardous Ranking System (HRS)[41] of the National Contingency Plan for potential inclusion on the NPL.[42]

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[36] CERCLA § 120(a)(1), 42 U.S.C. § 9620(a)(1) (West 1994).

[37] *Id.*

[38] CERCLA § 120(c), 42 U.S.C. § 9620(c) (West 1994).

[39] *Id.*

[40] A "preliminary assessment" is a review of existing information regarding a hazardous waste site to determine if a release may require additional investigation or action. It may include both on- and off-site inspection of the facility and the immediate vicinity, if appropriate. The preliminary assessment seeks to evaluate the magnitude and severity of the discharge or threat to public health or welfare or the environment; assess the feasibility of removal; identify potentially responsible parties; and ensure that authority exists for undertaking additional response actions. 40 C.F.R. §§ 300.5 and 300.305 (1992)

[41] 40 C.F.R. Part 300, app. A (1992).

For federal facilities not listed on the NPL, removal or remedial action is governed by the applicable state law.[43] For sites listed on the NPL, the federal agency must conduct a remedial investigation/feasibility study,[44] enter an interagency agreement with the EPA,[45] and conduct the necessary remedial action.[46] When planning and selecting the remedial action, the federal agency responsible for the cleanup must allow appropriate state and local officials the opportunity to participate.[47]

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[42] CERCLA § 120(d), 42 U.S.C. § 9620(d) (West 1994).

[43] CERCLA § 120(a)(4), 42 U.S.C. § 9620(a)(4) (West 1994) provides:

> (4) *State laws.* State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States when such facilities are not included on the National Priorities List. The preceding sentence shall not apply to the extent a State law would apply any standard or requirement to such facilities which is more stringent than the standards and requirements applicable to facilities which are not owned or operated by any such department, agency, or instrumentality.

[44] CERCLA § 120(e)(1), 42 U.S.C. § 9620(e)(1) (West 1994). The purpose of the remedial investigation is to collect and analyze data concerning the environmental condition of the site to be used to define the objectives of the response action, to develop remedial action alternatives, and to undertake an initial screening and detailed analysis of the alternatives; the "feasibility study" emphasizes data analysis and is generally performed concurrently and in an interactive fashion with the remedial investigation for the purpose of developing and evaluating options for remedial action. 40 C.F.R. §§ 300.5, 300.430 (1992).

[45] CERCLA § 120(e)(2), 42 U.S.C. § 9620(e)(2) (West 1994). In some instances, the federal facility and the EPA include the state as a third party in the interagency agreement. Generally, the agreement will be entered before the remedial investigation/feasibility study begins in order to provide a comprehensive guide and agreement acceptable to all involved parties concerning how the entire cleanup will progress.

[46] CERCLA § 120(e)(3), 42 U.S.C. § 9620(e)(3) (West 1994).

[47] CERCLA § 120(f), 42 U.S.C. § 9620(f) (West 1994). For state officials, further

3. *Liability under CERCLA*. Congress' intention in 1980 when it passed CERCLA to deal with the problem of contaminated property was for the expense of cleanup to be funded primarily by those who were responsible for the creation of the environmental harm and their successors.[48] Under CERCLA's broad scheme of liability "potentially responsible parties" (PRPs) are held liable for cleanup costs where there is a release or threatened release of a hazardous substance from a facility into the environment. CERCLA § 107(a) defines four classes or categories of persons who may be held liable as a PRP: (1) current owners and operators[49] of a facility[50] (including, in the case of abandonment, the owner and operator immediately prior to abandonment); (2) facility owners and operators at the time of disposal of the hazardous substances at the facility; (3) any party who arranges for

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opportunity is provided in accordance with CERCLA § 121, 42 U.S.C. § 9621 (West 1994).

[48] Smith Land & Imp. Corp. v. Celotex Corp., 851 F.2d 86, 92 (3rd Cir. 1988) *reh'g denied*, Aug 1, 1988, *cert. denied*, Celotex Corp. v. Smith Land and Imp. Corp., 488 U.S. 1029 (1989) ("Expenses can be borne by two sources: the entities which had a specific role in the production or continuation of the hazardous condition, or the taxpayers through federal funds. CERCLA leaves no doubt that Congress intended the burden to fall on the latter only when the responsible parties lacked the wherewithal to meet their obligations. Congressional intent supports the conclusion that, when choosing between the taxpayers or a successor corporation, the successor should bear the cost."). United States v. Shell Oil Co., 841 F. Supp. 962, 968 (C. D. Calif. 1993) ("Congress intended that responsible parties, not the general citizenry, 'bear the costs of protecting the public from hazards produced in the past by a generator, transporter, consumer, or dumpsite owner or operator...'" *citing* Senate Comm. on Environment and Public Works, S. REP. NO. 848, 96th Cong., 2d Sess. 98, (1980) reprinted in, 1 CERCLA LEG. HIST. at 405 (1980).)

[49] *See* CERCLA § 101(20), 42 U.S.C. § 9601(20) (West 1994) (defining "owner or operator," but excluding those who merely hold security interest with no participation in managing of facility as well as state and local governments).

[50] CERCLA § 101(a), 42 U.S.C. § 9601(9) (West 1994) (defining a "facility" broadly so as to include any site or area where hazardous substance has come to be located).

disposal or treatment of a hazardous substance of another party's facility, usually considered to be synonymous with "generators"; and (4) any party who accepts a hazardous substance for transport and selects the disposal or treatment facility.[51] A PRP is liable for the costs of removal or remedial action consistent with the national contingency plan, for the costs of assessing and restoring natural resource damages, and for costs incurred by the federal Agency for Toxic Substances and Disease Registry ("ATSDR").[52]

CERCLA liability is strict,[53] joint and several,[54] and retroactive.[55] There are few defenses. CERCLA section 107(b) provides only four affirmative defenses to the imposition of liability: (1) an act of God; (2) an act of war; (3) an act or omission of a third party;[56] and

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[51] CERCLA § 107(a)(1)-(4), 42 U.S.C. § 9607(a)(1)-(4) (West 1994).

[52] CERCLA § 107(a), 42 U.S.C. § 9607(a) (West 1994).

[53] *See* United States v. Monsanto, 858 F.2d 160, 167-68 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989); United States v. Northeastern Pharmaceutical & Chemical Co., 810 F.2d 726, 738 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

[54] *Monsanto* at 171; *Northeastern Pharmaceutical & Chemical Co.* at 733-34; O'Neil v. Picillo, 883 F.2d 176, 178-79 (1st Cir. 1989) *cert. denied* American Cyanamid Co. v. O'Neil, 493 U.S. 1071, (1990); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 810-11 (S.D. Ohio 1983); United States v. Bliss, 667 F. Supp. 1298, 1312-13 (E.D. Mo. 1987). *Note:* The application of joint and several liability is applicable in instances where two or more persons cause a single and indivisible environmental harm.

[55] *Monsanto Co.* at 174; *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1572 (5th Cir. 1988); New York v. Shore Realty Corporation at 1042; *Northeastern Pharmaceutical & Chemical Co.* at 732-34; United States v. Hooker Chemicals & Plastics Corp., 680 F. Supp 546, 557 (W.D.N.Y. 1988); United States v. Shell Co., 605 F. Supp. 1064, 1069-73 (D. Colo. 1985).

[56] A PRP may avoid liability if it can establish the following three essential elements of the third party defense "by a preponderance of the evidence": (1) the release or threat of release and the resulting damages was caused solely by the act or omission of a third party who is not the PRP's agent, employee, or a person with whom the PRP has a "contractual

(4) any combination of the preceding.[57] In the 1986 amendments to CERCLA,[58] Congress created an additional defense that has come to be known as the "innocent purchaser" defense, evidencing their intention that truly innocent purchasers should escape liability for the environmental harm done by others.[59]

4. *General elements of a cost recovery action.* The following elements are a prerequisite to establish a prima facia case of liability under CERCLA § 107(a). First, the defendant must be a "responsible person" under one of the four categories of covered

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relationship"; (2) that the PRP exercised "due care" with respect to the hazardous substance; (3) that the PRP took adequate precautionary measures against the foreseeable acts and omissions of the third party. CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3) (West 1994).

[57] CERCLA § 107(b), 42 U.S.C. § 9607(b) (West 1994).

[58] SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT OF 1986, Pub. L. No. 99-499 ("SARA"), 42 U.S.C. § 9601 *et seq.*

[59] CERCLA § 101(35), 42 U.S.C. § 9601(35) (West 1994); Westwood Pharmaceuticals, Inc. v. National Fuel Gas Distribution Corp., 964 F.2d 85, 88 (2nd Cir. 1992); U.S. v. Shell Oil Co., 841 F. Supp. 962, 972-974 (C.D. Cal. 1993).

The "innocent purchaser" defense was created by adding a definition for "contractual relationships" which excludes any landowner who acquired contaminated property "after the disposal or placement of the hazardous substance on, in, or at the facility" provided such landowner can establish that at the time he acquired the facility he "did not know and had no reason to know that any hazardous substance... was disposed of on, in, or at the facility." CERCLA § 101(35)(A)(i), 42 U.S.C. § 9601(35)(A)(i) (West 1994). To establish that he "had no reason to know" of any contamination, the landowner "must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability." CERCLA § 101(35)(B), 42 U.S.C. § 9601(35)(B) (West 1994). Additionally, the landowner must meet the "due care" requirements of CERCLA section 107(b)(3) and must not have committed any act or omission that caused or contributed to the release or threatened release of a hazardous substance. [CERCLA § 101(35)(D), 42 U.S.C. § 9601(35)(D) (West 1994).

persons listed in section 107(a)—owner, operator, generator, and arranger/transporter.[60] Second, the defendant must have caused a "release" or "threatened release" of a "hazardous substance" into the environment.[61] A "release" is generally defined as any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment of any sort of closed container of a hazardous substance, pollutant or contaminant).[62] "Hazardous substance" is defined as any substance designated as such pursuant to the CERCLA,[63] CWA,[64] RCRA,[65] CAA[66], or TSCA.[67] Third, the release or threatened release occurred at a "facility."[68] The term "facility"

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[60] CERCLA § 107(a)(1)-(4), 42 U.S.C. § 9607(a)(1)-(4) (West 1994). *See* Kelley ex rel. State of Mich. v. Kysor Indus. Corp., 826 F. Supp. 1089, 1094 (W.D. Mich. 1993); O'Neil v. Picillo, 682 F. Supp. 706, 710 n.1 (D. R.I. 1988) *aff'd* O'Neil v. Picillo, 883 F.2d 176 (1st Cir. 1989) *cert. den.* American Cyanamid Co. v. O'Neil, 493 U.S. 1071, 110 S.Ct. 1115, 107 L.Ed.2d 1022 (1990); Violet v. Picillo, 613 F. Supp. 1563, 1570 (D. R.I. 1985); U.S. v. Shell Oil Co., 841 F. Supp. 962, 968 (C.D. Cal. 1993).

[61] CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4) (West 1994).

[62] CERCLA § 101(22), 42 U.S.C. § 9601(22) (West 1994).

[63] CERCLA § 101(14), 42 U.S.C.§ 9601(14) (West 1994); CERCLA § 102, 42 U.S.C. § 9602 (West 1994).

[64] CLEAN WATER ACT (also known as the FEDERAL WATER POLLUTION CONTROL ACT), 33 U.S.C. §§ 1251 to 1387. *See* CWA §§ 307(a), 311(b)(2)(A), 33 U.S.C. 1317(a), 1321(b)(2)(A) (West 1994).

[65] SOLID WASTE DISPOSAL ACT as amended by the RESOURCE CONSERVATION AND RECOVERY ACT, 42 U.S.C. §§ 6901 to 6992k. *See* RCRA § 3001, 42 U.S.C. § 6921 (West 1994).

[66] CLEAN AIR ACT, 42 U.S.C. §§ 7401 to 7671q. *See* CAA § 112, 42 U.S.C. § 7412 (West 1994).

[67] TOXIC SUBSTANCES CONTROL ACT, 15 U.S.C. §§ 2601 to 2692. *See* TSCA § 7, 15 U.S.C. § 2606 (West 1994).

is broadly defined to include not only all sorts of structures and buildings but also "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, *or otherwise come to be located*."[69] Fourth, the release or threatened release has caused a party to incur response costs.[70] If that party is the United States, then such costs must not be inconsistent with the national contingency plan.[71] For any other party, such costs must be "necessary" and consistent with the national contingency plan.[72] The distinction between the two is the presumption regarding "consistency" and which party bears the burden of proving consistency (or inconsistency) with the NCP.[73]

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[68] CERCLA § 107(a), 42 U.S.C.§ 9601(a) (West 1994).

[69] CERCLA § 101(9), 42 U.S.C.§ 9601(9) (West 1994) (*emphasis added*).

[70] CERCLA § 107(a)(4)(A) & (B), 42 U.S.C.§ 9601(a)(4)(A) & (B) (West 1994). *See* Key Tronic Corp. v. United States, 1994 WL 237635. *6 (U.S. 1994), where the Supreme Court held that attorney fees "closely tied to the actual cleanup may constitute a necessary cost of response in and of itself under the terms of [CERCLA] § 107(a)(4)(B)." In *Key Tronic*, attorney fees associated with identification of other PRPs were recoverable but the Court distinguished other fees such as "legal services performed in connection with the negotiations between Key Tronic and the EPA that culminated in the consent decree." *Id.* For a survey of the scope of recoverable costs, *see* Arnold W. Reitze et al., *Cost Recovery by Private Parties Under CERCLA: Planning a Response Action for Maximum Recovery*, 27 TULSA L.J. 365, 401-416 (Spring 1992); Jane E. Lein and Kevin M. Ward, *Private Party Response Cost Recovery Under CERCLA*, 21 ENVTL. L. REP. 10322, 10,327-330 (June, 1991); Karl S. Bourdeau, *Elements Necessary to Establish Liability in a Cost Recovery Case Under Section 107 of CERCLA*, 342 PLI/REAL 15, 21-23 (December 1, 1989); Joseph G. Homsy and Mark R. Sargis, *The Scope of Private Cost-Recovery Actions Under CERCLA Section 107(a)(4)(B), and Allocation Among Potentially Responsible Parties*, 349 PLI/LIT 33, 47-50 (May 1, 1988).

[71] CERCLA § 107(a)(4)(A), 42 U.S.C.§ 9601(a)(4)(A) (West 1994).

[72] CERCLA § 107(a)(4)(B), 42 U.S.C.§ 9601(a)(4)(B) (West 1994).

[73] *See infra* pp. 40-43.

B. *RCRA Corrective Action.*

1. *The* RESOURCE CONSERVATION AND RECOVERY ACT. Federal involvement in waste management began in 1965 with the passage of the SOLID WASTE DISPOSAL ACT (SWDA).[74] The primary focus of the SWDA was on national research and development of solid waste disposal methods, and providing technical and financial assistance to state and local governments' solid waste disposal programs.[75] As the dangers of hazardous waste disposal became more widely known, Congress responded by amending the SWDA through the enactment of the RESOURCE CONSERVATION AND RECOVERY ACT of 1976 (RCRA)[76] and again in 1984.[77] The HAZARDOUS AND SOLID WASTE AMENDMENTS of 1984 ("HSWA") created two major new regulatory programs governing leaking underground storage tanks[78] and burning fuels containing used oil or hazardous wastes,[79] provided a strong regulatory disfavor for land disposal through mandatory minimum technology requirements and land ban regulations, established incentives for waste minimization, established permit

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[74] Pub. L. No. 89-272, Title II, 79 Stat. 997 (1965) formerly codified at 42 U.S.C. §§ 3251 to 3259 (1965).

[75] William David Bridgers, *The Hazardous Waste Wars: An Examination of the Origins and Major Battles to Date, With Suggestions for Ending the Wars*, 17 VT. L. REV. 821, 823 (1993).

[76] Pub. L. No. 94-580, 92 Stat. 3081, codified as amended at 42 U.S.C. §§ 6901 to 6992k (West 1994).

[77] HAZARDOUS AND SOLID WASTE AMENDMENTS of 1984, Pub. L. No. 98-616, 96 Stat. 3221 (1984).

[78] RCRA §§ 9001 to 9010, 42 U.S.C. §§ 6991 to 6991i (West 1994).

[79] RCRA § 3004(q), 42 U.S.C. §§ 6924(q) (West 1994).

deadlines and accelerated the permit process, and provided for corrective action at RCRA facilities.[80] The SWDA as amended by RCRA and HSWA is now commonly referred to as "RCRA."

RCRA has often been described as a "cradle-to-grave" scheme for the regulation of hazardous substances aimed primarily at active facilities. The hazardous waste management provisions contained in Subchapter C seek to regulate the handling of hazardous waste from generation through disposal and beyond.[81] The Act imposes an obligation on owners and operators of regulated facilities to inspect and maintain the facility, remedy any deteriorations or malfunctions, and eventually close the facility to prevent, or minimize the escape of hazardous materials. The 1984 amendments also provided for cleanup of RCRA permitted facilities through a program called "corrective action."[82]

2. *RCRA corrective action.* Although the principle statutory authority for corrective action was put in place by the HSWA, the program is still being shaped.[83] Basically,

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[80] *See generally* William L Rosebe and Robert L. Gulley, *The Hazardous and Solid Waste Amendments of 1984: A Dramatic Overhaul of the Way America Manages Its Hazardous Wastes*, 14 ENVTL. L. REP. 10458 (1984).

[81] RCRA §§ 3001 to 3023, 42 U.S.C. §§ 6921 to 6939(e). *See also* Horsehead Resource Development Co., Inc. v. Browner, 16 F.3d 1246, 1252 (D.C. Cir. 1994); Edison Elec. Institute v. U.S. E.P.A., 2 F.3d 438, 440 (D.C. Cir. 1993); American Iron and Steel Institute v. U.S. E.P.A., 886 F.2d 390, 393 (D.C. Cir. 1989) *cert. denied*, 497 U.S. 1003 (1990) ([RCRA] ... created in its Subtitle C a system for control over the treatment, storage and disposal of hazardous wastes... While invariably described as a 'cradle-to-grave' system, it in fact reaches... well beyond the grave."); United Technologies Corp. v. EPA, 821 F.2d 714, 716 (D.C. Cir.1987).

[82] RCRA § 3004(u), 42 U.S.C. § 6924(u) (West 1994).

[83] In July 1990, the EPA proposed a new corrective action rule that would create a new Subchapter S at 40 C.F.R. Part 264 of the RCRA regulations. This proposal will

RCRA requires the permit for an owner or operator of a treatment, storage, or disposal facility to include corrective action requirements for any ongoing release or past release of a hazardous waste from any solid waste management unit located at the facility regardless of the time at which the waste was placed in such unit.[84] Additionally, corrective action may extend beyond the facility's boundary if necessary to protect human health and the environment.[85] While neither RCRA nor existing regulations define some of the key terms necessary, the proposed regulation does.[86] That proposed regulation defines "facility" as used in RCRA § 3004(u) as "all contiguous property under the control of the owner/operator of a facility seeking a permit under [RCRA] subtitle C."[87] The definition of "release" is essentially the same as that in CERCLA except that as used in RCRA § 3004(u) it is "limited

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establish procedures and technical requirements for implementing corrective action under RCRA § 3004(u) for any solid waste management units (SWMUs) at facilities seeking a permit for the treatment, storage, or disposal of hazardous wastes under RCRA § 3005. 55 Fed. Reg. 30798 (July 27, 1990). For a discussion of the import of this emerging regulatory scheme, *see* John Graubert, *Corrective Action Under RCRA*, C883 ALI-ABA 117, 121-128 (1994).

[84] RCRA § 3004(u), 42 U.S.C. § 6924(u) (West 1994); 40 C.F.R. § 264.101(a) (1992).

[85] RCRA § 3004(v), 42 U.S.C. § 6924(v) (West 1994); 40 C.F.R. § 264.101(c) (1992). This requirement is limited by the ability of the owner or operator of the facility concerned to obtain permission from the affected landowner to take the necessary corrective actions outside the facility's boundary.

[86] 55 Fed. Reg. 30,798, 30,808 (July 27, 1990) would add Section 264.501 to 40 C.F.R. codifying the essential definitions based largely on current usage by the EPA and in existing case law.

[87] *Id.* (This definition of facility "is not intended to alter or subsume the existing—and narrower—definition of 'facility' that is given in 40 C.F.R. § 260.10. That definition describes the facility as "...all contiguous land and structures... used for treating, storing or disposing of hazardous waste...").

to addressing releases from solid waste management units."[88] "Solid waste management unit" (SWMU) is defined as "[a]ny discernible unit at which solid wastes have been placed at any time, irrespective of whether the unit was intended for the management of solid or hazardous waste. Such units include any area at a facility at which solid wastes have been routinely and systematically released."[89] Not only is the scope of RCRA corrective action limited by the foregoing definitions, since it is tied to permit requirements, facility owners who do not need a permit under RCRA § 3005 are not subject to corrective action requirements.

There are three main stages to a RCRA corrective action: a RCRA facility assessment (RFA), a RCRA facility investigation (RFI), and a corrective measures study (CMS).[90] The RFA is analogous to the preliminary assessment/site investigation of CERCLA and is necessary to identify potential releases from the facility that will require further investigation. The RFA is usually conducted by the state or EPA and includes a "desk top review" of available information on the site, a visual site inspection to confirm available information on solid waste management units at the site and to note any visual evidence of releases, and in

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[88] *Id.* (Therefore, "there may be releases at a facility that are not associated with solid waste management units, and that are therefore not subject to corrective action under this authority.").

[89] *Id.* (The proposed regulation adds that "a discernible unit in this context includes the types of units typically identified with the RCRA regulatory program, including landfills, surface impoundments, land treatment units, waste piles, tanks, container storage areas incinerators, injection wells, wastewater treatment units, waste recycling units, and other physical, chemical or biological treatment units. The proposed definition also includes as a type of solid waste management unit those areas of a facility at which solid wastes have been released in a routine and systematic manner.").

[90] *Id.* at 30,810.

some cases, a sampling visit, to confirm or disprove suspected releases.[91] An RFI is initiated when a potentially significant release has been identified in the RFA. The purpose of the RFI is to characterize the nature and extent of contamination at the facility, and it is analogous to the CERCLA Remedial Investigation process.[92] The owner or operator of the facility is expected to conduct the RFI and its scope will vary with the circumstances of the particular facility.[93] If, based on the data generated during the RFI or other information, a cleanup is likely to be necessary, the owner or operator of the facility will be required to conduct a CMS to identify a solution for the problem at the site.[94] The CMS is similar to CERCLA's feasibility study, is conducted to evaluate the remedial alternatives for the corrective action.[95] Finally, a remedial action is selected and the facility's RCRA permit is modified to ensure that the remedy will be implemented by the facility owner or operator.[96]

3. *RCRA enforcement.* RCRA's provisions may be enforced by both state and federal action.[97] Where a state enacts a hazardous waste management program that is equivalent to and consistent with the federal program and that provides an adequate mechanism for enforcement of compliance, it may receive EPA authorization to run its own

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[91] *Id.* at 30801.

[92] *Id.* at 30801-802.

[93] *Id.* at 30802.

[94] *Id.* at 30805.

[95] *Id.*

[96] *Id.* at 30801.

[97] RCRA § 3006, 42 U.S.C. § 6926 (West 1994).

state program in lieu of the federal program.[98] This action makes the state's law federally enforceable.[99]

The EPA may issue an order assessing civil penalties for past or current violations of state or federal requirements, requiring compliance with such requirements, or both.[100] EPA may also commence a civil action in a U.S. district court for an injunction or other appropriate relief.[101] Any enforcement action taken by a state under an EPA-authorized program has the same force and effect as an action taken by the EPA.[102]

RCRA also contains a citizens suit provision that allows anyone to commence a civil action against any person (including the United States or any governmental instrumentality) "who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an eminent or substantial endangerment to health or the environment...."[103]

State and federal enforcement actions at federal facilities for violations of environmental laws has been complex and difficult to achieve. Disputes between the EPA and other federal agencies have largely been viewed as a responsibility of the President and shielded from judicial review by the "unitary executive" theory.

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[98] RCRA § 3006(b), 42 U.S.C. § 6926(b) (West 1994).

[99] RCRA § 3008(a)(2), 42 U.S.C. § 6928(a)(2) (West 1994).

[100] RCRA § 3008(a)(1), 42 U.S.C. § 6928(a)(1) (West 1994).

[101] *Id.*

[102] RCRA § 3006(d), 42 U.S.C. § 6926(d) (West 1994).

[103] RCRA § 7002(a), 42 U.S.C. § 6972(a) (West 1994).

> ...This "unitary executive" theory led to the view that an interagency dispute did not present a proper case for a court to resolve. To resolve these non-justiciable disputes, the president issued an executive order assigning environmental compliance responsibilities within the federal government and establishing a dispute resolution system managed by the Office of Management and Budget (OMB).
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> The EPA implemented the executive order through various memoranda and a compliance strategy for federal facilities. Although some agencies entered into compliance agreements with EPA to help solve serious problems, this internal federal system was very much open to negotiation. It allowed OMB to intervene and resolve disputes by making trade-offs between mission performance and environmental compliance. Thus, RCRA was not effectively enforced within the federal government.[104]

State-initiated enforcement actions at federal facilities are constrained by the doctrines of federal supremacy and sovereign immunity. Therefore, state enforcement actions for violations of state hazardous waste management laws are limited to those areas in which the federal government has waived sovereign immunity. The courts have construed such waivers narrowly, looking for Congressional intent in clear and unequivocal language.[105] The state-federal conflict over the limits of sovereign immunity and the extent to which RCRA waived

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[104] Stephen J. Darmody, *Hazardous Waste Law for the Federal Employee After the Federal Facility Compliance Act of 1992*, 40 Fed. B. News & J. 650, 651-52 (1993) (*citations omitted*).

[105] United States v. Mitchell, 445 U.S. 535, 538 (1980); Hancock v. Train, 426 U.S. 167, 179 (1976); U.S. v. State of Wash., 872 F.2d 874, 877 (9th Cir. 1989) ("Section 6961 does not contain an unequivocal expression of a waiver of sovereign immunity to civil penalties imposed by a state administrative agency. [The state] asks us to imply a waiver of state imposed penalties because Congress provided in section 6961 that all federal facilities be subject to all substantive and procedural "requirements" contained in state laws controlling solid or hazardous waste disposal. We disagree. The plain words employed by Congress make it clear that federal facilities must comply with a state's substantive standards for waste disposal. A federal facility must also obtain all necessary permits and file reports required by state law. The statute makes no reference to immunity from penalties imposed by state agencies."); People of State of Cal. v. Walters, 751 F.2d 977 (9th Cir. 1984).

that immunity culminated in the legislative aftermath from *U.S. Dept. of Energy v. Ohio*.[106] In *U.S. Dept. of Energy v. Ohio*, the Supreme Court reviewed RCRA's wavier of immunity and concluded that states could not impose civil penalties against the United States for past violations.[107]

Shortly after the Supreme Court issued its decision in *U.S. Dept. of Energy v. Ohio*, Congress passed the FEDERAL FACILITY COMPLIANCE ACT of 1992 (FFCA).[108] The FFCA clearly and unambiguously waives sovereign immunity by providing the following:

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[106] 112 S.Ct. 1627 (1992).

[107] *Id.* at 1639-40. The Court found that the waiver of sovereign immunity was limited to court-imposed sanctions for failure to comply with the terms of an injunction.

> ...We have already observed that substantive requirements can be enforced either punitively or coercively, and the Tenth Circuit's understanding that Congress intended the latter finds strong support in the textual indications of the kinds of requirements meant to bind the Government. Significantly, all of them refer either to mechanisms requiring review for substantive compliance (permit and reporting requirements) or to mechanisms for enforcing substantive compliance in the future (injunctive relief and sanctions to enforce it). In stark contrast, the statute makes no mention of any mechanism for penalizing past violations, and this absence of any example of punitive fines is powerful evidence that Congress had no intent to subject the United States to an enforcement mechanism that could deplete the federal fisc regardless of a responsible officer's willingness and capacity to comply in the future.
>
> The drafters' silence on the subject of punitive sanctions becomes virtually audible after one reads the provision's final sentence, waiving immunity "from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief." The fact that the drafter's only specific reference to an enforcement mechanism described "sanction" as a coercive means of injunctive enforcement bars any inference that a waiver of immunity from "requirements" somehow unquestionably extends to punitive fines that are never so much as mentioned. *Id.* at 1640.

[108] Pub. L. No. 102-386, 106 Stat. 1505 (1992) codified at RCRA § 6001, 42 U.S.C. § 6961.

> ...Neither the United states, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief. No agent, employee or officer of the United States shall be personally liable for any civil penalty... with respect to any act or omission within the scope of [his] official duties...[109]

With the objections based on the "unitary executive" theory gone and sovereign immunity virtually eliminated, the door is now open for civil suits by EPA, states, or any citizen to sue the government for noncompliance with RCRA requirements. This includes state or EPA enforcement actions, including compliance orders under RCRA § 3008(a), against any federal agency for a violation of applicable hazardous waste laws.

4. *Costs of RCRA corrective action as a CERCLA response cost.* Costs associated with a RCRA mandated corrective action may be recovered from other responsible parties by characterizing such costs as "response costs" under CERCLA.[110] As the Third Circuit succinctly concluded, "...if a particular government action qualifies as a 'removal action' under the definition contained in CERCLA, the government's costs are recoverable under the unambiguous language of [CERCLA § 107], regardless of what statutory authority was invoked by EPA in connection with its action."[111] This same logic would apply in

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[109] RCRA § 6001(a), 42 U.S.C. § 6961(a) (West 1994).

[110] *See* Chemical Waste Management, Inc. v. Armstrong World Industries, 669 F. Supp. 1285 (E.D. Pa.1987) (holding costs of private party removal of hazardous waste under RCRA to be recoverable from another private party as CERCLA response costs under CERCLA § 107); Mardan Corp. v. C.G.C. Music, Ltd., 600 F. Supp. 1049 (D. Ariz.1984), *aff'd*, 804 F.2d 1454 (9th Cir.1986) (court held that costs incurred to comply with RCRA are response costs under CERCLA although the action was barred by a release in the sale agreement and by the clean hands doctrine).

[111] United States v. Rohm and Haas Co., 2 F.3d 1265, 1274-75 (3rd Cir. 1993). While the court concluded that "...a 'removal' is a removal whether it is undertaken pursuant to

situations where costs of a RCRA mandated corrective action were incurred by a party other than the EPA.

In promulgation of the 1990 NCP, EPA addressed comments on this very point. The EPA stated:

> ...it is important to note that CERCLA section 107(a)(4)(B) does not require private parties to conduct cleanups consistent with the NCP; rather, it establishes a right of action under CERCLA for cost recovery in those cases where non-governmental parties have incurred necessary response costs consistent with the NCP. The result of not meeting this standard is that cost recovery under CERCLA may not be available; however, this does not mean that the action may not proceed, or that cost recovery may not be available under other federal or state law. Of course, even if a party takes a cleanup action under an authority other than CERCLA (e.g., RCRA corrective action), it may have a right of cost recovery under CERCLA section 107 if the action was a necessary response to a release of hazardous substances, and was performed consistent with the NCP.[112]

C. *DERP—DOD's cleanup program.*

1. *The DEFENSE ENVIRONMENTAL RESTORATION PROGRAM.* The DEFENSE ENVIRONMENTAL RESTORATION PROGRAM ("DERP")[113] provides the statutory authorization and funds to the Department of Defense (DOD) for the clean up of environmental hazards at current and former DOD sites. The statutory goals of the program are as follows:

> (1) The identification, investigation, research and development, and cleanup of contamination from hazardous substances, pollutants, and contaminants.

CERCLA or another statute", the court held that EPA's oversight costs incurred pursuant to an administrative consent order under RCRA were not encompassed by the CERCLA definition of "removal" and, therefore, were not recoverable. *Id.* at 1275.

[112] 55 Fed. Reg. 8666, 8796 (March 8, 1990).

[113] SARA § 211, Pub. L. No. 99-499, 100 Stat. 1613 (1986), codified at 10 U.S.C. §§ 2701-2708 (West 1994).

(2) Correction of other environmental damage (such as detection and disposal of unexploded ordnance) which creates an imminent and substantial endangerment to the public health or welfare or to the environment.

(3) Demolition and removal of unsafe buildings and structures, including buildings and structures of the Department of Defense at sites formerly used by or under the jurisdiction of the Secretary.[114]

Under DERP, the Secretary of Defense is responsible for "response actions" at (a) any facility or site presently possessed by the United States and under the jurisdiction of DOD; (b) any facility or site formerly under the jurisdiction of DOD and possessed by the United States at the time of actions leading to contamination by hazardous substances; and (c) any vessel owned or operated by DOD.[115] "Response" is given the same meaning as "remove, removal, remedy, and remedial action" given in CERCLA § 101.[116] CERCLA defines "remove or removal" as the cleanup or removal of released hazardous substances from the environment, actions necessary to monitor, assess, or evaluate the release or threat of release of hazardous substances, the disposal of removed material, or actions necessary to prevent, minimize, or mitigate environmental contamination.[117] "Remedy or remedial action" is defined as an action consistent with permanent remedy taken instead of or in addition to a removal action (e.g., storage, confinement, neutralization, cleanup, etc.).[118]

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[114] 10 U.S.C. § 2701(b) (West 1994).

[115] 10 U.S.C. § 2701(c) (West 1994).

[116] 10 U.S.C. § 2707(1) (West 1994).

[117] CERCLA § 101(23), 42 U.S.C. § 9601(23) (West 1994).

[118] CERCLA § 101(24), 42 U.S.C. § 9601(24) (West 1994).

DERP allows the Secretary of Defense to enter into agreements with other Federal, state, or local government agencies to assist DOD in meeting it responsibilities.[119] Furthermore, the protections of CERCLA § 119 apply to private "response action contractors" performing response actions pursuant to DERP.[120] Such contractors are not liable for injuries, costs, damages, expenses, or other liability resulting from the release or threatened release that is the subject of the response action unless caused by the contractor's own negligence, gross negligence, or intentional misconduct.[121]

2. *Research, development, and demonstration program.* As a part of DERP, the Secretary of Defense is directed to carry out a program of research, development, and demonstration (RD&D) with respect to hazardous wastes in cooperation with EPA and the advisory council established under CERCLA § 311(a)(5).[122] The RD&D program shall include (1) ways of reducing the quantities of hazardous waste generated by DOD; (2) methods of treatment, disposal, and management (including recycling and detoxifying) of hazardous waste; (3) identification of more cost-effective cleanup technologies; (4)

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[119] 10 U.S.C. § 2701(d) (West 1994). Under this subsection, agreements with other Federal agencies are to be on a reimbursable basis while agreements with non-federal governmental agencies may or may not be reimbursable. Services obtained under this subsection include the identification, investigation, and cleanup of any off-site contamination.

[120] 10 U.S.C. § 2701(e) (West 1994). Arguably, the protections of CERCLA § 119 are limited to contractor actions at NPL cites. CERCLA defines "response action contract" as a contract with a response action contractor "to provide any remedial action... at a facility listed on the [NPL]...." CERCLA § 119(e)(1); 42 U.S.C. § 9619(e)(1) (West 1994).

[121] CERCLA § 119(a)(1) and (2), 42 U.S.C. § 9601(a)(1) and (2) (West 1994).

[122] 10 U.S.C. § 2702 (West 1994); CERCLA § 311(a)(5), 42 U.S.C. § 9660(a)(5) (West 1994).

toxicological data collection and methodology on exposure risks to hazardous waste generated by DOD; and (5) testing, evaluation, and demonstration of innovative technology, processes, equipment, or related training devices which may contribute to establishment of new methods to control, contain, and treat hazardous substances.

3. *DERA—the environmental restoration transfer account.* The Defense Appropriation Act for Fiscal Year 1984[123] established the Defense Environmental Restoration Account (DERA),[124] a transfer account from which DOD could fund its environmental restoration programs.[125] The DERA funds that enable DOD to meet its responsibilities under DERP and CERCLA are received primarily in the ordinary budget cycle.[126] A second source

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[123] Pub. L. No. 98-212, 97 Stat. 1421 (Dec. 8, 1983).

[124] 10 U.S.C. § 2703 (West 1994).

[125] Pub. L. No. 98-212, 97 Stat. 1421, 1427 (Dec. 8, 1983) provided as follows:

> ENVIRONMENTAL RESTORATION, DEFENSE
> For expenses, not otherwise provided for, for environmental restoration program, including hazardous waste disposal operations and removal of unsafe or unsightly buildings and debris of the Department of Defense, and including programs and operations at sites formerly used by the Department of Defense; $150,000,000.

[126] *See, e.g.*, Pub. L. No. 103-139, 107 Stat 1418, 1425 (1993) (Department of Defense Appropriations Act, 1994), which provided:

> ENVIRONMENTAL RESTORATION, DEFENSE
> (INCLUDING TRANSFER OF FUNDS)
> For the Department of Defense; $1,962,300,000, to remain available until transferred: Provided, That the Secretary of Defense shall, upon determining that such funds are required for environmental restoration, reduction and recycling of hazardous waste, removal of unsafe buildings and debris of the Department of Defense, or for similar purposes (including programs and operations at sites formerly used by the Department of

of funds would be from actions under CERCLA § 107 against responsible parties for response cost incurred by DOD.[127] Using DERA as the principle account, the three military departments and the Defense Logistic Agency (DLA) operate separate installation restoration programs and the Office of the Secretary of Defense provides policy oversight and controls the actual disbursement of DERA funds into the established accounts of the individual DOD components.[128] Having a separate transfer account not only allows DOD to detach itself from the accounting details that would be required by a nontransferable account, it also allows DERA funds to remain available beyond the one-year limit normally applicable to appropriated funds.[129]

> Defense), transfer the funds made available by this appropriation to other appropriations made available to the Department of Defense as the Secretary may designate, to be merged with and to be available for the same purposes and for the same time period as the appropriations of funds to which transferred: Provided further, That upon a determination that all or part of the funds transferred from this appropriation are not necessary for the purposes provided herein, such amounts may be transferred back to this appropriation: Provided further, That of the funds provided under this heading, not less than $200,000,000 shall be available only for the expedited cleanup of environmentally contaminated sites and only in accordance with a comprehensive plan submitted to Congress by the Secretary of Defense.

[127] 10 U.S.C. § 2703(e); CERCLA § 107, 42 U.S.C. § 9607 (West 1994).

[128] Kyle E. McSlarrow, *The Department of Defense Environmental Cleanup Program: Application of State Standards to Federal Facilities After SARA*, 17 ENVTL. L. REP. 10120, 10,121 (1987).

[129] 10 U.S.C. § 2703(a)(3) (West 1994). Annual appropriations acts typically include language providing that "[n]o part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year unless expressly so provided herein." *See, e.g.*, Pub. L. No. 103-139, 107 Stat 1418, 1437, section 8003 (1993) (Department of Defense Appropriations Act, 1994); Pub. L. No. 103-211, 108 Stat 3, 39, section 401 (1994) (Emergency Supplemental Appropriations and Rescissions).

4. *Commonly found unregulated hazardous substances.* Because of the unique mission of DOD, many processes and operations that generate hazardous wastes are not found in other federal or civilian facilities. Since this may result in hazardous wastes unique to DOD, DERP requires the Secretary of Defense to notify the Secretary of Health and Human Services (HHS) of, at a minimum, the twenty-five most commonly found "unregulated hazardous substances" found at DOD facilities.[130] "Unregulated hazardous substance" includes any hazardous substance (A) for which no standard, requirement, criteria, or limitation is in effect under the TOXIC SUBSTANCES CONTROL ACT,[131] the SAFE DRINKING WATER ACT,[132] the CLEAN AIR ACT,[133] or the CLEAN WATER ACT;[134] and (B) for which no water quality criteria are in effect under any provision of the CLEAN WATER ACT.[135] The Secretary of HHS, through the Agency for Toxic Substances and Disease Registry (ATSDR),[136] must then prepare toxicological profiles of each of the substances identified.[137]

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[130] 10 U.S.C. § 2704(a)(1) (West 1994).

[131] 15 U.S.C. §§ 2601 to 2692 (West 1994).

[132] 42 U.S.C. §§ 300f to 300j-26 (West 1994).

[133] 42 U.S.C. §§ 7401 to 7671q (West 1994).

[134] 33 U.S.C. §§ 1251 to 1387 (West 1994).

[135] 10 U.S.C. § 2704(a)(2) (West 1994).

[136] CERCLA 104(i), 42 U.S.C. § 9604(i) (West 1994), establishes the ATSDR within the Department of Health and Human Services.

[137] 10 U.S.C. § 2704(b) (West 1994). Although the Department of Health and Human Services is responsible to perform this function, DOD is obligated to support and fund it. Subsection (c) states that DOD "shall transfer to the Secretary of Health and Human Services such toxicological data, such sums from amounts appropriated to the Department of Defense, and such personnel of the Department of Defense as may be necessary (1) for the preparation

Also, where a hazardous substance emanating from a DOD facility threatens a drinking water supply, the Secretary of Defense must request the Administrator of EPA to issue a health advisory.[138]

5. *Notice to EPA, State, and Local authorities.* DERP requires DOD to promptly notify the regional offices of EPA and the appropriate State and local authorities regarding certain "environmental restoration activities" at DOD facilities[139] Specifically, notice is required for the following:

> (1) The discovery of releases or threatened releases of hazardous substances at the facility.
>
> (2) The extent of the threat to public health and the environment which may be associated with any such release or threatened release.
>
> (3) Proposals made by the Secretary to carry out response actions with respect to any such release or threatened release.
>
> (4) The initiation of any response action with respect to such release or threatened release and the commencement of each distinct phase of such activities.[140]

DOD must provide EPA and appropriate State and local officials an adequate opportunity to comment on notices regarding the discovery of a release or threatened release

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of toxicological profiles under subsection (b) or (2) for other health related activities under section 104(i) of CERCLA." CERCLA § 104(i)(2), 42 U.S.C. § 9604(i)(2), deals with ATSDR's obligation to prepare toxicological profiles on the 100 hazardous substances most commonly found at facilities on the NPL.

[138] 10 U.S.C. § 2704(d)(1) (West 1994). Although EPA is responsible to prepare the health advisory, DOD is obligated to support and fund it. Subsection (d)(3) states that DOD must "transfer to the Administrator [of EPA] such toxicological data, such sums from amounts appropriated to the Department of Defense, and such personnel of the Department of Defense as may be necessary for the preparation of such health advisories." 10 U.S.C. § 2704(d)(3) (West 1994).

[139] 10 U.S.C. § 2705 (West 1994).

[140] 10 U.S.C. § 2705(a) (West 1994).

and the extent of the threat that such a release poses to public health and the environment.[141] Furthermore, unless the response action is an emergency removal due to an "imminent and substantial endangerment to human health or the environment", EPA and appropriate State and local officials must be given an adequate opportunity to review and comment on any proposed response action before DOD may proceed with such action.[142] Not only does DERP impose a notice requirement on DOD, it also seeks to involve the EPA, state and local officials, and members of the community through the establishment of a "technical review committee."[143] The technical review committee's function is to review and comment on DOD "actions and proposed actions with respect to releases or threatened releases of hazardous substances at installations."[144] The committee must include at least one representative of DOD, EPA, State and local authorities, and a "public representative of the community involved."[145]

6. *Annual reports to Congress on environmental restoration activities.* The Secretary of Defense is required to submit three reports to Congress each year.[146] The

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[141] 10 U.S.C. § 2705(b)(1) (West 1994).

[142] 10 U.S.C. § 2705(b)(2) (West 1994).

[143] 10 U.S.C. § 2705(c) (West 1994). Note that 10 U.S.C. § 2701(a)(2) makes the requirements for federal facilities of CERCLA § 120, 42 U.S.C. § 9620, applicable to actions under DERP. Subsection (f) of CERCLA § 120 would also require the Secretary of DOD to provide state and local officials an opportunity to participate in the planning and selection of a remedial action at a federal facility.

[144] *Id.*

[145] *Id.*

[146] 10 U.S.C. § 2706 (West 1994).

first report covers DOD's progress in carrying out environmental restoration activities at military installations.[147] The second report addresses DOD's progress in carrying out environmental compliance activities at military installations.[148] The third report encompasses the payments made by DOD to defense contractors for the costs of environmental response actions at facilities owned or operated by the defense contractor or at which the defense contractor is liable in whole or in part for the environmental response action.[149]

7. *Indemnification by contractors handling hazardous waste from DOD facilities.* Section 311 of the Defense Authorization Act for 1992 and 1993 added a new section to DERP entitled "Contracts for handling hazardous waste from defense facilities."[150] Congress wanted contractors engaged in the offsite treatment and disposal of hazardous

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[147] 10 U.S.C. § 2706(a)(1) (West 1994). This report includes the number of sites at which a hazardous substance has been identified the status and progress of the response actions, fiscal information about the funds used and projected for such response actions, and an estimated schedule for completing environmental restoration activities. 10 U.S.C. § 2706(a)(2) (West 1994).

[148] 10 U.S.C. § 2706(b)(1) (West 1994). This report includes the funding levels and full-time personnel required for environmental compliance in the current and following five fiscal years, an analysis of the effect that compliance may have on the operations and mission capabilities of DOD as a whole and for each military installation, funding levels requested in the budget submitted by the President, a description of the number and duties of all current full-time civilian and military personnel who carry out environmental activities, and funding levels and personnel required for compliance with applicable environmental requirements at military installations located outside the United States. 10 U.S.C. § 2706(b)(2) (West 1994).

[149] 10 U.S.C. § 2706(c)(1) (West 1994). This report includes, for the preceding fiscal year, an estimate of the payments made by DOD to any defense contractor (other than a response action contractor) for the costs of environmental response actions and the amount and current status of any pending requests by any defense contractor. 10 U.S.C. § 2706(c)(2) (West 1994).

[150] 10 U.S.C. § 2708 (West 1994). *See* Pub. L. No. 102-190, 105 Stat. 1290, 1339 (Jan. 3, 1991).

waste to be liable for their own actions.[151] Consequently, this new section requires every contract or subcontract with a DOD contractor to reimburse the Federal Government for all liabilities, penalties, costs or damages caused by the breach of any term or provision of the contract or subcontract or any negligent or willful act or omission of the contractor or subcontractor, or his employees.[152] Specifically excepted from this requirement are contracts to perform remedial action or corrective action, contracts under which the generation of the hazardous waste to be disposed of is incidental to the performance of the contract, contracts to dispose of ammunition or solid rocket motors, contracts for which there is only one responsible offeror or no responsible offeror willing to provide such indemnification, and contracts which, if not awarded, would place the facility in violation of any requirement of the SOLID WASTE DISPOSAL ACT.[153]

8. *Construction projects for environmental response actions.* DERA funds are typically placed in the "operations and maintenance" (O&M) accounts of the military services and DLA.[154] However, O&M funds may only be used for military construction projects below a set dollar amount. The usual non-DERA budgetary procedures require military construction projects in excess of that dollar amount to be included as a line-item in the military construction authorization act before the project can be initiated. There

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[151] 137 CONG. REC. H9,868-01, 10,110 (daily ed. Nov. 13, 1991).

[152] 10 U.S.C. § 2708(a)(1) (West 1994).

[153] 10 U.S.C. § 2708(b)(2) and (c) (West 1994). The SOLID WASTE DISPOSAL ACT (as amended by the RESOURCE CONSERVATION AND RECOVER ACT) is found at 42 U.S.C. §§ 6901 to 6992k (West 1994).

[154] 10 U.S.C. § 2703(b) (West 1994).

was concern in Congress that this *two-plus year* budgetary requirement would interfere with DOD's ability to respond quickly to clean up contaminated sites.[155] SARA § 211 dealt with this concern by adding § 2810 to the military construction provisions of Title 10, United States Code.[156] Under § 2810, DERA funds used for capital expenditures that are a necessary

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[155] Senator Pete Wilson of California highlighted this concern when he stated that change was needed that would "exempt hazardous waste cleanup projects from the existing requirements in the law to secure a line-item military construction authorization" for any project costing in excess of $1 million. Senator Wilson went on to say,

> ...The problem with this approach to hazardous waste cleanup projects costing as much as $350 million—and one example is the Rocky Mountain Arsenal—is the average time to take proposed military construction from the drawing board to the President's desk for signature runs from 3 to 5 years. While this kind of deliberation may be appropriate for regular military construction projects which are for MILCON dollars, *it represents an unwise and unnecessary delay when we are talking about the immediate need to clean up toxic waste at military bases.*
>
> So, my amendment makes an exception for hazardous waste cleanup projects and allows the Secretary to obligate funds from the environmental transfer account which is virtually a trust account under this amendment for construction projects without prior congressional authorization. Provision is made in the amendment for a 21-day notice period before the appropriate committees of Congress when the Secretary decides to obligate moneys that would otherwise require military construction authorization.

131 CONG. REC. S12019-20 (daily ed. Sep. 24, 1985) (*emphasis added*).

[156] 10 U.S.C. § 2810 (West 1994). That section provides as follows:

> **§ 2810. CONSTRUCTION PROJECTS FOR ENVIRONMENTAL RESPONSE ACTIONS.**
>
> (a) Subject to subsection (b), the Secretary of Defense may carry out a military construction project not otherwise authorized by law (or may authorize the Secretary of a military department to carry out such a project) if the Secretary of Defense determines that the project is necessary to carry out a response action under chapter 160 of this title or under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. §§ 9601 et seq.).
>
> (b)(1) When a decision is made to carry out a military construction

part of a response action may bypass the normal procedures required for the appropriation for military construction.[157]

There are three prerequisites imposed on construction projects funded by DERA[158] pursuant to this section. First, the Secretary of Defense must determine that the project is necessary to carry out a response action under DERP or under CERCLA.[159] Second, the Secretary of Defense must submit a written report to Congress justifying the project (and reliance on this statute) and providing an estimate of the cost of the project.[160] Third, DOD

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project under this section, the Secretary of Defense shall submit a report in writing to the appropriate committees of Congress on that decision. Each such report shall include—

(A) the justification for the project and the current estimate of the cost of the project; and

(B) the justification for carrying out the project under this section.

(2) The project may then be carried out only after the end of the 21-day period beginning on the date the notification is received by such committees.

(c) In this section, the term "response action" has the meaning given that term in section 101 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9601).

[157] 10 U.S.C. § 2810(a) (West 1994).

[158] The statute does not identify the source of funds and, therefore, does not limit its application to only those projects funded with DERA money. It is feasible that regular O&M funds or other DOD funds could be used for environmentally-related military construction projects as long as the prerequisites imposed by the statute are met.

[159] 10 U.S.C. § 2810(a) (West 1994).

[160] 10 U.S.C. § 2810(b)(1) (West 1994).

must wait twenty-one days from the date Congress is notified of the proposed project before taking steps toward carrying out the project.[161]

III. DOD's cost recovery at an NPL site.

Implementation of CERCLA response actions vary somewhat depending on whether the site to be remediated is listed on the National Priorities List (NPL) or not.[162]

A. *Who's in charge: EPA or DOD?* The authority and obligation to implement the provisions of CERCLA are generally imposed on the President of the United States.[163] However, the President has the express authority to delegate and assign any such duties and powers and to promulgate any regulations necessary to carry out the provisions of CERCLA.[164] In 1981 the President delegated his CERCLA authority to cleanup hazardous waste sites at DOD facilities to DOD by Executive Order No. 12,316.[165] This Executive Order was revoked in 1987 and replaced by Executive Order No. 12,580.[166] The relevant portion of this latter Executive Order provides the following:

> ...the functions vested in the President by [CERCLA] Sections 104(a),

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[161] 10 U.S.C. § 2810(b)(2) (West 1994).

[162] The statutory authority for the NPL is found in CERCLA § 105(a), 42 U.S.C. § 9605(a) (West 1994), and the actual list is found at 40 C.F.R. Part 300 app. B (1992).

[163] CERCLA § 104(a)(1); 42 U.S.C. § 9604(a)(1) (West 1994).

[164] CERCLA § 115, 42 U.S.C. § 9615 (West 1994).

[165] 46 Fed. Reg. 42,237 (Aug 14, 1981). Section 2, paragraph (c), provides "The functions vested in the President by [CERCLA] Section 104(a) and (b) of the Act are delegated to the Secretary of Defense with respect to releases from Department of Defense facilities or vessels..."

[166] 52 Fed. Reg. 2923 (Jan 23, 1987).

> (b) and (c)(4), 113(k), 117(a) and (c), 119, and 121 of the Act are delegated to the Secretaries of Defense and Energy, with respect to releases or threatened releases where either the release is on or the sole source of the release is from any facility or vessel under the jurisdiction, custody or control of their departments, respectively, including vessels bare-boat chartered and operated. These functions must be exercised consistent with the requirements of [CERCLA] Section 120 of the Act.[167]

Based on this delegation of authority, the Department of Defense is the "lead agency" at sites where either the release or the sole source of the release is from any facility or vessel which is under the jurisdiction, custody, or control of DOD.[168]

B. *What standard applies: CERCLA § 107(a)(4)(A) or (B)?* CERCLA allows the agency or private party performing the response action to recover response costs that are "consistent" with the NCP from other responsible parties. The burden as to proving consistency (or inconsistency) with the NCP varies depending on who the "lead agency" is.[169]

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[167] Executive Order No. 12,580, Sec. 2, para. (d); 52 Fed. Reg. 2923 (Jan 23, 1987).

[168] U.S. v. State of Colo., 990 F.2d 1565, 1571 n.9 (10th Cir. 1993) *cert. denied*, 114 S.Ct. 922 (1994) ("While most of the President's CERCLA authority has been delegated to the EPA pursuant to 42 U.S.C. § 9615 (West 1983), the President delegated his CERCLA response action authority under § 9604(a-b) with respect to Department of Defense facilities to the Secretary of Defense. See Executive Order No. 12,316, 46 Fed. Reg. 42,237 (1981), as amended by Executive Order No. 12,418, 48 Fed. Reg. 20,891 (1983), revoked by and current delegation of authority at Executive Order No. 12,580, 52 Fed. Reg. 2,923 (1987)."); Wagner Seed Co., Inc. v. Bush, 946 F.2d 918, 927-928 (D.C. Cir. 1991) *cert. denied*, 112 S.Ct. 1584 (1992) (President's authority under CERCLA §§ 104(a), (b), (c)(4), 113(k), 117(a), (c), 119 and 121 is delegated to the Departments of Defense and Energy); Werlein v. U.S., 746 F. Supp. 887, 891 (D. Minn. 1990) *vacated in part*, 793 F. Supp. 898 (D. Minn. 1992) ("In cases where the release occurs on private land, the President has delegated the response authority to the Administrator of the EPA. Executive Order No 12,580 § 2(g), 3 C.F.R. 193 (1988). In cases where the release occurs on property owned by the Department of Defense, the President's response authority is delegated to the Secretary of Defense, who must exercise that authority 'consistent with the requirements of [CERCLA § 120].' Executive Order No 12,580 2(d), 3 C.F.R. 193 (1988).").

[169] 40 C.F.R. § 300.5 defines "lead agency" as follows:

Under CERCLA § 107(a), current owners and operators of a facility, facility owners and operators at the time of disposal of the hazardous substances at the facility, any party who arranges for disposal or treatment of a hazardous substance of another party's facility, and any party who accepts a hazardous substance for transport to a disposal or treatment facility selected by that party where such activity results in "a release, or a threatened release which causes the incurrence of response costs" shall be liable for the following:

> (A) all costs of removal or remedial action *incurred by the United States Government* or a State or an Indian tribe *not inconsistent with* the national contingency plan;
>
> (B) any other necessary costs of response *incurred by any other person consistent with* the national contingency plan;

> Lead agency means the agency that provides the [On-Scene Coordinator/Remedial Project Manager] to plan and implement response action under the NCP. EPA, the USCG, another federal agency, or a state (or political subdivision of a state)... may be the lead agency for a response action. In the case of a release of a hazardous substance, pollutant, or contaminant, where the release is on, or the sole source of the release is from, any facility or vessel under the jurisdiction, custody, or control of Department of Defense (DOD) or Department of Energy (DOE), then DOD or DOE will be the lead agency. Where the release is on, or the sole source of the release is from, any facility or vessel under the jurisdiction, custody, or control of a federal agency other than EPA, the USCG, DOD, or DOE, then that agency will be the lead agency for remedial actions and removal actions other than emergencies. The federal agency maintains its lead agency responsibilities whether the remedy is selected by the federal agency for non-NPL sites or by EPA and the federal agency or by EPA alone under CERCLA section 120. The lead agency will consult with the support agency, if one exists, throughout the response process.

In private party response actions, no governmental action is necessary, and the actions to be taken by the "lead agency" become those to be taken by the private party. *See* 55 F.R. 8666, 8795 (March 8, 1990) ("In a private party response action, the private party may perform most of the functions of a lead agency, except of course, waivers of applicable laws, permit waivers, and functions related to use of the Fund (EPA has identified those sections of the NCP that are potentially relevant to private party cleanups in § 300.700(c) (5)-(7)); there is no support agency in a private party cleanup action.").

(C) ...[natural resource damages]
(D) ...[ATSDR assessments][170]

If the "United States Government" is the lead agency, the statute cloaks the federal government with a presumption of consistency shifting the burden to the defendant to prove that the response costs are *not* consistent with the NCP.[171] A private party, on the other hand, who seeks to recovery of response costs under CERCLA § 107 bears the affirmative burden of proving that such response costs were necessary and were incurred in substantial compliance with the terms of the NCP.[172] The question then becomes, "Who is the United States Government?" The answer is a lot less obvious than one would suppose. Clearly, response actions performed by the EPA acting under the delegated authority of the President enjoy the presumption of CERCLA § 107(a)(4)(B).[173] The arduous issue to resolve is whether

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[170] CERCLA § 104(a), 42 U.S.C. § 9607(a) (West 1994) (*emphasis added*). *See supra* pp. 13-15.

[171] CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A) (West 1994) ("...all costs of removal or remedial action incurred by the United States Government or a State or an Indian Tribe *not inconsistent with* the national contingency plan..."). *See* U.S. v. Hardage, 982 F.2d 1436, 1441 (10th Cir. 11992) *cert. denied*, Advance Chemical Co. v. U.S., 114 S.Ct. 300 (1993) ("...we adopt the Eighth Circuit's holding that the burden of proof of inconsistency with the NCP rests with the defendant when the government seeks recovery of its costs."); United States v. Northeastern Pharmaceutical & Chemical Co. (NEPACCO), 810 F.2d 726, 747 (8th Cir.1986), *cert. denied*, 484 U.S. 848 (1987); U.S. v. R.W. Meyer, Inc., 889 F.2d 1497, 1508 (6th Cir. 1989) *cert. denied*, 494 U.S. 1057 (1990).

[172] CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B) (West 1994) ("...any other necessary costs of response incurred by any other person consistent with the national contingency plan..."). *See also* Artesian Water Co. v. New Castle County, 659 F. Supp. 1269, 1292 (D. Del. 1987) *aff'd* 851 F.2d 643 (3d Cir.1988); Hatco Corp. v. W.R. Grace & Co.--Conn., 801 F. Supp. 1309, 1332-33 (D. N.J. 1992) (substantial, not strict, compliance with the 1985 and 1990 NCP is a prerequisite for recovery of response costs).

[173] *See* cases cited *supra* note 168.

other federal agencies such as DOD or DOE, also acting under delegated Presidential authority, enjoy this presumption or are they treated the same as any other non-governmental entity.[174]

C. *A case in controversy—Allied-Signal.* The United States District Court for the Northern District of California considered this issue in a context similar to the manner presented here in *United States v. Allied-Signal Corp.*[175] In *Allied-Signal*, the United States Navy acquired vacant property contiguous to the Concord Naval Station via eminent domain.[176] Some of the land was contaminated with heavy metals but the environment risk was not sufficient to merit listing on the NPL. Ultimately, the Navy incurred CERCLA response cost for cleanup of the land and brought suit to recover those costs from neighboring facilities and previous landowners.[177] In the intervening years between the initiation of the response action and adoption of a final remedial plan, Congress passed SARA amending CERCLA § 113 by adding a new subsection (j) that provided:

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

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[174] CERCLA § 120(a) states that "[e]ach department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title." CERCLA § 120(a)(1), 42 U.S.C. § 9620(a)(1) (West 1994).

[175] 736 F. Supp. 1553 (N.D. Cal. 1990).

[176] *Allied-Signal Corp.* at 1554-55.

[177] *Allied-Signal Corp.* at 1555.

in accordance with law.[178]

In the course of the discovery incident to the ensuing litigation, the Navy asserted that judicial review of its clean-up response, as the President's delegatee, was subject only to deferential review based on the administrative record and that discovery outside that record should be prohibited.[179] The Navy argued that its authority to formulate a remedial action plan and to bring a cost recovery action stems from the power granted to the President by CERCLA § 104.[180] This Presidential authority was delegated to the Secretary of Defense by Executive Order.[181] The Secretary of Defense, in turn, delegated his authority to the Secretary of the Navy.[182]

The court recorded the Navy's description of its remedial action as follows:

> The Navy undertook a variety of studies to determine the nature of the hazardous contamination at the Naval Station and then developed and analyzed various clean-up alternatives. Navy personnel prepared a variety of

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[178] SARA § 113(c)(2), Pub. L. No. 99-499, 100 Stat. 1613 (1986), codified at CERCLA § 113(j)(2), 42 U.S.C. § 9613(j)(2) (West 1994).

[179] *Allied-Signal Corp.* at 1555.

[180] *Id. See also* CERCLA § 104(a)(1), 42 U.S.C. § 9604(a)(1) (West 1994), which provides, in part, that "[w]henever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment."

[181] Executive Order No. 12,580, Sec. 2, para. (d); 52 Fed. Reg. 2923 (Jan 23, 1987).

[182] *Allied-Signal Corp.* at 1555.

reports which were published for public review and comment, and consulted with the Fish and Wildlife Service and the Environmental Protection Agency (EPA), allegedly giving defendants the opportunity to participate in those consultations. Finally, the Navy prepared a Proposed Remedial Action Plan and solicited comments in response to the plan from "interested parties."

After considering the comments and consulting with other agencies as well as with defendants, the Navy adopted the Final Remedial Action Plan on April 6, 1989. The administrative record was completed on that date and allegedly contains all of the information that went into developing the Final Plan, as well as the Plan itself.[183]

The defendants, however, argued that the Navy's proposed clean-up plan should be subject to *de novo* review by the Court.[184] Their argument was based on the new DEFENSE ENVIRONMENTAL RESTORATION PROGRAM, also created by SARA.[185] SARA § 211 created 10 U.S.C. § 2701(c)(1) which imposes a duty on the Secretary of Defense to carry out response actions under CERCLA at any facility under his jurisdiction.[186] The defendants argue

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[183] *Id.* at 1555-56.

[184] *Id.* at 1555.

[185] SARA § 211, Pub. L. No. 99-499, 100 Stat. 1613 (1986), codified at 10 U.S.C. §§ 2701-2708 (West 1994).

[186] 10 U.S.C. § 2701 (West 1994) provides:

(c) Responsibility for response actions.—
(1) Basic responsibility.—The Secretary shall carry out (in accordance with the provisions of this chapter and CERCLA) all response actions with respect to releases of hazardous substances from each of the following:

(A) Each facility or site owned by, leased to, or otherwise possessed by the United States and under the jurisdiction of the Secretary.

(B) Each facility or site which was under the jurisdiction of the Secretary and owned by, leased to, or otherwise possessed by the United States at the time of actions leading to contamination by hazardous substances.

(C) Each vessel owned or operated by the Department of Defense.
(2) Other responsible parties.—Paragraph (1) shall not apply to a removal or remedial action if the Administrator has provided for response action by a

that Congress through SARA, and not the President via an executive order, delegated to the Secretary the authority to perform CERCLA response actions at DOD facilities.[187] They reasoned that since DOD's authority stems from SARA § 211, it must therefore be consistent with SARA § 120 which added CERCLA § 120.[188] As noted *supra*, CERCLA § 120 subjects every "department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government)" to the rigors of CERCLA "in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity."[189]

The defendants (as well as the court) seemed offended at the notion that the Navy, as a delegatee of Presidential authority, would enjoy a preferential position in a case where it owned the property being remediated, was the lead agency in the cleanup, and was itself potentially liable as a PRP. The defendants argued:

> Clearly the Navy should not be able to select a remedy that will enhance the value of its own property, and then, when seeking to have someone else pay for it, take refuge behind an administrative record of its own

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> potentially responsible person in accordance with section 122 of CERCLA (relating to settlements).
> (3) State fees and charges.—The Secretary shall pay fees and charges imposed by State authorities for permit services for the disposal of hazardous substances on lands which are under the jurisdiction of the Secretary to the same extent that nongovernmental entities are required to pay fees and charges imposed by State authorities for permit services. The preceding sentence shall not apply with respect to a payment that is the responsibility of a lessee, contractor, or other private person.

[187] *Allied-Signal Corp.* at 1556.

[188] *Id.*

[189] *See supra* p. 43; CERCLA § 120(a)(1), 42 U.S.C. § 9620(a)(1) (West 1994).

> making. Congress (and the President in his delegation) intended that where federal land is being cleaned up, the federal government must seek to recover its costs in just the same manner as any other property owner. The Navy will have to prove, at trial, by a preponderance of the evidence that the remedy it selected is consistent with the National Contingency Plan ... Put another way, it will have to prove its damages (the cost of remediating the sites) and that it is entitled to recover them.[190]

The court conceded that "nothing in SARA's language or legislative history explicitly states that the authority granted the President under CERCLA § 104 no longer extends to DOD facilities; neither does the statute provide guidance as to what difference it makes, if any, that the agency to which the President delegates his powers under § 104 is also the owner of the contaminated site and, therefore, has a vested interest in devising the remedial action plan."[191] Furthermore, the court acknowledged that Congress clearly intended to distinguish CERCLA response activities at DOD facilities from similar response actions at other facilities.[192] But the court never addressed what, in its view, that distinction was. Instead, the court seemed to reject the plaintiffs argument—and the Navy's assertion that it was acting as the President's delegatee—because it felt it would lead to an anomalous result.

> If a party, such as the Navy in this case, could simply choose to label its response action a CERCLA § 104 action and thus bring itself under the protective mantle of SARA § 113(j), it would effectively by-pass SARA § 120 altogether. To allow such a result would be to nullify the congressional amendments.[193]

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[190] *Allied-Signal Corp.* at 1556-57 citing Allied's Memo. in Opp. to Plaintiff's Motion at 21. The defendants also argued in the alternative that SARA should not apply retroactively, which argument was rejected by the court. *Id.* at 1557.

[191] *Id.* at 1557.

[192] *Id.*

[193] *Id.* at 1557-58.

The court placed great emphasis on the fact that the EPA was not "extensively involved formulating and effecting" the remedial action plan as it would have been had the site be listed on the NPL.[194] If EPA had been more involved, the result may have been different:

> Had the EPA participated in a meaningful way in the formulation of the Navy's remedial action plan, as is contemplated by § 210 [sic] (See 10 U.S.C. s 2701(a)(3)), the Navy might have prevailed in arguing that the Court should apply a deferential standard of review based on the administrative record, even though not statutorily required. As it stands, however, the Court is convinced that the EPA's participation in this action has been, at best, pro forma.[195]

Additionally, the court concluded that to give such deference to the Navy which had a vested interest in the remedial plan would be manifestly unjust and deny the defendants "minimal due process rights."[196] This result, too, may have been different had the EPA reviewed and approved the remedial action plan.[197] Based on this interpretation of CERCLA and on "due process" considerations, the court ultimately held that the Navy did not enjoy any special status based on the delegation of Presidential authority under CERCLA § 104 and that *de novo* review of the remedial action plan is "both warranted and necessary."[198]

If the court's reasoning in *Allied-Signal* is applied in the context of CERCLA § 107(a)

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[194] *Id.* at 1558.

[195] *Id. Note:* Although the opinion sites to § 210 of SARA, it should have cited to § 211.

[196] *Id.*

[197] *Id.*

[198] *Id.*

as it was in CERCLA § 113, consistency would demand that DOD be treated the same as "any other person" and that the grant of authority under CERCLA § 104 was somehow preempted by SARA. Therefore, DOD must, as any other private party, bear the burden of proving that its CERCLA response costs are consistent with the NCP as *prima facia* element of its case and a prerequisite to cost recovery.

D. *Is Allied-Signal "good law"? Allied-Signal* represents the first case to confront such an issue and it would be overly presumptive and premature to conclude that this point of law is definitively settled. For this reason, it is important to consider whether the court's conclusion in *Allied-Signal* is "good law" that will withstand future attacks.[199]

1. *Sections 120 and 211 of SARA do not preempt Presidential authority under section 104 of CERCLA.* Under DERP, created by SARA § 211, Congress specifically required the Secretary of Defense to "carry out... all response actions with respect to releases of hazardous substances from... [DOD facilities]." But in laying on DOD this responsibility—not EPA or some other entity—did Congress intended for DERP to be the exclusive grant of authority, preempting other CERCLA authorities? To answer this question, one must begin with the principles of statutory construction. "As in all cases involving statutory construction, 'our starting point must be the language employed by Congress.'"[200] When interpreting a statute, one should not go beyond its language unless it is ambiguous or

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[199] The substance of the following arguments were presented to the court in the Reply Brief of United States to Opposition Briefs of Defendants to U.S. Motion on the Appropriate Standard and Scope of Review, Etc., at 5 (December 5, 1989) (on file with author).

[200] American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982) (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 337 (1979)).

rendered so by other inconsistent statutory language.[201] "The cardinal principle of statutory construction is to save and not to destroy."[202] It is the duty of the court to "give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section...."[203] If an ambiguity exists, it is appropriate to look to the legislative history to determine Congressional intent.[204] What should *not* be done is to look to legislative history where there is no ambiguity in the plain meaning of the statutory language or in order to "create an ambiguity in the statute where none exists in order to justify use of that history as dispositive evidence of congressional intent."[205]

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[201] Ex parte Collett, 337 U.S. 55, 61 (1949) ("...there is no need to refer to the legislative history where the statutory language is clear."); Escondido Mutual Water Co. v. Federal Energy Regulatory Commission, 692 F.2d 1223, 1234 (9th Cir.1982); Inspector General of U.S. Dept. of Agriculture v. Great Lakes Bancorp, 825 F. Supp. 790 (E.D. Mich. 1993).

[202] Estate of Reynolds v. Martin, 985 F.2d 470, 473 (9th Cir. 1993) (quoting United States v. Menasche, 348 U.S. 528, 538-39 (1955)).

[203] *Id.* (quoting United States v. Menasche, 348 U.S. 528, 538-39 (1955)); Bresgal v. Brock, 843 F.2d 1163, 1166 (9th Cir.1987); Matter of Borba, 736 F.2d 1317, 1320 (9th Cir.1984) ("...it is the duty of the court to give significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose, and to give effect to the statute as a whole, and not render it partially or entirely void.").

[204] Patterson v. Shumate, 112 S.Ct. 2242, 2248 (1992); Toibb v. Radloff, 111 S.Ct. 2197, 2200 (1991) ("...a court appropriately may refer to a statute's legislative history to resolve statutory ambiguity..."); U.S. v. O'Neil, 11 F.3d 292, 297 (1st Cir. 1993); Commodity Futures Trading Commission v. Co Petro Marketing Group, Inc. 680 F.2d 573, 577 (9th Cir. 1982).

[205] U.S., ex rel. Siller v. Becton Dickinson & Company, Division, --- F.3d ----, 1994 WL 131553, *13 (4th Cir. 1994) opinion amended by --- F.3d ----, 1994 WL 200114 (4th Cir. 1994); Johnson City Medical Center v. U.S., 999 F.2d 973, 984 (6th Cir. 1993) *reh'g and suggestion for reh'g en banc denied* (Sep 9, 1993).

"Carry out" simply and plainly means "[t]o put into practice or effect."[206] Reading into the plain meaning or resorting to legislative history in order to create an ambiguity is wholly inappropriate. There is nothing about this mandate that permits one to conclude that Congress intended DERP to be the exclusive delegation of response authority. In contrast to SARA § 211, CERCLA § 104 is a broad and detailed grant of federal power to the President to take whatever action is appropriate to protect the public health or welfare of the environment.[207] SARA § 211, however, is a narrow grant of authority to the Secretary of Defense to "carry out (in accordance with the provisions of... CERCLA) all response actions" at DOD facilities.[208] Taken together, SARA plainly requires the Secretary to *implement* CERCLA at DOD facilities, ostensibly including the powers granted to the President under CERCLA § 104.

2. *The President's authority under CERCLA § 104 is delegated to the Secretary of Defense.* The President's authority to delegate power is rooted in the Constitution and provided for by Statute. The Constitution provides that the "executive power shall be vested in the President of the United States of America."[209] Furthermore, Congress has specifically provided general statutory authority for such delegations:

> The President of the United States is authorized to designate and empower the head of any department or agency in the executive branch, or any official thereof who is required to be appointed by and with the advice and

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[206] WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 233 (1988).

[207] CERCLA § 104(a) and (b), 42 U.S.C. § 9604(a) and (b) (West 1994).

[208] SARA § 211(c)(1) codified at 27 U.S.C. § 2701(c)(1) (West 1994).

[209] U.S. Const. art II, § 1, cl. 1.

> consent of the Senate, to perform without approval, ratification, or other action by the President... any function which is vested in the President by law... Such designation and authorized shall be in writing, shall be published in the Federal Register, shall be subject to such terms, conditions, limitations as the President may deem advisable, and shall be revocable at any time the President in whole or in part.[210]

Finally, Congress provided specific statutory authority for Presidential delegation of CERCLA powers:

> The President is authorized to delegate and assign any duties or powers imposed upon or assigned to him and to promulgate any regulations necessary to carry out the provisions of this subchapter.[211]

The President's exercise of this authority is embodied in Executive Order 12,580. That executive order specifically includes the President's authority to "remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time... or take any other response measure... necessary to protect the public health or welfare or the environment;[212] to investigate, test, survey, monitor, etc., a release or threatened release as he may deem necessary or appropriate;[213] to compile the administrative record upon which the selection of a response action is based;[214] and to establish procedures for the "participation of interested persons, including potentially responsible parties, in the development of the administrative record on which the President

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[210] 3 U.S.C. § 301 (West 1994).

[211] CERCLA § 115, 42 U.S.C. § 9615 (West 1994).

[212] CERCLA § 104(a)(1); 42 U.S.C. § 9604(a)(1) (West 1994).

[213] CERCLA § 104(b)(1); 42 U.S.C. § 9604(b)(1) (West 1994).

[214] CERCLA § 113(k)(1), 42 U.S.C. § 9613(k)(1) (West 1994).

will base the selection of remedial actions and on which judicial review or remedial actions will be based.[215] Therefore, the Secretary of Defense, as the President's delegatee, may exercise this authority.

3. *The breadth of the CERCLA § 120 waiver.* The critical language in CERCLA § 120(a)(1) subjects federal entities to CERCLA "in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under [CERCLA 107]..." The issue to be resolved is whether this language preempts or waives all other CERCLA authority any time a federal agency is partially responsible for the environmental harm necessitating a response action or is it more limited to the issues of liability and compliance. The court in *Allied-Signal* seems to indicate the former.

The reasoning necessary to reach this result is as follows: DOD or a DOD agency is a responsible party under CERCLA § 104(a) for a release at a DOD facility. CERCLA § 120 requires that such federal agencies be treated the same as any nongovernmental entity. Since nongovernmental entities are not entitled the presumption of consistency with the NCP under CERCLA § 107(a)(4)(B), neither is DOD or any of its agencies.

Granted, the key language in CERCLA § 120(a)(1) is broad and subject to varying interpretation. In such a case it may be appropriate to refer to the legislative history.[216] The

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[215] CERCLA § 113(k)(2)(B), 42 U.S.C. § 9613(k)(2)(B) (West 1994).

[216] *See supra* p. 49; Patterson v. Shumate, 112 S.Ct. 2242, 2248 (1992); Toibb v. Radloff, 111 S.Ct. 2197, 2200 (1991) ("...a court appropriately may refer to a statute's legislative history to resolve statutory ambiguity..."); U.S. v. O'Neil, 11 F.3d 292, 297 (1st Cir. 1993) ("As a rule, courts should resort to legislative history and other guides to congressional intent when the words of a statute give rise to ambiguity or when they lead to an unreasonable interpretation."); Commodity Futures Trading Commission v. Co Petro Marketing Group, Inc. 680 F.2d 573, 577 (9th Cir. 1982) ("Where the statute is... ambiguous

final conference Committee Report in 1986, which reconciled conflicting versions of House and Senate amendments to CERCLA on section 120, states:

> This provision clarifies that all guidelines, rules, regulations and criteria promulgated pursuant to CERCLA must be complied with by all Federally-owned or operated facilities unless specifically exempted by this Act. Federal agencies must comply with all procedural and substantive provisions of the National Contingency Plan.[217]

In the floor debate of the bill which ultimately became SARA (H.R. 2005), several senators remarked on the intent of CERCLA § 120(a)(1). Senator Mitchell, a member of the Conference Committee, indicated that CERCLA § 120 clarified Congress' intent to waive sovereign immunity:

> ...section 120 clarifies that sovereign immunity is broadly waived. By clarifying that Federal facilities are to be treated as nongovernmental entities, sovereign immunity is waived. Thus, Federal facilities are subject to all State administrative and court procedures and sanctions, including penalties and injunctions.[218]

Representative Synar of Oklahoma, also a member of the Conference Committee, echoed this same point:

> The SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT of 1986 preserve the clear statutory authority to bring civil actions and issue administrative orders against Federal facilities. In addition, the new amendments significantly strengthen the role of the States and EPA in expediting cleanup and in the selection of the proper remedial action.[219]

Senator Chafee, another member of the Conference Committee, indicated that

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on its face, it is necessary to look to legislative history to ascertain the intent of Congress.").

[217] H.R. REP. NO. 962, 99th Cong. 2d Sess. 240-41 (1986).

[218] 132 CONG. REC. S14,918 (daily ed. Oct 3, 1986).

[219] 132 CONG. REC. H9581 (daily ed. Oct. 8, 1986).

CERCLA § 120 ensured the federal government would comply procedurally and substantively with NCP requirements in the development and selection of a remedial plan (just as any nongovernmental agency):

> It is specifically intended that Federal agencies be required to comply with all procedural and substantive provisions of the national contingency plan [NCP.]. This includes the mandatory development of a remedial investigation/feasibility study to assure the adequate consideration of all relevant factors in choosing and implementing a remedy in accordance with the NCP.[220]

Representative Fazio, one of the primary authors of CERCLA § 120, expressed a similar view:

> The amendments reiterate the rule of current law that all cleanup standards and other legal requirements—except as specified—shall apply to Federal facilities in the same manner as they apply to private sites. These timetables, standards and requirements are enforceable under the citizens' suits provisions of the legislation as nondiscretionary duties of the Federal Government.[221]

The above remarks indicate that the Conference Committee had two primary concerns: federal liability and compliance with the requirements of the NCP. In fact, the remarks of Senator Mitchell and Congressman Fazio demonstrate that Congress intended CERCLA § 120 to "clarify" or "reiterate" existing law on these points. Therefore, CERCLA § 120 made no substantive change to the scope of federal liability or the application of cleanup standards at federal facilities. No where in the legislative history does Congress evidence an intent to restrict or avoid other authorities or responsibilities imposed on federal agencies by CERCLA. Since neither CERCLA § 120(a)(1) or its legislative history indicate

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[220] 132 CONG. REC. S14,928 (daily ed. Oct. 3, 1986).

[221] 132 CONG. REC. H9602 (daily ed. Oct. 8, 1986).

that federal agencies should, in all respects, be treated the same as all private, nongovernmental entities it is inappropriate for the court to impel such treatment.

4. *Due Process is not denied merely because the Federal agency selecting the remedial plan may also be a PRP.* The court in *Allied-Signal* concluded that to give deference to the Navy would be manifestly unjust and deny the defendants "minimal due process rights."[222] The court's concerns are not without merit since the Navy would, indeed, benefit directly from the enhanced value of the land by virtue of the cleanup and this may bias its judgement in the selection of a remedial plan. Furthermore, by granting special deference to the Navy ostensibly gives it the power to structure the cleanup and tailor the ROD in a manner that minimizes its own cleanup costs.

First, the selection of a remedial plan is not a adjudicatory, or even a quasi-adjudicatory, proceeding in the traditional sense. It is an informal decsionmaking process based on the NCP.[223] Arguably, the Navy's interest in *Allied-Signal* were not in conflict with those of the other parties, i.e., to select and implement a remedial plan that complied with both CERCLA and the NCP.[224] Unlike a private party, the enhanced value of the land created via the cleanup is incidental. The Navy does not have a pecuniary or proprietary interest in the property in the same sense as a traditional landowner and would not "profit" from any

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[222] *Allied-Signal Corp.* at 1558. This result may have been different had the EPA reviewed and approved the remedial action plan. *Id.*

[223] 40 C.F.R. Part 300 (1992); 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 5372, 7521 (West 1994).

[224] *E.g.* performance of an appropriate site investigation, development of appropriate alternatives, selection of a cost-effective remedial response, and involvement of the public in the remedial process. *See infra* pp. 79-92.

increased value through a sale or other disposal. Thus, the interests of the Navy as the government decisionmaker to chose the proper remedial plan are equivalent to the public's interests and the monies recovered under CERCLA § 107(a) will reimburse the United States for its cleanup costs.[225]

Second, the mere fact that the Navy may be a PRP does not create a *per se* conflict of interest. Arguably, this fact more closely aligns the interests of the Navy with the defendants. The Navy shares the interest of the defendants in developing the most cost-

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[225] *See* State of Ohio v. U.S. Dept. of Interior, 880 F.2d 432 (D.C. Cir. 1989) *reh'g denied*, 897 F.2d 1151 (D.C. Cir. 1989). In *State of Ohio* the petitioners argued that the government official's dual responsibility for conducting a natural resource damage assessment under CERCLA and for bringing an enforcement action under CERCLA § 107 for natural resource damages amounted to a conflict of interest violative of due process. The court reasoned that the interests of the government official were public interests because the purpose of the damage assessment was to ascertain the amount of compensation due the public for the injury to natural resources, and that the sums recovered under CERCLA § 107 action must be devoted to the restoration o the natural resources. The court wrote:

> The procedural due process claim concentrates on the role of the authorized official in damage assessment proceedings. Deeming the official an interested party with discretionary power to exclude potentially responsible parties from the assessment process, Industry Petitioners assert a violation of their procedural due process rights in light of the presumption accorded [the] assessments. To be sure, the official is under a duty to assess the injury to natural resources and collect damages therefor, and to that extent he or she is an interested party. We do not agree, however, that potentially responsible parties will be totally excluded from participation in the proceedings forerunning a damage determination. Nor do we agree that the coupling of the rebuttable presumption to a... damage determination contravenes procedural due process standards.

Id at 480 (footnotes omitted). The natural resource assessment in *State of Ohio* is analogous to the CERCLA remedy decision in *Allied-Signal* in that the government official must select a remedial plan and monied recovered under CERCLA § 107 will reimburse the United States government for its cost in remediating the environmental harm.

effective remedy as required by the NCP.[226] Also, the remedy decision and the ROD do not address liability or apportionment of cleanup costs and cannot, therefore, be manipulated to minimize the liability of one party or another. The assessment of liability and apportion of cleanup costs are a matter for negotiation and judicial determination.[227]

IV. Substantial compliance with the National Contingency Plan.

The "national contingency plan" (NCP), formally known as the "National Oil and Hazardous Substances Pollution Contingency Plan,[228] is a comprehensive plan that applies to every cleanup of hazardous wastes within the scope of CERCLA.[229] The predecessor to the modern NCP predates even the creation of the EPA. Called the National Multi-Agency Oil And Hazardous Materials Pollution Contingency Plan, it was originally issued in September

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[226] County Line Inv. Co. v. Tinney, 1989 WL 237380, 19 ENVTL. L. REP. 21,312 (N.D. Okl. 1989) *aff'd*, 933 F.2d 1508 (10th Cir. 1991) (Where parties failed to perform an adequate remedial investigation/feasibility study, provide for public comment concerning the selected remedy, or show that their remedial actions were cost-effective, the District Court held that their response costs were not consistent with the National Contingency Plan.). *See also* 55 Fed. Reg. 8666, 8793 (March 8, 1990) where EPA defines a CERCLA-quality cleanup as one that is protective of human health and the environment, utilizes permanent solutions and alternative treatment technologies to the maximum extent practicable, and *cost-effective.*

[227] *See* Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 673 (5th Cir. 1989) *clarified on denial of reh'g*, (Jan 23, 1990) ("By deciding liability generally, we intended to leave for the district court the specific questions of appropriate cleanup and equitable apportionment of response costs. Those questions must be resolved during the remedial phase of trial after the district court has determined which standards will govern the cleanup efforts.")

[228] 40 C.F.R. Part 300 (1992).

[229] 40 C.F.R. s 300.3(a) (1992) ("The NCP applies to... discharges of oil into or upon the navigable waters of the United States and adjoining shorelines... releases into the environment of hazardous substances, and pollutants or contaminants which may present an imminent or substantial danger to public health or welfare.").

1968 as a product of a Presidential directive to study the government's capabilities and develop multi-agency plans for handling environmental disasters with particular focus on oil spills.[230] This plan was revised in 1970 after the enactment of the ENVIRONMENTAL QUALITY IMPROVEMENT ACT.[231] The plan was first called by its current name (i.e., "National Oil and Hazardous Substances Pollution Contingency Plan") when the Council on Environmental Quality revised it further in 1971.[232]

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[230] Joseph Freedman, *Proposed Amendments to the National Contingency Plan: Explanation and Analysis*, 19 ENVTL. L. REP. 10,103, 10,105-06 (1989). The National Multi-Agency Oil And Hazardous Materials Pollution Contingency Plan was an agreement between the Departments of Interior; Transportation; Defense; Health, Education and Welfare; and the Office of Emergency Planning and established a national and regional reaction teams and contingency plans. The elements of the plan included provisions for discovering and reporting pollution incidents, containing oil discharges, applying techniques for cleanup and disposal, recovering cleanup costs, and enforcing federal statutes. Freedman notes that the original plan established several response organizations that have survived with surprisingly few changes throughout it's history—an on-scene commander with primary responsibility for individual response efforts, Regional Operations Center and Regional Operations Team, a Joint Operations Team and a Joint Operations Center established in Washington, D.C., a National Inter-Agency Committee made up of participating agencies and headed by the Interior Department. It divided response operations into four phases: (1) discovery and notification to the response center; (2) containment and countermeasures to halt or slow the spread of the release directed by the on-scene commander who is responsible to ascertain the facts and establish priorities; (3) removal of the pollutant from the water and restoration of the environment to its "pre-spill condition"; and (4) recovery of response costs and the costs of damages to government property.

[231] Pub. L. No. 91-224, 84 Stat. 91, § 102 (1970); 35 Fed. Reg. 8508 (June 2, 1970).

[232] 36 Fed. Reg. 16,215 (Aug 20, 1971). The Council on Environmental Quality (CEQ) was established in the Executive Office of the President pursuant to § 202 of the NATIONAL ENVIRONMENTAL POLICY ACT OF 1969 (NEPA), Pub. L. No. 91-190, § 202, 83 Stat. 852 (1970) (codified at 42 U.S.C. § 4342 *et seq.*). Regulatory implementation of NEPA, CEQ procedures, and the EIS process are found at 40 C.F.R. §§ 1500 *et seq.* The CEQ's three members are appointed by the President with advice and consent of the Senate and supported by a small staff. Though the size of the organization is small when compared with other agencies, its activities and influence have permeated the executive branch because of its oversight responsibility in the EIS process. Since its creation in 1970, CEQ has carried out

The NCP was revised again in 1973[233] after the enactment of § 311 of the FEDERAL WATER POLLUTION CONTROL ACT OF 1972 (FWPCA)[234] and again in 1980[235] in the wake of the 1977 amendments to the FWPCA[236] and CERCLA.[237] The pre-1980 version of the NCP, though comprehensive in the areas it did address, applied only to discharges into waters regulated by the CLEAN WATER ACT—"It did not apply to releases to groundwater or soil, and it did not provide authority or funding for long-term federal response to chronic hazards."[238] With the enactment of CERCLA, the NCP took on an expansive new role. Congress directed the President to revise and republish the NCP in light of the new law.[239] The President assigned the responsibility of amending the NCP to the EPA[240] and in 1982

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three major functions: NEPA oversight, research and public education, and furnishing advice to the President. Most of the Council's mandate is found in Title II of NEPA (42 U.S.C. §§ 4341 to 4347). On February 8, 1993, President Clinton announced his intent to create a White House Office of Environmental Policy, abolish the 23-year-old Council on Environmental Quality (CEQ), and support elevation of EPA to cabinet-level status. The new office will oversee the administration's environmental policymaking. Abolishing the CEQ will require legislative amendments to NEPA. *See Recent Developments In the News: White House Office of Environmental Policy*, 23 ENVTL. L. REP. 10251 (April, 1993).

[233] 38 Fed. Reg. 21,888 (1973).

[234] Pub. L. 92-500, 86 Stat. 865 (1972); FWPCA § 311, 33 U.S.C. § 1321 (1972).

[235] 45 Fed. Reg. 17,832 (1980).

[236] Pub. L. No. 95-217, 91 Stat. 1593-1596, 33 U.S.C. § 1321 (1977).

[237] Pub. L. No. 96-510, 94 Stat. 2767, 42 U.S.C. 9601 to 9657 (1980).

[238] Freedman, *supra*, 19 ENVTL. L. REP. at 10,107.

[239] CERCLA § 105(a), 42 U.S.C. § 9605(a) (1980).

[240] CERCLA § 115, 42 U.S.C. § 9615 (1980); Executive Order No. 12,316, 46 Fed. Reg. 42,237 (1981) (revoked by Executive Order No. 12,580, 52 Fed. Reg. 2923 (1987)).

EPA issued a new version of the NCP.[241] EPA revised the NCP further in 1985[242] and again in 1990 to reflect the changes in CERCLA wrought by SARA.[243] The NCP is described as "a rule that presents ... [a] general plan or framework for responding to hazardous substances releases... [it] is not intended to provide complex and detailed site-specific decisionmaking criteria."[244]

A. *Consistency in general.* As noted above, the burden as to proving consistency (or inconsistency) with the NCP varies depending on who the "lead agency" is.[245] If EPA is

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[241] 47 Fed. Reg. 31,180 (1982).

[242] 50 Fed. Reg. 47,912 (1985).

[243] 55 Fed. Reg. 8666 (1990).

[244] 50 Fed. Reg. 47,912, 47,920 (1985).

[245] 40 C.F.R. § 300.5 defines "lead agency" as follows:

> Lead agency means the agency that provides the [On-Scene Coordinator/Remedial Project Manager] to plan and implement response action under the NCP. EPA, the USCG, another federal agency, or a state (or political subdivision of a state)... may be the lead agency for a response action. In the case of a release of a hazardous substance, pollutant, or contaminant, where the release is on, or the sole source of the release is from, any facility or vessel under the jurisdiction, custody, or control of Department of Defense (DOD) or Department of Energy (DOE), then DOD or DOE will be the lead agency. Where the release is on, or the sole source of the release is from, any facility or vessel under the jurisdiction, custody, or control of a federal agency other than EPA, the USCG, DOD, or DOE, then that agency will be the lead agency for remedial actions and removal actions other than emergencies. The federal agency maintains its lead agency responsibilities whether the remedy is selected by the federal agency for non-NPL sites or by EPA and the federal agency or by EPA alone under CERCLA section 120. The lead agency will consult with the support agency, if one exists, throughout the response process.

In private party response actions, no governmental action is necessary, and the actions

the lead agency, the burden shifts to the defendant to prove that EPA's response costs are not consistent with the NCP since the statute cloaks EPA with a presumption of consistency.[246] A private party, on the other hand, who seeks recovery of response costs under CERCLA § 107 bears the affirmative burden of proving that such response costs were necessary and were incurred in substantial compliance with the terms of the NCP.[247] The courts evaluate the responding party's costs "against the NCP in force at the time that such costs were incurred."[248]

To recover CERCLA response costs to remediate the release of a hazardous substance, such costs must be consistent with the requirements of the national contingency

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to be taken by the "lead agency" become those to be taken by the private party. *See* 55 Fed. Reg. 8666, 8795 (March 8, 1990) ("In a private party response action, the private party may perform most of the functions of a lead agency, except of course, waivers of applicable laws, permit waivers, and functions related to use of the Fund (EPA has identified those sections of the NCP that are potentially relevant to private party cleanups in § 300.700(c) (5)-(7)); there is no support agency in a private party cleanup action.").

[246] CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A) (West 1994) ("...all costs of removal or remedial action incurred by the United States Government or a State or an Indian Tribe *not inconsistent with* the national contingency plan..."). *See* U.S. v. Hardage, 982 F.2d 1436, 1441 (10th Cir. 11992) *cert. denied*, Advance Chemical Co. v. U.S., 114 S.Ct. 300 (1993) ("...we adopt the Eighth Circuit's holding that the burden of proof of inconsistency with the NCP rests with the defendant when the government seeks recovery of its costs."); United States v. Northeastern Pharmaceutical & Chemical Co. (NEPACCO), 810 F.2d 726, 747 (8th Cir.1986), *cert. denied*, 484 U.S. 848 (1987); U.S. v. R.W. Meyer, Inc., 889 F.2d 1497, 1508 (6th Cir. 1989) *cert. denied*, R.W. Meyer, Inc. v. U.S., 494 U.S. 1057 (1990).

[247] CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B) (West 1994) ("...any other necessary costs of response incurred by any other person consistent with the national contingency plan..."). *See also* Artesian Water Co. v. New Castle County, 659 F. Supp. 1269, 1292 (D. Del. 1987) *aff'd*, 851 F.2d 643 (3d Cir.1988); Hatco Corp. v. W.R. Grace & Co.--Conn., 801 F. Supp. 1309, 1332-33 (D. N.J. 1992) (substantial, not strict, compliance with the 1985 and 1990 NCP is a prerequisite for recovery of response costs).

[248] Reading Co. v. City of Philadelphia, 823 F. Supp. 1218, 1239 (E.D. Pa. 1993).

plan.[249] Those requirements are set forth in 40 C.F.R. Part 300.[250] For private parties, proof that the response costs are consistent with the NCP is an element of a *prima facie* case for recovery under CERCLA § 107.[251] The 1985 NCP did not mention the standard of

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[249] CERCLA § 104(a)(4)(A) & (B), 42 U.S.C. § 9607(a)(4)(A) & (B) (West 1994).

[250] 55 Fed. Reg. 8666, 8813 ff (March 8, 1990); 40 C.F.R. Part 300 (1992).

[251] County Line Investment Co. v. Tinney, 933 F.2d 1508, 1512 (10th Cir. 1991); Dedham Water Co. v. Cumberland Farms Dairy, Inc., 889 F.2d 1146, 1150 (1st Cir.1989); Ascon Properties, Inc. v. Mobil Oil Co., 866 F.2d 1149, 1154 (9th Cir.1989); Amland Properties Corp. v. Aluminum Co., 711 F. Supp. 784, 794 (D. N.J. 1989); Artesian Water Co. v. New Castle County, 659 F. Supp. 1269, 1291 (D. Del.1987) *aff'd*, 851 F.2d 643 (3rd Cir.1988); Analytical Measurements, Inc. v. Keuffel & Esser Co., 843 F. Supp. 920, 931 (D. N.J. 1993).

See also Rhodes v. County of Darlington, S.C., 833 F. Supp. 1163, 1177 (D. S.C. 1992)("The requirements of a private cause of action under CERCLA versus a Government-prosecuted cause of action under the Act are similar, although not identical. The sovereign need not allege or prove that its costs were properly incurred pursuant to and consistent with the NCP."); United States v. Ward, 618 F. Supp. 884, 899-900 (E.D. N.C. 1985):

> That defendants are entitled to challenge the consistency of the government's actions with the NCP is clear. 42 U.S.C. § 9607(a)(4)(A). *See, e.g.,* United States v. NEPACCO, 579 F. Supp. 823, 850 (W.D. Mo.1984). While plaintiffs are not entitled to interfere with the government's actions in implementing the chosen remedial action under CERCLA, by the wording of section 107(a)(4)(A) responsible parties are entitled to challenge the extent of their liability to the government by asserting that the EPA's cleanup activities were inconsistent with the NCP. 42 U.S.C. § 9607(a)(4)(A). Lone Pine Steering Committee v. United States Environmental Protection Agency, 600 F. Supp. 1487 (D. N.J. 1985).
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> The burden of raising and proving inconsistency with the NCP is, however, on the Ward defendants. Section 107(a)(4)(A) allows recovery by the government of costs "not inconsistent with the national contingency plan" while section 107(a)(4)(B) allows private parties to recover only those costs which are "consistent with the national contingency plan." 42 U.S.C. §§ 9607(a)(4)(A) & (B) (1982). This implies that government actions taken are presumed to be consistent with the NCP unless otherwise shown, while actions of private parties are not entitled to the benefit of this presumption. United States v. NEPACCO, 579 F. Supp. at 851. This is in accord with the

compliance necessary to be "consistent" with the NCP leaving the courts divided as to whether strict compliance was required or something less. The majority of courts interpreting those regulations prior to the promulgation of the 1990 NCP required "strict compliance" with its provisions[252] while other courts adopted a more liberal standard of "substantial compliance."[253]

> general principle that actions of public officers are presumed to be regular. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). Therefore, defendants bear the burden of proving that governmental actions were inconsistent with the NCP. New York v. General Electric Co., 592 F. Supp. 291, 303-04 (N.D. N.Y. 1984); J.V. Peters & Co. v. Ruckelshaus, 584 F. Supp. 1005 (N.D. Ohio 1984); United States v. NEPACCO, 579 F. Supp. at 851. In addition, it would be an unreasonable waste of judicial time and government resources not to mention an usurpation of agency authority, to require the EPA to justify its every action in order to recover under section 107, even when no allegation of inconsistency had been made.

[252] County Line Inv. Co. v. Tinney, 1989 WL 237380, 19 ENVTL. L. REP. 21,312 (N.D. Okl. 1989) *aff'd*, 933 F.2d 1508 (10th Cir. 1991) (Where parties failed to perform an adequate remedial investigation/feasibility study, provide for public comment concerning the selected remedy, or show that their remedial actions were cost-effective, the District Court held that their response costs were not consistent with the National Contingency Plan.); Amland Properties Corp. v. Aluminum Co. of Am., 711 F. Supp. 784, 796-97 (D. N.J. 1989) ("the requirements of the NCP must be adhered to in order to permit a private party to recover its response costs, unless the party seeking recovery explains why a specific requirement is not appropriate to the specific site and problem"); Artesian Water Co. v. New Castle County, 659 F. Supp. 1269, 1291-92, 1294 (D. Del.1985) *aff'd*, 851 F.2d 643 (3d Cir.1988); Channel Master Satellite, Systems, Inc. v. JFD Electronics Corp., 748 F. Supp. 373, 383 (E.D. N.C. 1990); Gussin Enterprises, Inc. v. Rockola, 1993 WL 114643, 36 Envtl. Rep. Cas. (BNA) 1903 (N.D. Ill. 1993); Versatile Metals, Inc. v. Union Corp., 693 F. Supp. 1563, 1579-83 (E.D. Pa.1988).

[253] Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887, 891 (9th Cir.1986) ("...section 107(a) does not require strict compliance with the national contingency plan; rather, response costs incurred by a private party may be "consistent with the national contingency plan" so long as the response measures promote the broader purposes of the plan."); NL Industries, Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir.1986) ("consistency with the national contingency plan does not necessitate strict compliance with its provisions")

When EPA revised and reissued the NCP in 1990, this issue was specifically addressed. In the revised NCP, EPA declared that "[a] private party response action will be considered 'consistent with the NCP' if the action, when evaluated as a whole, is in substantial compliance with the applicable requirements."[254] In so doing, "the EPA has

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(citing *Wickland Oil Terminals* at 891-92 (9th Cir.1986); General Electric Co. v. Litton Business Systems, Inc., 715 F. Supp. 949, 962 (W.D. Mo.1989)) ("Consistency with the National Contingency Plan does not necessitate strict compliance with its provisions.") (citing *NL Industries* at 898-99).

[254] 40 C.F.R. § 300.700(c)(3)(i) (1992). 40 C.F.R. § 300.700 provides as follows (*emphasis added*):

> **40 C.F.R. § 300.700 ACTIVITIES BY OTHER PERSONS.**
>
> (a) General. Any person may undertake a response action to reduce or eliminate a release of a hazardous substance, pollutant, or contaminant.
> (b) Summary of CERCLA authorities. The mechanisms available to recover the costs of response actions under CERCLA are, in summary:
>
> (1) Section 107(a), wherein any person may receive a court award of his or her response costs, plus interest, from the party or parties found to be liable;
>
> (2) 111(a)(2), wherein a private party, a potentially responsible party pursuant to a settlement agreement, or certain foreign entities may file a claim against the Fund for reimbursement of response costs;
>
> (3) Section 106(b), wherein any person who has complied with a section 106(a) order may petition the Fund for reimbursement of reasonable costs, plus interest; and
>
> (4) Section 123, wherein a general purpose unit of local government may apply to the Fund under 40 C.F.R. part 310 for reimbursement of the costs of temporary emergency measures that are necessary to prevent or mitigate injury to human health or the environment associated with a release.
> (c) Section 107(a) cost recovery actions.
>
> (1) Responsible parties shall be liable for all response costs incurred by the United States government or a State or an Indian tribe *not inconsistent with the NCP.*
>
> (2) Responsible parties shall be liable for necessary costs of response actions to releases of hazardous substances incurred by *any other person consistent with the NCP.*
>
> (3) For the purpose of cost recovery under section 107(a)(4)(B) of

apparently lessened the strictures demanded for consistency with the NCP."[255] Under the revised NCP, "consistency with the NCP" should be measured by whether the private party cleanup has, when evaluated as a whole, achieved "substantial compliance" with the

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CERCLA:

> (i) A private party response action will be considered "consistent with the NCP" if the action, *when evaluated as a whole, is in substantial compliance* with the applicable requirements in paragraphs (c)(5) and (6) of this section, and results in a CERCLA-quality cleanup;
>
> (ii) Any response action carried out in compliance with the terms of an order issued by EPA pursuant to section 106 of CERCLA, or a consent decree entered into pursuant to section 122 of CERCLA, will be considered "consistent with the NCP."
>
> (4) Actions under s 300.700(c)(1) will not be considered "inconsistent with the NCP," and actions under s 300.700(c)(2) will not be considered not "consistent with the NCP," based on immaterial or insubstantial deviations from the provisions of 40 C.F.R. part 300.
>
> (5) ....

[255] Rhodes v. County of Darlington, S.C., 833 F. Supp. 1163, 1195 (D. S.C. 1992); Ambrogi v. Gould, Inc., 750 F. Supp. 1233, 1254 n. 27 (M.D. Pa. 1990) ("The new regulations expressly require lenience in their application and state that inconsistency should not be found on 'immaterial or insubstantial deviations from the provisions of 40 C.F.R. part 300.'" *citing* the new § 300.700(c)(4) at 55 F.R. 8666, 8858.)); Con-Tech Sales Defined Ben. Trust v. Cockerham, 1991 WL 209791, *6 (E.D. PA. 1991) ("...we find that consistency with the NCP now requires a showing of substantial compliance with the NCP, rather than strict compliance.").

See also 55 Fed. Reg. 8666, 8793 (March 8, 1990) ("EPA's decision to require only 'substantial' compliance with potentially applicable requirements is based, in large part, on the recognition that providing a list of rigid requirements may serve to defeat cost recovery for meritorious cleanup actions based on a mere technical failure by the private party that has taken the response action. For example, EPA does not believe that the failure of a private party to provide a public hearing should serve to defeat a cost recovery action if the public was afforded an ample opportunity for comment. A substantial compliance test is appropriate as well in light of the difficulty of judging which potentially relevant NCP provisions must be met in any given case.").

potentially applicable requirements, and resulted in a CERCLA-quality cleanup.[256] The EPA has defined a CERCLA-quality cleanup as a cleanup that (1) satisfies the three basic remedy selection requirements of CERCLA § 121, i.e., protective of human health and the environment, cost-effective, and utilizes permanent solutions and alternative treatment technologies to the maximum extent practicable;[257] (2) attains applicable and relevant and appropriate requirements (ARARs);[258] and provides for meaningful public participation.[259] These are not new requirements; what is new is the application of "substantial compliance" as the standard for recovery.[260]

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[256] 55 Fed. Reg. 8794 (March 8, 1990) ("Thus, this rule defines actions as "consistent with the NCP" for the purposes of section 107(a)(4)(B), when the private party cleanup, evaluated as a whole, is found to have achieved "substantial compliance" with specified requirements and resulted in a CERCLA-quality cleanup..."); City of Detroit v. A.W. Miller, Inc., 842 F. Supp. 957 , 963 (E.D. Mich. 1994); Reading Co. v. City of Philadelphia, 823 F. Supp. 1218, 1239 (E.D. Pa. 1993); Tri-County Business Campus Joint Venture v. Clow Corp., 792 F. Supp. 984, 991 (E.D. Pa. 1992).

[257] CERCLA § 121(b)(1), 42 U.S.C. § 9621(b)(1); 55 Fed. Reg. 8666, 8793 (March 8, 1990).

[258] CERCLA § 121(d)(4), 42 U.S.C. § 9621(d)(4) (West 1994); 55 Fed. Reg. 8666, 8793 (March 8, 1990).

[259] CERCLA § 117(d)(4), 42 U.S.C. § 9617(d)(4) (West 1994); 55 Fed. Reg. 8666, 8793 (March 8, 1990) ("Although public participation is not an explicit requirement in [CERCLA § 121] on remedy selection, EPA believes that it is integral to ensuring the proper completion part of any CERCLA cleanup action, as discussed below.").

[260] 55 Fed. Reg. 8666, 8793 (March 8, 1990) ("These requirements are not new additions from the proposed rule. Under the proposal, private parties were required to strictly comply with the detailed provisions of the NCP, including provisions codifying these statutory mandates (see final rule § 300.430(f)(1)(ii)(A) (protectiveness), (B) (ARARs), (D) (cost-effectiveness), (E) (permanence/treatment), and § 300.430(f)(3) (public participation)). EPA has simply issued a substantial compliance test while at the same time identifying several requirements that must be met in order to achieve substantial compliance.").

A number of courts have considered the effect that the standard set forth in the 1990 NCP has on the application of the 1985 NCP on pre-1990 response costs. Many have held that the "substantial compliance" standard set forth in the 1990 regulations simply *clarify* the 1985 NCP, and as a clarification, applies to response costs incurred during the reign of the 1985 NCP.[261] The introduction to the 1990 NCP states that the "revisions to the NCP are intended to implement regulatory changes necessitated by SARA, *as well as to clarify existing NCP language* and to reorganize the NCP to coincide more accurately with the sequence of response actions."[262] This does not mean that the 1990 NCP applies retroactively to response actions initiated prior to the effective date of the current NCP.[263]

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[261] Jastram v. Phillips Petroleum Co., 844 F. Supp 1139, 1142-43 (E.D. La. 1994); Analytical Measurements, Inc. v. Keuffel & Esser Co., 843 F. Supp. 920, 933 (D. N.J. 1993); Reading Co. v. City of Philadelphia, 823 F. Supp. 1218, 1240 (E.D. Pa. 1993) ("The court agrees with the logical conclusion that 'to the extent that the subsequent regulations clarify the prior regulations as to private party obligations, such regulations will govern.'" *citing* Versatile Metals, Inc. v. Union Corp, 693 F. Supp. 1563, 1575 (E.D. Pa.1988)); Hatco Corp. v. W.R. Grace & Co.--Conn, 801 F. Supp. 1309, 1332-33 (D. N.J. 1992); Con- Tech Sales Defined Ben. Trust v. Cockerham, 1991 WL 209791, *6 (E.D. Pa.1991).

[262] 55 Fed. Reg. 8666 (March 8, 1990) (*emphasis added*). *See also* Con-Tech Sales Defined Ben. Trust v. Cockerham, 1991 WL 209791, *6 (E.D. PA. 1991) ("...the substantial compliance standard is meant to clarify the meaning of 'consistent with the NCP,' not to add a new provision. The 'strict compliance' standard advocated by defendants is a creation of the courts, not the EPA, and the agency has simply announced its disagreement with the courts' interpretation of section 107 of CERCLA and of the 1985 NCP.").

[263] 55 Fed. Reg. 8666, 8795 (1990).

> **4. Retroactivity.** Some commentators expressed the concern that PRPs [potentially responsible parties] may attempt to impose the new definition of "consistency with the NCP" on private cleanups that are already complete or underway. They assert that it should be made clear that the rule does not apply to private response actions initiated prior to the effective date of the revised NCP.
>
> In response, EPA does not believe that it is appropriate to grandfather

As noted above, there are at least five key elements essential to achieve a "CERCLA-quality cleanup"—protective of human health and the environment, cost-effective, utilizes permanent solutions and alternative treatment technologies to the maximum extent practicable, attains ARARs, and provides for meaningful public participation.[264] Additionally, the NCP specifically identifies other plan requirements that are potentially applicable to response actions by private parties. They are worker health and safety; documentation to support actions taken under the NCP and to form the basis for cost recovery; determining the need for a Superfund financed action; permit requirements; identification of ARARs; reports of releases; and removal and remedial action requirements.[265]

> cleanups that are already "underway." Such a position would result in an exemption from this rule for actions that were initiated prior to the effective date, but which may continue for years (such as long-term ground-water remediation actions). Further, EPA does not believe that this issue will pose a serious problem to private parties for several reasons. First, the rule's requirement of "substantial compliance" with potentially applicable NCP requirements affords private parties some latitude in meeting the full set of revised NCP provisions. Second, private parties have been on notice for over a year that EPA intended to require compliance with the principal mandates of CERCLA—those required for a "CERCLA-quality cleanup," as discussed above—as a condition for being "consistent with the NCP."
>
> Finally, the requirement for "consistency with the NCP" has been a precondition to cost recovery under CERCLA section 107 since the passage of the statute in 1980, and pursuant to the 1985 NCP, consistency with the NCP was measured by compliance with a detailed list of NCP requirements: thus, on-going actions should already comply with the 1985 provisions.

See also Amcast Indus. Corp. v. Detrex Corp, 779 F. Supp. 1519, 1536-37 (N.D. Ind. 1991), *aff'd in part, rev. in part* 2 F.3d 746 (7th Cir. 1993), *cert. denied.* Detrex Corp. v. Amcast Indus. Corp., 114 S.Ct. 691 (1994).

[264] *See supra* p. 67; CERCLA §§ 117(d)(4), 121(b)(1), 121(d)(4), 42 U.S.C. §§ 9617(d)(4), 9621(b)(1), 9621(d)(4); 55 Fed. Reg. 8666, 8793 (March 8, 1990).

[265] 40 C.F.R. § 300.700(c)(5) (1992) provides:

B. *Removal vs. remedial.* The courts have generally held that the NCP applies differently to response actions depending on whether such action is a "removal" action or a "remedial" action.[266] Removal actions are short-term actions necessary to promptly protect

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(5) The following provisions of this part are potentially applicable to private party response actions:

(i) Section 300.150 (on worker health and safety);

(ii) Section 300.160 (on documentation and cost recovery);

(iii) Section 300.400(c)(1), (4), (5), and (7) (on determining the need for a Fund-financed action); (e) (on permit requirements) except that the permit waiver does not apply to private party response actions; and (g) (on identification of ARARs) except that applicable requirements of federal or state law may not be waived by a private party;

(iv) Section 300.405(b), (c), and (d) (on reports of releases to the NRC);

(v) Section 300.410 (on removal site evaluation) except paragraphs (e)(5) and (6);

(vi) Section 300.415 (on removal actions) except paragraphs (a)(2), (b)(2)(vii), (b)(5), and (f); and including s 300.415(i) with regard to meeting ARARs where practicable except that private party removal actions must always comply with the requirements of applicable law;

(vii) Section 300.420 (on remedial site evaluation);

(viii) Section 300.430 (on RI/FS and selection of remedy) except paragraph (f)(1)(ii)(C)(6) and that applicable requirements of federal or state law may not be waived by a private party; and

(ix) Section 300.435 (on RD/RA and operation and maintenance).

[266] County Line Inv. Co. v. Tinney, 933 F.2d 1508, 1512 n.6 (10th Cir. 1991) ("A 'remedial action' under CERCLA includes investigation and cleanup actions 'consistent with a permanent remedy' for a site. 42 U.S.C. § 9601(24). It is contrasted with a 'removal action' under the statute, which is generally an emergency, interim response to particular site conditions that is governed by more limited and flexible NCP requirements."); Hatco Corporation v. W.R. Grace & Co.--Conn. v. Allstate Insurance Co., --- F. Supp. ----, 1994 WL 65105, *29 (D. N.J. 1994); Reading Co. v. City of Philadelphia, 823 F. Supp. 1218, 1240 (E.D. Pa., May 11, 1993) ("Under CERCLA, response costs can be characterized as either removal or remedial. Under the NCP, different regulations apply to the two actions. The requirements for proving that a remedial action is consistent with the NCP are more stringent than those for a removal action."); U.S. Steel Supply Inc. v. Alco Standard Corp., 1992 WL 229252, *8, 36 Envtl. Rep. Cas. (BNA) 1330 (N.D. Ill. 1992) ("Whether Plaintiff's costs can be characterized as necessary depends upon whether Plaintiff's actions are characterized as a removal action or a remedial action under CERCLA and the NCP."); Tri-County Business

public health or welfare or the environment from a release or threat of release of a hazardous substance.[267] CERCLA defines "removal" as follows:

> The terms "remove" or "removal" means 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 [CERCLA § 104(b)] of this title, and any emergency assistance which may be provided under the DISASTER RELIEF AND EMERGENCY ASSISTANCE ACT.[268]

Remedial actions, however, entail long-term, permanent actions necessary to restore environmental quality and abate a release and contamination. CERCLA provides the following definition for "remedial":

> The terms "remedy" or "remedial action" means 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

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Campus Joint Venture v. Clow Corp., 792 F. Supp. 984, 991 (E.D. Pa. 1992) ("Remedial actions are subject to the more stringent requirements of the 1990 plan... while removals are subject to the less stringent requirements...").

[267] See New York v. Shore Realty Corp., 759 F.2d 1032, 1040 (2d Cir. 1985); T.E. Indus., Inc. v. Safety Light Corp., 680 F. Supp. 696, 706 (D. N.J. 1988); City of New York v. Exxon Corp., 633 F. Supp. 609, 614 (S.D. N.Y. 1986).

[268] CERCLA § 101(23), 42 U.S.C. § 9601(23) (West 1994).

> 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 where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or welfare; the term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.[269]

One way to think of these definitions is that they describe different phases of a clean-up—the removal is the prompt response to an emergency situation while the remedial action is a carefully and thoroughly developed response designed to provide a permanent solution and to prevent a future releases. The inherent overlap in the two definitions sometimes make it difficult to distinguish what actions constitute a "removal" action and what actions constitute a "remedial" action. Indeed, some actions can be either making this inquiry fact specific on a case-by-case basis.[270] In spite of the uncertainty, this inquiry is a fundamental

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[269] CERCLA § 101(24), 42 U.S.C. § 9601(24) (West 1994). For sites listed on the NPL, monies from the Superfund may be used for remedial actions. CERCLA § 104(a), 42 U.S.C. § 9604(a) (West 1994).

[270] Reading Co. v. City of Philadelphia, 823 F. Supp. 1218, 1241 (E.D. PA. 1993); U.S. Steel Supply Inc. v. Alco Standard Corp., 1992 WL 229252, *10, 36 Envtl. Rep. Cas. 1330 (N.D. Ill. 1992) ("The court must also consider the nature of the response itself. A remedial action is designed 'to prevent or minimalize the release of hazardous substances ... so that they do not migrate.' 40 C.F.R. § 300.68(a)(1). A generic conceptualization would involve an on-site structural confinement of the hazardous waste. A remedial action may also include the off-site transport and storage of hazardous wastes, but such an action may more easily be characterized as removal of the hazardous waste."); Tri-County Business Campus Joint Venture v. Clow Corp., 792 F. Supp. 984, 991 (E.D. PA. 1992); BCW Associates, Ltd.

prerequisite when addressing the issue as to whether a particular response action is consistent with the NCP and, therefore, recoverable under CERCLA § 107.

The ultimate determination of whether a response action is a removal action or a remedial action is a question of law to be decided by the court.[271] In *U.S. Steel Supply Inc. v. Alco Standard Corp.*, the District Court for the Northern District of Illinois noted a number of factors that should be considered when making this important determination.[272] Such factors as the exigency of the release or threat of release; the permanence of the response (i.e., whether the action effects a permanent remedy); the cost and duration of the response; the nature or purpose of the response itself (i.e., to prevent or minimize the release or migration of the hazardous substances); and the place of the response action (i.e., whether on- or off-site).[273]

C. *NCP and "removal" actions.* The less stringent requirements for removal actions are found at 40 C.F.R. §§ 300.410 and 300.415 of the extant NCP.[274] Those sections

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v. Occidental Chemical Corp., 1988 WL 102641, *18 (E.D. Pa. 1988) ("Just because what would otherwise be a removal action effects a permanent remedy does not convert that response into a remedial action.").

[271] Analytical Measurements, Inc. v. Keuffel & Esser Co., 843 F. Supp. 920, 932 (D. N.J. 1993); Reading Co. v. City of Philadelphia, 823 F. Supp. 1218, 1242 (E.D. Pa. 1993).

[272] 1992 WL 229252, 36 Envtl. Rep. Cas. (BNA) 1330 (N.D. Ill. 1992).

[273] U.S. Steel Supply Inc. v. Alco Standard Corp., 1992 WL 229252, *10, 36 Envtl. Rep. Cas. (BNA) 1330 (N.D. Ill. 1992); *See also* Reading Co. v. City of Philadelphia, 823 F. Supp. 1218, 1241 (E.D. Pa. 1993) (court relied on immediacy of the action, cost, complexity and duration of the action, the nature of the action as factors in determining whether response action was remedial or removal.).

[274] *See* Appendix A for the full text of 40 C.F.R. §§ 300.410 and 300.415 (1992).

require the response party to conduct a removal site evaluation[275] and to select an appropriate removal action.[276]

1. *Removal site evaluation.* The removal site evaluation includes a removal preliminary assessment and, if warranted, a removal site inspection.[277] Anyone who is, or may be, affected by a release of a hazardous substance, pollutant, or contaminant may petition the lead agency to conduct a removal preliminary assessment.[278] This assessment may be based on readily available information and should include the following: the identification of the source and nature of the release or threat of release; any evaluations of the threat to public health from the ATSDR[279] or any other sources such as any state public health agencies; an evaluation of the magnitude of the threat; an evaluation of factors necessary to make the determination of whether a removal is necessary; and a determination of whether a nonfederal party is undertaking the proper response.[280] If the assessment is for a release from a hazardous waste management facility, it should include a review of the site management practices, information from generators, photographs, analysis of historical photographs, literature searches, and personal interviews with present and former

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[275] 40 C.F.R. § 300.410(b) (1992).

[276] 40 C.F.R. § 300.415(a)(1) (1992).

[277] 40 C.F.R. § 300.410(a) (1992).

[278] 40 C.F.R. §§ 300.410(b) (1992).

[279] The Agency for Toxic Substances and Disease Registry is established within the Department of Health and Human Services by CERCLA 104(i), 42 U.S.C. § 9604(i) (West 1994).

[280] 40 C.F.R. §§ 300.410(c)(1) (1992).

employees.[281] If more information is needed, a removal site inspection may be performed both on- and off-site.[282] The removal site evaluation may be terminated for a number of reasons ranging from a determination that there was no release to the site evaluation is complete.[283] The results of the removal site evaluation must be documented.[284] If the evaluation indicates that natural resources are or may be injured by the release, the lead agency must notify the appropriate state or federal trustee.[285] If the site evaluation indicates remedial action, rather than a removal action, is appropriate then the lead agency must initiate a remedial site

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[281] 40 C.F.R. §§ 300.410(c)(2) (1992).

[282] 40 C.F.R. §§ 300.410(d) (1992).

[283] 40 C.F.R. §§ 300.410(e) (1992) provides:

> (e) A removal site evaluation shall be terminated when the OSC [on-scene commander] or lead agency determines:
>
> (1) There is no release;
>
> (2) The source is neither a vessel nor a facility as defined in s 300.5 of the NCP;
>
> (3) The release involves neither a hazardous substance, nor a pollutant or contaminant that may present an imminent and substantial danger to public health or welfare;
>
> (4) The release consists of a situation specified in s 300.400(b)(1) through (3) subject to limitations on response;
>
> (5) The amount, quantity, or concentration released does not warrant federal response;
>
> (6) A party responsible for the release, or any other person, is providing appropriate response, and on-scene monitoring by the government is not required; or
>
> (7) The removal site evaluation is completed.

[284] 40 C.F.R. §§ 300.410(f) (1992).

[285] 40 C.F.R. §§ 300.410(g) (1992).

evaluation.[286]

2. *Removal actions.* If the lead agency determines that a removal action is appropriate[287] and the responsible parties are known, it should first determine whether such parties can and will perform the necessary removal action promptly and properly.[288] As soon as possible, the lead agency should conduct a removal action to abate, prevent, minimize, stabilize, mitigate, or eliminate the release or the threat of release where it finds such action appropriate based on the following factors:

(i) Actual or potential exposure to nearby human populations, animals, or the food chain from hazardous substances or pollutants or contaminants;
(ii) Actual or potential contamination of drinking water supplies or sensitive ecosystems;
(iii) Hazardous substances or pollutants or contaminants in drums, barrels, tanks, or other bulk storage containers, that may pose a threat of release;
(iv) High levels of hazardous substances or pollutants or contaminants in soils largely at or near the surface, that may migrate;
(v) Weather conditions that may cause hazardous substances or pollutants or contaminants to migrate or be released;
(vi) Threat of fire or explosion;
(vii) The availability of other appropriate federal or state response mechanisms to respond to the release; and
(viii) Other situations or factors that may pose threats to public health or welfare or the environment.[289]

If the agency has a planning period of at least six months before the initiation of the

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[286] 40 C.F.R. § 300.410(h) (1992); *See also* 40 C.F.R. § 300.420 (1992).

[287] In making this determination, the agency should consider information gathered by the remedial site evaluation, if any, conducted pursuant to 40 C.F.R. § 300.420 as well as the results from the removal site evaluation. 40 C.F.R. § 300.415(a)(1) (1992).

[288] 40 C.F.R. § 300.415(a)(2) (1992).

[289] 40 C.F.R. § 300.415(b)(1)-(3) (1992).

on-site removal action, it must conduct an engineering evaluation/cost analysis (EE/CA), or its equivalent, of alternative removal actions for the site.[290] In any event, if the removal action is funded from the Superfund it "shall be terminated after $2 million has been obligated for the action or 12 months have elapsed from the date that removal activities begin on-site" except where the action is conducted pursuant to CERCLA § 104(b) or if there is an immediate risk to public health or welfare or the environment and continued response actions are immediately required to prevent, limit, or mitigate an emergency.[291]

Removal actions include such things as erecting fences or other security or site control precautions; building drainage controls to reduce migration; stabilizing berms, dikes, or impoundments; draining or closing lagoons, capping contaminated soils or sludges to reduce migration and protect the soil, ground or surface water, or air; using chemicals and other materials to retard the spread of the release or to mitigate its effects; excavating consolidating, or removing contaminated soils; removing drums, barrels, tanks, or other bulk containers of hazardous substances; containing, treating, disposing, or incinerating hazardous materials; and

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[290] 40 C.F.R. § 300.415(b)(4) (1992).

[291] 40 C.F.R. § 300.415(b)(5) (1992). The continued removal action must also be consistent with the remedial action to be taken later. Of course, the limitations places on "funded" removal actions is not normally a consideration at DOD since the funds for the Defense Environmental Restoration Account (DERA) are separately appropriated. *See* The Defense Appropriation Act for Fiscal Year 1984 (Pub. L. No. 98-212, 97 Stat. 1421 (Dec. 8, 1983)) which established DERA at 10 U.S.C. § 2703 (West 1994). DERA is a transfer account from which DOD could fund their environmental restoration programs and meet its responsibilities under DERP and CERCLA are received primarily in the ordinary budget cycle. *See also* Pub. L. No. 103-139, 107 Stat 1418, 1425 (1993) (Department of Defense Appropriations Act, 1994), which provided $1,962,300,000 for DERA.

providing an alternative water supply to reduce exposure to contaminated household water.[292] Where such removal actions fail to fully address the threat posed by the release, the lead agency shall ensure an orderly transition from removal to remedial response activities.[293]

3. *Removal actions and community relations.* Although removal actions are thought of as short-term actions, the NCP nevertheless mandates certain community relations activities. Specifically, the lead agency must designate a spokesperson responsible to inform the community of actions taken, to respond to inquiries, and to provide information concerning the release; coordinate all news releases or statements made by participating agencies; and notify, at a minimum, immediately affected citizens, state and local officials, and, when appropriate, civil defense or emergency management agencies.[294] If the agency has a planning period that is less than six months before the initiation of the on-site removal action, the agency must publish a notice of availability of the administrative record file in a major local newspaper of general circulation within sixty days of initiation of on-site removal activity; provide a public comment period of not less than thirty days; and prepare a written response to significant comments.[295] If the on-site removal action is expected to extend beyond 120 days from its initiation, the lead agency must also conduct interviews with local officials, community residents, public interest groups, or other interested or affected parties to solicit their concerns, information needs, and how or when citizens would like to be

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[292] 40 C.F.R. § 300.415(d) (1992).

[293] 40 C.F.R. § 300.415(f) (1992).

[294] 40 C.F.R. § 300.415(m)(1) (1992).

[295] 40 C.F.R. § 300.415(m)(2) (1992).

involved in the CERCLA process; prepare a formal community relations plan (CRP) specifying the anticipated community relations activities; and establish a local information repository at or near the location of the response action that contains the items made available for public information including the administrative record file.[296]

If the agency has a planning period of at least six months prior to initiation of the on-site removal activities, it should comply with these community relations requirements prior to the completion of the engineering evaluation/cost analysis (EE/CA); publish a notice of availability and brief description of the EE/CA in a major local newspaper; provide a comment period of at least thirty calendar days after completion of the EE/CA; and prepare a written response to significant comments.[297]

D. *NCP and "remedial" actions.* Remedial actions are subject to the more stringent requirements of the 1990 plan as set forth in 40 C.F.R. §§ 300.420, 300.425, 300.430 and 300.435, These sections address four broad areas: (1) performance of an appropriate site investigation and analysis, (2) development of appropriate alternatives; (3) selection of a cost-effective remedial response; and (4) involvement of the public in the remedial process.

1. *Site investigation and analysis.* First, the lead agency must perform a remedial preliminary assessment (PA) on all CERCLIS sites.[298] This assessment is necessary

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[296] 40 C.F.R. § 300.415(m)(3) (1992).

[297] 40 C.F.R. § 300.415(m)(4) (1992). *Note:* the information repository and the administrative record file will be established no later than when the EE/CA approval memorandum is signed.

[298] 40 C.F.R. § 300.420(b) (1992). CERCLIS is the abbreviation for the CERCLA

to eliminate from further consideration those sites that pose no threat to public health or the environment; determine if there is any potential need for removal action; set priorities for site inspections; and gather existing data to facilitate later evaluation of the release pursuant to the Hazard Ranking System (HRS), if warranted.[299] The PA consists of a review of existing information about the release such as information on the pathways of exposure, exposure targets, and source and nature of release and may also include an off-site investigation.[300] If the this assessment indicates that a removal action may be warranted, the lead agency must initiate a removal evaluation.[301] Incident to the PA, the lead agency must prepare a PA report that includes a description of the release; a description of the probable nature of the release; and a recommendation on whether further action is warranted, which lead agency should conduct further action, and whether an site investigation or removal action or both should be undertaken.[302] Any person who is, or may be, affected by a release may petition the head of

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Information System, EPA's comprehensive data base and management system that inventories and tracks releases addressed or needing to be addressed by the Superfund program. CERCLIS contains the official inventory of CERCLA sites and supports EPA's site planning and tracking functions. Sites that EPA decides do not warrant moving further in the site evaluation process are given a "No Further Response Action Planned" (NFRAP) designation in CERCLIS. This means that no additional federal steps under CERCLA will be taken at the site unless future information so warrants. Sites are not removed from the data base after completion of evaluations in order to document that these evaluations took place and to preclude the possibility that they be needlessly repeated. 40 C.F.R. § 300.5 (1992).

[299] 40 C.F.R. § 300.420(b)(1) (1992).

[300] 40 C.F.R. § 300.420(b)(2) (1992).

[301] *Id.* A removal evaluation is conducted pursuant to 40 C.F.R. § 300.410.

[302] 40 C.F.R. § 300.420(b)(3) (1992).

the appropriate federal agency to perform a PA.[303] The agency must then complete a remedial or removal PA within one year of the petition unless it determines that a PA is not appropriate.[304]

The second part of the site evaluation involves a remedial site inspection. Its purpose is similar to that of the PA[305] and builds on the information already collected.[306] If the site inspection includes field sampling, then the agency must develop a sampling and analysis plan that ensures the data obtained thereby is of sufficient quality and quantity to satisfy data needs, including evaluation under the NCP's hazard ranking system.[307] Once the remedial SI is complete, the lead agency must prepare a report that describes the history and nature of waste handling, the known contaminants, and the pathways of migration of contaminants; identifies and describes the human and environmental targets; and makes a recommendation as to whether further action is warranted.[308]

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[303] 40 C.F.R. § 300.420(b)(5) (1992).

[304] 40 C.F.R. § 300.420(b)(5)(iii) (1992).

[305] 40 C.F.R. § 300.420(c)(1) provides that "[t]he lead agency shall perform a remedial SI as appropriate to: (i) Eliminate from further consideration those releases that pose no significant threat to public health or the environment; (ii) Determine the potential need for removal action; (iii) Collect or develop additional data, as appropriate, to evaluate the release pursuant to the HRS; and (iv) Collect data in addition to that required to score the release pursuant to the HRS, as appropriate, to better characterize the release for more effective and rapid initiation of the RI/FS or response under other authorities.

[306] 40 C.F.R. § 300.420(c)(2) (1992).

[307] 40 C.F.R. § 300.420(c)(4) (1992). 40 C.F.R. § 300.425 addresses the methods and procedures EPA uses to establish its priorities for remedial actions (i.e., inclusion on the NPL).

[308] 40 C.F.R. § 300.420(c)(5) (1992).

2. *Development of appropriate alternatives.* The lead agency must develop appropriate remedial alternatives. The NCP states:

> The purpose of the remedial investigation/feasibility study (RI/FS) is to assess site conditions and evaluate alternatives to the extent necessary to select a remedy. Developing and conducting an RI/FS generally includes the following activities: project scoping, data collection, risk assessment, treatability studies, and analysis of alternatives. The scope and timing of these activities should be tailored to the nature and complexity of the problem and the response alternatives being considered.[309]

The purpose of scoping is to identify the optimal set and sequence of actions necessary to address remediation of the site. The lead agency must assemble and evaluate existing data on the site, identify likely response scenarios and potentially applicable technologies and operable units that may address site problems, prepare site-specific health and safety plans.[310] While it may also be necessary to collect some data and develop sampling and analysis plans,[311] the majority of this kind of activity will be conducted during the remedial investigation.[312]

The NCP states that the "purpose of the remedial investigation (RI) is to collect data necessary to adequately characterize the site for the purpose of developing and evaluating effective remedial alternatives."[313] In accomplishing this purpose, the lead agency must conduct a field investigation and a baseline risk assessment to gather the information

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[309] 40 C.F.R. § 300.430(a)(2) (1992).

[310] 40 C.F.R. § 300.430(b)(1), (3) and (6) (1992).

[311] 40 C.F.R. § 300.430(b)(4), (5) and (8) (1992).

[312] 40 C.F.R. § 300.430(d) (1992).

[313] 40 C.F.R. § 300.430(d)(1) (1992).

necessary to assess the risks to human health and the environment and to support the development, evaluation, and selection of appropriate response alternatives.[314] The field investigation should focus on the following seven factors:

(i) Physical characteristics of the site, including important surface features, soils, geology, hydrogeology, meteorology, and ecology;
(ii) Characteristics or classifications of air, surface water, and ground water;
(iii) The general characteristics of the waste, including quantities, state, concentration, toxicity, propensity to bioaccumulate, persistence, and mobility;
(iv) The extent to which the source can be adequately identified and characterized;
(v) Actual and potential exposure pathways through environmental media;
(vi) Actual and potential exposure routes, for example, inhalation and ingestion; and
(vii) Other factors, such as sensitive populations, that pertain to the characterization of the site or support the analysis of potential remedial action alternatives.[315]

(The lead agency must also identify potential ARARs as well as any other pertinent advisories, criteria, or guidance in a timely manner.[316])

Using the information developed through the field investigation, the lead agency must also conduct a site-specific baseline risk assessment to characterize the current and potential threats to human health and the environment that may be posed by contaminants migrating to ground water or surface water, releasing to air, leaching through soil, remaining in the soil, or bioaccumulating in the food chain.[317]

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[314] *Id.*

[315] 40 C.F.R. § 300.430(d)(2) (1992).

[316] 40 C.F.R. § 300.430(d)(3) (1992).

[317] 40 C.F.R. § 300.430(d)(4) (1992).

The feasibility study can be thought of as the second half of this process of developing appropriate remedial alternatives.

> The primary objective of the feasibility study (FS) is to ensure that appropriate remedial alternatives are developed and evaluated such that relevant information concerning the remedial action options can be presented to a decision-maker and an appropriate remedy selected.... Development of alternatives shall be fully integrated with the site characterization activities of the remedial investigation... The lead agency shall include an alternatives screening step, when needed, to select a reasonable number of alternatives for detailed analysis.[318]

Determining the number and type of alternatives to be analyzed is a site-specific task dependant on the scope, characteristics, and complexity of the site problem being addressed.[319] The first step in developing and screening alternatives is to establish remedial action objectives, potential exposure pathways, and remediation goals.[320] The remediation goals establish acceptable exposure levels based on state and federal applicable or relevant and appropriate requirements (ARARs), maximum contaminant level goals (MCLGs),[321] water quality criteria established under the CLEAN WATER ACT, alternate concentration limits (ACL) established in accordance with CERCLA § 121(d)(2)(B)(ii), and any threats to sensitive habitats and critical habitats of species protected under the ENDANGERED SPECIES

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[318] 40 C.F.R. § 300.430(e)(1) (1992).

[319] 40 C.F.R. § 300.430(e)(2) (1992).

[320] 40 C.F.R. § 300.430(e)(2)(i) (1992).

[321] MCLGs are established under the SAFE DRINKING WATER ACT and "shall be attained by remedial actions for ground or surface waters that are current or potential sources of drinking water, where the MCL is relevant and appropriate under the circumstances of the release." 40 C.F.R. § 300.430(e)(2)(B) and (C).

ACT.[322] The next step is to identify and evaluate potentially suitable treatment technologies[323] and then to assemble the suitable technologies into alternative remedial actions.[324]

The development and screening of remedial alternatives should consider the short- and long-term aspects of the following three criteria: effectiveness,[325] implementability,[326] and cost.[327] The viable remedial alternatives identified at this screening stage merit a detailed analysis.[328] This analysis assesses each alternative against the following nine evaluation criteria: (1) overall protection of human health and the environment from unacceptable risks;

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[322] 40 C.F.R. § 300.430(e)(2)(i)(A) through (G) (1992).

[323] 40 C.F.R. § 300.430(e)(2)(ii) (1992).

[324] 40 C.F.R. § 300.430(e)(2)(iii) (1992).

[325] 40 C.F.R. § 300.430(e)(7)(i) (1992) ("This criterion focuses on the degree to which an alternative reduces toxicity, mobility, or volume through treatment, minimizes residual risks and affords long-term protection, complies with ARARs, minimizes short-term impacts, and how quickly it achieves protection. Alternatives providing significantly less effectiveness than other, more promising alternatives may be eliminated. Alternatives that do not provide adequate protection of human health and the environment *shall be eliminated from further consideration.*") (*emphasis added*).

[326] 40 C.F.R. § 300.430(e)(7)(ii) (1992) ("This criterion focuses on the technical feasibility and availability of the technologies each alternative would employ and the administrative feasibility of implementing the alternative. Alternatives that are technically or administratively infeasible or that would require equipment, specialists, or facilities that are not available within a reasonable period of time may be eliminated from further consideration.").

[327] 40 C.F.R. § 300.430(e)(7)(iii) (1992) ("The costs of construction and any long-term costs to operate and maintain the alternatives shall be considered. Costs that are grossly excessive compared to the overall effectiveness of alternatives may be considered as one of several factors used to eliminate alternatives. Alternatives providing effectiveness and implementability similar to that of another alternative by employing a similar method of treatment or engineering control, but at greater cost, may be eliminated.").

[328] 40 C.F.R. § 300.430(e)(9) (1992).

(2) compliance with (or waiver of) state and federal ARARs; (3) long-term effectiveness and permanence along with the degree of certainty that the alternative will prove successful; (4) reduction of toxicity, mobility, or volume through treatment or recycling; (5) short-term effectiveness and impacts such as any risk to the community, workers, or the environment during implementation of an alternative; (6) the ease or difficulty of implementing an alternative in terms of technical or administrative feasibility and the availability of services and materials necessary to support the action; (7) capital costs (direct and indirect costs), annual operation and maintenance costs, and net present value of capital and O&M costs; (8) acceptance of the alternative by the state; and (9) acceptance of the alternative by interested persons in the community.

3. *Selection of a cost-effective remedial response.* The agency must then select a effective remedial response. The selection of a remedial action may be summarized as a two-step process: (1) identification of the preferred alternative and presentation of that alternative to the public in a proposed plan, for review and comment and (2) review of the public comments received on the plan and consultation with the state to determine if the preferred alternative remains the most appropriate remedial action for the site or site problem.[329] In the first step, the identification of the preferred alternative is based on the same nine criteria used to initially cull out the viable alternatives from the entire field of alternatives.[330] For this purpose, the NCP categorizes these criteria into three groups: (1) threshold criteria that *must* be meet (i.e., compliance with ARARs); (2) primary balancing

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[329] 40 C.F.R. § 300.430(f)(1)(ii) (1992).

[330] 40 C.F.R. § 300.430(e)(9)(iii) (1992).

criteria (i.e., long-term effectiveness and permanence; reduction of toxicity, mobility, or volume through treatment; short-term effectiveness; implementability; and cost); and (3) modifying criteria (i.e., state and community acceptance).[331]

The agency is free to select only from among those remedies that are protective of human health and the environment, attain state and federal ARARs that have been identified up to that point,[332] are cost-effective,[333] and utilize permanent solutions and alternative

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[331] 40 C.F.R. § 300.430(f)(1)(i) (1992).

[332] If an alternative does not meet a state or federal ARAR, the NCP provides that it may be selected only under the following limited circumstances:

> (1) The alternative is an interim measure and will become part of a total remedial action that will attain the applicable or relevant and appropriate federal or state requirement;
>
> (2) Compliance with the requirement will result in greater risk to human health and the environment than other alternatives;
>
> (3) Compliance with the requirement is technically impracticable from an engineering perspective;
>
> (4) The alternative will attain a standard of performance that is equivalent to that required under the otherwise applicable standard, requirement, or limitation through use of another method or approach;
>
> (5) With respect to a state requirement, the state has not consistently applied, or demonstrated the intention to consistently apply, the promulgated requirement in similar circumstances at other remedial actions within the state; or
>
> (6) For Fund-financed response actions only, an alternative that attains the ARAR will not provide a balance between the need for protection of human health and the environment at the site and the availability of Fund monies to respond to other sites that may present a threat to human health and the environment.

40 C.F.R. § 300.430(f)(1)(ii)(C) (1992).

[333] 40 C.F.R. § 300.430(f)(1)(ii)(D) provides: "Cost-effectiveness is determined by evaluating the following three of the five balancing criteria noted in § 300.430(f)(1)(i)(B) to determine overall effectiveness: long-term effectiveness and permanence, reduction of toxicity, mobility, or volume through treatment, and short-term effectiveness. Overall

treatment technologies or resource recovery technologies to the maximum extent practicable.[334] Once the preferred remedy is selected, the lead agency must present that alternative to the public in a proposed plan, describe the other remedial alternatives analyzed, and summarize the information relied upon to select the preferred alternative.[335] As discussed below, community involvement is a key element and one of the primary purposes of the proposed plan is to "provide the public with a reasonable opportunity to comment on the preferred alternative... as well as alternative plans under consideration and to participate in the selection of the remedial action at the site."[336]

In the final step of the remedy selection process, the lead agency must factor in any new information or points of view expressed by the state or the community during the public comment period and reassess its initial determination that the preferred alternative provides the best balance of trade-offs.[337] The lead agency must then make a final remedy selection decision and document that decision in the record of decision (ROD).[338] The ROD must be sufficiently detailed for the site at issue and include all facts, analyses of facts, and site-specific

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effectiveness is then compared to cost to ensure that the remedy is cost-effective. A remedy shall be cost-effective if its costs are proportional to its overall effectiveness."

[334] 40 C.F.R. § 300.430(f)(1)(ii) (1992).

[335] 40 C.F.R. § 300.430(f)(2) (1992).

[336] *Id.*

[337] 40 C.F.R. § 300.430(f)(4)(i) (1992).

[338] *Id.* At federal facilities listed on the NPL, the remedial selection process must be made jointly between the head of the relevant department, agency, or instrumentality and EPA. If mutual agreement on the remedy is not reached, selection of the remedy is made by EPA. 40 C.F.R. § 300.430(f)(4)(iii) (1992).

policy determinations considered in the course of making the decision and explain how the evaluation criteria noted *supra* was used.[339] It must also describe how the selected remedy is protective of human health and the environment; how it will attain ARARs or explain why such ARARs will not be meet; how the cost of the remedy is proportional to its overall effectiveness; how the remedy utilizes permanent solutions and alternative treatment technologies or resource recovery technologies; whether the selected remedy meets the statutory preference for remedies that employ treatment of toxicity, mobility, or volume of the hazardous substances (as opposed to mere containment) and if not, why such a remedy was not selected; what remediation goals the remedy is expected to achieve; any significant changes and responses to comments received in response to the proposed plan; whether hazardous substances, pollutants, or contaminants will remain at the site necessitating periodic review of the remedial action; and any commitment for further analysis and selection of long-term response measures.[340] Once the ROD is signed, the lead agency must publish a notice of its availability for inspection prior to the commencement of the remedial action.[341]

4. *Remedial actions and community relations.* The NCP imposes an obligation on the lead agency to involve the public throughout the remedial process. Many of the community relations requirements are similar to those required for removal actions.[342] Before beginning actual field work for the remedial investigation, the lead agency must:

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[339] 40 C.F.R. § 300.430(f)(5)(i) (1992).

[340] 40 C.F.R. § 300.430(f)(5)(ii) and (iii) (1992).

[341] 40 C.F.R. § 300.430(f)(6) (1992).

[342] *See* 40 C.F.R. §§ 300.415(m) and 300.430(c) (1992).

- Solicit concerns and information needs from local officials, community residents, public interest groups, or other interested or affected parties.[343]

- Prepare a formal community relations plan (CRP) that ensures public involvement in site-related decisions, including site analysis and characterization, alternatives analysis, and selection of remedy.[344]

- Establish a repository of local information at or near the location of the response action that contains a copy of items made available to the public and inform the public of its location.[345]

- Inform the community of the availability of technical assistance grants.[346]

The public, as well as PRPs, may participate in aspects of the community relations program, such as technical discussions, and in settlement agreements under CERCLA § 122.[347]

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[343] 40 C.F.R. § 300.430(c)(2)(i) (1992).

[344] 40 C.F.R. § 300.430(c)(2)(ii) (1992).

[345] 40 C.F.R. § 300.430(c)(2)(iii) (1992).

[346] 40 C.F.R. § 300.430(c)(2)(iv) (1992). Technical assistant grants are provided under CERCLA § 117(e), 42 U.S.C. § 9617(e), which provides that "the President may make grants available to any group of individuals which may be affected by a release or threatened release at any facility which is listed on the National Priorities List under the National Contingency Plan. Such grants may be used to obtain technical assistance in interpreting information with regard to the nature of the hazard, remedial investigation and feasibility study, record of decision, remedial design, selection and construction of remedial action, operation and maintenance, or removal action at such facility... The amount of any grant under this subsection may not exceed $50,000 for a single grant recipient.... Not more than one grant may be made under this subsection with respect to a single facility, but the grant may be renewed to facilitate public participation at all stages of remedial action."

[347] 40 C.F.R. § 300.430(c)(4) and (5) (1992).

Once the feasibility study identifies viable alternatives, the lead agency must then assess those alternatives against the nine criteria of 40 C.F.R. § 300.430(e)(9)(iii). One of these criteria is the degree of support a particular alternative has from the affected community.[348] The NCP requires that the lead agency to publish a notice of the proposed plan in a major local newspaper of general circulation; make the proposed plan and supporting analysis and information available in the administrative record in the public repository; provide at least thirty days for public comment; hold a public meeting to be held during the public comment period and make a transcript of this meeting available to the public; and summarize and make available significant comments, criticisms, and new relevant information submitted during the public comment period and its response to each issue.[349] Once the ROD is signed the community relations requirements of the NCP mandate that the lead agency publish a notice of the availability of the ROD and make it available for public inspection and copying at or near the facility at issue prior to the commencement of any remedial action.[350]

During the remedial design/remedial action phase, the lead agency must review the

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[348] 40 C.F.R. § 300.430(e)(9)(iii)(I) (1992).

[349] 40 C.F.R. § 300.430(f)(3)(i) (1992). If new information is disclosed during this comment period "that significantly changes the basic features of the remedy with respect to scope, performance, or cost, such that the remedy significantly differs from the original proposal in the proposed plan and the supporting analysis and information, the lead agency shall.... [s]eek additional public comment on a revised proposed plan, when the lead agency determines the change could not have been reasonably anticipated by the public based on the information available in the proposed plan or the supporting analysis and information in the administrative record." 40 C.F.R. § 300.430(f)(3)(ii) (1992).

[350] 40 C.F.R. § 300.430(f)(6) (1992).

community relations plan to determine if it adequately includes public involvement.[351] If it becomes necessary to amend the ROD such that the basic features of the selected remedy with respect to scope, performance, or cost are fundamentally altered, then the lead agency must make the proposed amendment and information supporting the decision available for public comment for at least thirty days; hold a public meeting during the comment period and make a transcript of this meeting available; include in the amended ROD a brief explanation of the amendment and the response to each of the significant comments, criticisms, and new relevant information submitted during the public comment period; publish a notice of the availability of the amended ROD in a major local newspaper of general circulation; and make the amended ROD and supporting information available to the public in the administrative record and information repository prior to the commencement of the remedial action affected by the amendment.[352]

E. *Consistency with the NCP and the case law.* Since its inception, certain requirements of the NCP tend to be litigated more frequently than others. There appears to be no reason to think that this trend will not continue under the 1990 NCP even though EPA has made it clear that "substantial" compliance is the standard to apply and that minor deviations should not thwart a cost recovery action for an otherwise compliant response action.[353] The following cases are not presented as an exhaustive discussion of the most

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[351] 40 C.F.R. § 300.435(c) (1992).

[352] 40 C.F.R. § 300.435(c)(2) (1992).

[353] 55 Fed. Reg. 8666, 8793 (Mar. 8, 1990). In the comments accompanying the NCP, EPA stated:

troublesome and neglected areas of compliance, but rather because they exemplify the types of actions and omissions that usually prevent a cost recovery action by the lead agency against the responsible parties who should bear the financial burden of the response action.

In the preamble of the 1990 NCP, the Environmental Protection Agency emphasized the importance of the public participation requirement:

> Public participation is an important component of a CERCLA-quality cleanup, and of consistency with the NCP. The public—both PRP's [potentially responsible parties] and concerned citizens—have a strong interest in participating in cleanup decisions that may affect them, and their involvement helps to ensure that these cleanups—which are performed without governmental supervision—are carried out in an environmentally sound manner. Thus, EPA has decided that providing public participation opportunities should be a condition for cost recovery under CERCLA.[354]

Nevertheless, compliance with the NCP's community relations and public notice requirements all too often seems to be an afterthought. Nothing will kill a cost recovery action

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> Thus, in the final rule (§ 300.700(c)(3)), strict compliance with that list of NCP provisions is not required in order to be "consistent with the NCP"... Instead, in evaluating whether or not a private party should be entitled to cost recovery under CERCLA section 107(a)(4)(B), EPA believes that "consistency with the NCP" should be measured by whether the private party cleanup has, when evaluated as a whole, achieved "substantial compliance" with potentially applicable requirements, and resulted in a CERCLA-quality cleanup.
>
> EPA's decision to require only "substantial" compliance with potentially applicable requirements is based, in large part, on the recognition that providing a list of rigid requirements may serve to defeat cost recovery for meritorious cleanup actions based on a mere technical failure by the private party that has taken the response action. For example, EPA does not believe that the failure of a private party to provide a public hearing should serve to defeat a cost recovery action if the public was afforded an ample opportunity for comment.

[354] 55 Fed. Reg. 8666, 8795 (March 8, 1990).

as completely as the failure to make some sort of effort to include public in the process. As the lead agency readies for a cost recovery action, it is faced with a motion for summary judgement by one or more PRPs alleging that the agency failed in its responsibilities in this area. The agency must then scramble to demonstrate how the public was involved, usually without much success.

County Line Investment Co. v. Tinney[355] and *Gussin Enterprises, Inc. v. Rockola*,[356] illustrate the paramount importance of pubic participation. In *County Line*, the plaintiff, County Line Investment Co., brought suit against Tinney, another former owner, to recover CERCLA response costs incident to closure of a sanitary landfill. However, County Line failed to provide for any type of public comment period as required by the NCP.[357] Although the response action was conducted under the 1985 NCP, the court discussed the impact of the 1990 NCP on the standard against which compliance should be measured (i.e., strict or substantial) and concluded that under either standard failure to provide for public comment was fatal to County Line's cost recovery action.[358] The court's ruling was based *solely* on this

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[355] 933 F.2d 1508 (10th Cir. 1991).

[356] 1993 WL 114643, 36 Envtl. Rep. Cas. (BNA) 1903 (N.D. Ill. 1993)

[357] *County Line Investment Co. v. Tinney* at 1514.

[358] *Id.* at 1514-15 ("We need not decide this issue, however, because the result in this case is the same under either standard. Both the 1985 and 1990 NCPs require, at a minimum, that a private party attempting to act "consistent with the national contingency plan" provide an opportunity for public comment on its selection of the response action for the site. See 1990 NCP, 55 Fed. Reg. at 8858 (to be codified at 40 C.F.R. s 300.700(c)(6)); 1985 NCP, s 300.71(a)(2)(ii)(D) (1988)... It is undisputed that the [County Line] provided no such opportunity for public comment on their response action at the Landfill. Accordingly, under either the strict compliance standard employed by the district court or the substantial compliance standard stated in the 1990 NCP, the costs incurred by New Owners in closing

deficiency; it did not matter—nor did the court discuss—whether the response actions taken at the site were otherwise consistent with the NCP.[359]

In *Gussin Enterprises, Inc. v. Rockola*, Gussin sought to recover CERCLA response costs incurred in conjunction with the investigation and clean-up of the contaminated site from Rockola, the previous owner of the facility.[360] After the court concluded that Gussin's actions were "remedial" it then analyzed whether those actions were consistent with the NCP.[361] The court found that there is was no indication that the public had any opportunity to comment on the remedial action and concluded that, absent meaningful public participation, the cost recovery claim for the remedial action under must fail.[362]

Arguments that participation by other public agencies or public participation in some forum outside CERCLA have been advanced with very limited success. In *Sherwin-Williams Co. v. City of Hamtramck*,[363] Sherwin-Williams brought an action seeking a declaratory

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the Landfill were not consistent with the NCP and hence are not recoverable under CERCLA section 107 as a matter of law.").

[359] *Id.* However, the court left open the possibility that County Line may have been able to recover some of its pre-closure investigatory costs had it distinguished those costs from other costs at trial and independently demonstrated their consistency with the NCP. *Id.* at 1515.

[360] *Gussin Enterprises, Inc. v. Rockola* at *1.

[361] *Id.* at *5. The court refused to determine the issue of whether the 1985 NCP and its "strict compliance" standard applied or if the 1990 NCP and its more forgiving "substantial compliance" standard applied retroactively to the response action which began in 1989. Instead, the court found that Gussin's actions failed to comply with either.

[362] *Id.*

[363] 840 F. Supp. 470 (E.D. Mich. 1993).

judgment that cleanup costs incurred by the City of Hamtramck were not recoverable under CERCLA because the city failed to comply with the public notice requirements of the NCP.[364] The court analyzed the City's actions against the 1990 NCP requirements for community involvement and held that state regulatory involvement in the remedial process was not an adequate substitute for the public comment requirements of the NCP.[365]

> Public comment means just that, public comment. Negotiations between the City and [the Michigan Department of Natural Resources] officials do not constitute the public comment contemplated by the CERCLA regulations... the NCP requires that a brief analysis of the proposed plan be published in a major newspaper, that not less than thirty days be allowed for the submission of written and oral comments from the public, and that a public meeting be held during the comment period at or near the proposed cleanup site... The regulations clearly contemplate participation by the general public in decisions that could affect the environmental conditions of their neighborhood. Using state regulators as a substitute for the "public" is contrary to the letter and the spirit of the regulations. Furthermore... even where a cleanup is conducted by the EPA or a state agency, a public comment period is required.[366]

On the sole basis of the City's failure to provide for public comment, the court found that the City was not in substantial compliance with the NCP and unable to recover its costs incurred in its remediation efforts.[367]

The court in *Pierson Sand & Gravel, Inc. v. Pierson Township*[368] reached a similar

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[364] *Sherwin-Williams Co. v. City of Hamtramck* at 472.

[365] *Id.* at 476-77.

[366] *Id.* at 477.

[367] *Id.* at 477-78.

[368] --- F. Supp. ----, 1994 WL 170723 (W.D. Mich. 1994).

result. The plaintiff purchased a landfill in 1984 and continued to operate it.[369] Although the landfill was never authorized to receive hazardous waste, in 1987 Pierson Sand was notified that groundwater in the area of the landfill evidenced contamination and the landfill was the suspected source.[370] Pierson Sand was required by the state environmental agency to remediate the site and during process it uncovered evidence that Pierson Township and others may have deposited hazardous waste at the site prior to its purchase by Pierson Sand.[371] Pierson Sand brought suit to recover response costs of $5.2 million incurred in removing hazardous wastes from, and remediating their effects at, the site.[372] Pierson Sand argued that it had complied with the public notice requirements of the NCP in that it discussed the remediation of the site at a public hearing held on its application to expand the landfill operation.[373] But at the hearing, there was no discussion or analysis of response action alternatives; no discussion of the environmental impact of the existing contamination or of the proposed re-mediation; and no discussion of cost-effectiveness.[374] Although the hearing offered opportunity for public comment on related matters, it ultimately had nothing to do with the fundamental purpose underlying the NCP. The court succinctly stated that "[t]his

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[369] *Pierson Sand & Gravel, Inc. v. Pierson Township* at *1.

[370] *Id.*

[371] *Id.*

[372] *Id.*

[373] *Id.* at *5.

[374] *Id.* at *6.

shortfall is not merely an 'immaterial or insubstantial deviation;' it is a fundamental defect."[375] Pierson Sand pointed to a second public meeting that took place shortly after the remedial action had begun and the court similarly concluded that it, too, failed to afford the public any meaningful opportunity to participate in selection of the appropriate response action.[376]

Compare the result in *Pierson Sand* to that in *Amcast Indus. Corp. v. Detrex Corp.*[377] In *Amcast Indus.* the plaintiff sought to recover CERCLA response costs from Detrex Corp., a supplier of industrial chemicals whose drivers allegedly spilled trichloroethylene ("TCE"), a CERCLA hazardous substance, during deliveries at Amcast's facility.[378] The court declined to decide which version of the NCP would apply—the 1985 NCP, which required "strict" compliance and was the version in effect when the case was filed, or the less onerous 1990 NCP, which was in effect at the time of the court's opinion—since the result would be the same under either.[379] This case is noteworthy because the court found that the Amcast met its public participation requirements under the NCP through its pursuit of a NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM ("NPDES") permit needed as part of the remedial action.[380] With respect to the 1985 NCP, the court considered the notice and

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[375] *Id.*

[376] *Id.* at *6-7 ("The two public meetings relied upon by Pierson Sand, whether viewed separately or conjunctively, do not approach the 'substantial compliance' threshold.").

[377] 779 F. Supp. 1519 (N.D. Ind. 1991), *aff'd in part, rev'd in part*, 2 F.3d 746 (7th Cir. 1993), *cert. den.* Detrex Corp. v. Amcast Indus. Corp., 114 S.Ct. 691 (1994).

[378] *Amcast Indus. Corp. v. Detrex Corp.* at 1524.

[379] *Id.* at 1536-37.

[380] *Id.* at 1537.

opportunity to review Amcast's permit application, the absence of any feasibility studies or alternative remedies, the absence of any public meeting (ostensibly because there was no significant public interest), the public comments that were received.[381] With respect to the requirements of the 1990 NCP, the court noted that public comment was invited in the notice of the application for the NPDES permit, the public submitted comments to which state officials responded, there would have been a public hearing had state officials decided that there was significant public interest.[382] Unlike the application to expand the landfill in *Pierson Sand*, the NPDES permit was *part of* the remedial action.

Metropolitan Services Dist. v. Oregon Metal Finishers, Inc.[383] is included to emphasize that the courts will not, and should not, sacrifice the NCP for expedience or efficiency.[384] In *Metropolitan Service District* the plaintiff (Metro) acquired by eminent domain property from the defendant in 1987 and thereafter learned of potential hazardous waste contamination.[385] Metro promptly contracted with an engineering firm to take soil samples on the property.[386] The results indicated concentrations of hazardous substances were at or below normal background levels within the area and the parties agreed to allow one of

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[381] *Id.*

[382] *Id.* at 1537-38.

[383] 1990 WL 134537, 32 Envtl. Rep. Cas. (BNA) 1102 (D. Or. 1990).

[384] *See also* Versatile Metals, Inc. v. Union Corp. 93 F. Supp. 1563, 1572 (E.D. Pa. 1988).

[385] *Metropolitan Services Dist. v. Oregon Metal Finishers, Inc.* at *1.

[386] *Id.*

the defendant PRPs to undertake a site cleanup.[387] The state environmental agency inspected the site and stated that there appeared to be no more contamination.[388] However, subsequent soil samples taken from an area under a recently demolished building indicated that the soil was contaminated with "potentially high levels" of chrome and Metro undertook a CERCLA response action.[389] The court found that the response actions of Metro were acts of remediation and not removal and that it was precluded from recovering its costs because it did not comply with the requirements of the NCP (no public notice; defendants did not have any opportunity to participate in the selection of the kind of remedial action).[390] Apparently, Metro valued expedience over conipliance with the NCP and knowingly elected to proceed outside of the formal requirements of public notice in order to avoid construction delays. Metro and the state felt that this course of action would be *less* burdensome for the public coffers.[391] Instead, it insured that the taxpayers would bear the sole burden of the cleanup rather than the culpable parties.

Louisiana-Pacific Corp. v. ASARCO Inc.[392] illustrates how the lead agency may, even

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[387] *Id.*

[388] *Id.*

[389] *Id.* at *1-2.

[390] *Id.* at *2-3.

[391] *Id.* at *3.

[392] Louisiana-Pacific Corp. v. ASARCO Inc., 6 F.3d 1332 (9th Cir. 1993) Opinion Amended by 13 F.3d 1378 (9th Cir. 1994) Opinion Withdrawn and Superseded by --- F.3d ----, 1994 WL 150239 (9th Cir. 1994) *reh'g denied* --- F.3d ----, 1994 WL 150232 (9th Cir. 1994).

if unintentionally, comply with the public participation requirements of the NCP. In this case, ASARCO's copper smelting process, in operation since 1905, produced large amounts of a by-product called "slag" which ASARCO began to sell to logyards in 1973. After the slag served its useful purpose, the logyards disposed of it in local landfills. In 1986, the state environmental protection agency began requiring cleanups of the logyards. The Port of Tacoma, which owned some of the logyard sites, then sued ASARCO for response costs under CERCLA and state law.[393] ASARCO contended that is should not be responsible for response costs because the Port failed to comply with notice and comment requirements of the NCP for the selection of the remedial action.[394] The Circuit Court of Appeals noted that, while compliance was not perfect, it was substantial.[395] The Port held six meetings at which the cleanup of the site was discussed, including two meetings held after preparation of the feasibility study outlining cleanup options.[396] The meetings and their agendas were well advertised and open to the public and the feasibility study was likewise available for public examination at the Port's office.[397] The court did not specifically address the contents of the public notice or the primary purpose of the meetings, it seemed sufficient that there was *some* opportunity for public participation.[398]

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[393] *Id.* at 1336.

[394] *Id.* at 1341.

[395] *Id.* at 1341-42.

[396] *Id.* at 1341-42.

[397] *Id.*

[398] *Id.*

Other major areas frequently litigated center around the broad requirements for development and selection of the removal or remedial plan. The plaintiff in *Channel Master Satellite Systems, Inc. v. JFD Electronics Corp.*[399] spent close to $3.4 million on a "cleanup" of two properties and then sought to recover these costs from JFD Electronics Corp., who occupied the premises from 1968 to 1979, and its corporate parent.[400] The court first dealt with the issue of whether the cleanup was a remedial action or a removal action and ultimately concluded that it was remedial in nature.[401] Next, the court evaluated Channel Masters' remedial action against the four requirements of the 1985 NCP: (1) appropriate site investigation and analysis of remedial alternatives; (2) compliance with the scoring, development, and selection criteria; (3) selection of a cost-effective response and (4) provision of an opportunity for public comment concerning the selection of a remedy.[402] The court concluded it was inappropriate to consider the third requirement on a motion for summary judgement but went on to find that Channel Master had nevertheless failed to meet the other three requirements.[403] At what should have been the remedial investigation stage, Channel Master lacked any discernable plan and made no effort to evaluate the risk to public health or the environment or consider available information from evaluations conducted by

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[399] 748 F. Supp. 373 (E.D. N.C. 1990).

[400] *Id.* at 376.

[401] *Id.* at 384-87.

[402] *Id.* at 387 (*citing* 40 C.F.R. s 300.71(a)(2)(A)-(D) (1985).

[403] *Id.*

others.[404] It failed to conduct a feasibility study or otherwise meet any of the NCP's other requirements to assessing factors to determine whether and what type of remedial and/or removal actions to considered or the development of alternatives.[405] Furthermore, Channel Master failed to provide an opportunity for appropriate public comment concerning the selection of a remedial action.[406] Whether analyzed under a strict or substantial compliance standard, Channel Masters' actions were inconsistent with the NCP and their costs were, therefore, unrecoverable.[407]

Versatile Metals, Inc. v. Union Corp.[408] is another case in which the plaintiff failed to comply with the NCP. In this case the court found that Versatile Metals was a responsible party since it had negligently handled electrical capacitors and transformers which caused and contributed to the level of the release of PCBs.[409] However, Metal Bank, who had incurred CERCLA response costs at the site, failed to comply with the NCP and was denied cost recovery.[410] Specifically, Metal Bank failed to conduct an adequate remedial investigation or

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[404] *Id.* at 387-88.

[405] *Id.*

[406] *Id.* at 389-90. *Note:* The court rejected Channel Masters' argument that the input provided by state agencies was the substantial equivalent of public involvement stating that "[p]ublic knowledge and involvement in the selection of a remedial response is one of the most significant elements of the remedial process." *Id.* at 390.

[407] *Id.* at 390-93.

[408] 693 F. Supp. 1563 (E.D. Pa. 1988).

[409] *Id.* at 1572.

[410] *Id.* at 1582. *Note:* response costs were incurred starting in May, 1984 and continued until March 1985. The court concluded that consistency with the NCP should be determined "in light of the NCP in effect at the time the response costs were incurred, not

any sort of feasibility study and, therefore, failed to address the full range of alternatives as required by the NCP.[411] Metal Bank's expert testified at trial that this "short-cut" saved at least one to three years worth of time and well over a million dollars.[412] The court also noted that the lack of a proper feasibility study and failure to consider alternatives to the remedial action made it impossible for Metal Bank demonstrate other requirements of the NCP such as cost-effectiveness or the necessity of the response costs incurred.[413] It is interesting to note some of the other deficient areas *not* addressed by the court—failure to meet ARARs,[414] no community involvement or opportunity for public comment, and an inadequate remedial investigation. The conclusion to be drawn, at least from this court, is that the feasibility study is a fundamental NCP requirement, paramount to many others, making it unnecessary to address them.

Contrast these cases with *U.S. Steel Supply Inc. v. Alco Standard Corporation*[415] in which the plaintiff did just about everything right. In *U.S. Steel Supply Inc.*, Alco owned the facility at issue from the mid-1960s until it was sold to USSSI in 1988.[416] Thereafter, USSSI undertook a CERCLA response action at the facility and then brought this cost recovery

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when the response actions were initiated or when the claims for cost recovery are evaluated." *Id.* at 1574. Therefore, the court applied the NCP of 1982 as clarified by the NCP of 1985.

[411] *Id.* at 1580-81.

[412] *Id.* at 1581.

[413] *Id.* at 1582.

[414] *Id.* at 1582 n.9 (The post-remedial soil contamination levels exceeded ARARs.).

[415] 1992 WL 229252, 36 Envtl. L. Rep. 1330 (N.D. Ill. 1992).

[416] *Id.* at *1.

action against Alco for past and future response costs. The court first determined that the response action should be characterized as a "removal" and then compared USSSI activities with the standards set forth in the 1985 NCP for removal actions.[417] Ultimately, the court concluded that USSSI's removal adequately complied with the 1985 NCP and the pending remediation plan was developed in the manner required by the 1990 NCP: USSSI adequately assessed the site; site conditions warranted the removal action; Alco was notified of the circumstances and the pending response action before any substantial commitment had been made giving Alco the opportunity to join in the response action; USSSI considered the actual or potential exposure of nearby populations (employees and residents), animals, and the food chain to hazardous substances; USSSI considered the actual or potential contamination of drinking water supplies; USSSI considered the threat of release of any stored contaminants and the risk of migration of solvents in the soil.[418] Although the assessment was not extensive, it was fully responsive to the exigencies of the situation.[419]

Amland Properties Corp. v. Aluminum Company of America[420] is included because it illustrates how a plaintiff may be able to recover removal costs independently from remedial cost, assuming such costs may be separately proved. In *Amland Properties*, Aluminum Company of America (Alcoa) owned and operated an industrial facility from 1914 to 1965.[421]

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[417] *Id.* at *9.

[418] *Id.* at *12-13.

[419] *Id.* at *13.

[420] 711 F. Supp. 784 (D. N.J. 1989).

[421] *Id.* at 787.

The facility was sold in 1968 and there were several intervening owners before it was acquired by Amland Properties in 1983.[422] Amland brought this action against Alcoa to recover its CERCLA response costs incurred in evaluating and responding to PCB contamination at the plant.[423] The court characterized the preliminary monitoring and evaluation costs incurred early in the response action from other cost incurred later in the process, especially those associated with actual remediation.[424] It found that these preliminary costs fell within the definition of "removal" and were recoverable as response costs consistent with the NCP.[425] Amland's remaining actions were characterized as remedial and evaluated under the strict compliance standard of the 1985 NCP.[426] The court divided Amland's response into two components: the means by which Amland established the standard of cleanup (i.e., how clean the facility was to be made) and the means by which Amland chose the remedial method that would achieve that standard.[427] Although the court found that the establishment of the cleanup standard was done consistent with the NCP, it nevertheless denied recovery because the process to select the remedial method was not.[428] In conducting the feasibility study, Amland considered only five of the fifteen factors required by the 1985

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[422] *Id.*

[423] *Id.* at 784. Amland also sued based on strict liability, private nuisance, public nuisance and negligence.

[424] *Id.* at 795.

[425] *Id.*

[426] *Id.* at 796.

[427] *Id.* at 798.

[428] *Id.* at 798-99.

NCP to determine the types of remedial actions that would be considered.[429] Furthermore, Amland developed alternative remedies based upon only one of the five required categories;[430] failed to conduct the initial screening of the alternatives in terms of cost-effectiveness;[431] and failed to provide an opportunity for public comment.[432]

Compliance with the NCP will always be a fact-specific inquiry and, as such, it is difficult to say with certainty at what point the amorphus "substantial compliance" standard will be met. Clearly, the courts have exhibited an attitude of forgiveness where the plaintiff has given them cause to do so. One commentator aptly summarized what is necessary of response parties as follows:

> ...whether the response is evaluated under a strict compliance standard or substantial compliance standard, at least some attempt must be made to

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[429] *Id.* at 799-800. Amland considered population at risk; routes of exposure; amount, concentration, and form of hazardous substances; determination of applicable state standard; and extent to which contamination levels exceed standard. The factors not considered by Amland were hydrogeological factors, such as soil permeability; current and potential groundwater uses; climate; extent to which source can be identified; likelihood of future releases; adequacy of natural or man-made barriers; extent of migration of substance; and air, land, water, and/or food chain contamination. *See* 40 C.F.R. § 300.68(e)(2) (1985).

[430] *Id.* at 800. Amland considered alternatives that attained applicable or relevant and appropriate Federal public health and environmental requirements but failed to consider alternatives for treatment or disposal at an off-site facility; alternatives that exceeded applicable or relevant and appropriate Federal public health and environmental requirements; alternatives that did not attain applicable or relevant and appropriate Federal public health and environmental requirements but nevertheless would reduce the likelihood of present or future threat from the hazardous substances and that provided significant protection to public health and welfare and the environment; and a "no action" alternative. *See* 40 C.F.R. § 300.68(f)(1) (1985).

[431] *Id.*

[432] *Id.* at 801. The court rejected Amland's assertion that participation by state and local officials was an adequate substitute for public comment.

> either satisfy each portion of the NCP, or demonstrate its inapplicability.... even under the new NCP, private parties must at least make some attempt to comply with the broad requirements of the NCP, and their action when evaluated as a whole must be in substantial compliance with the NCP, and result in a CERCLA quality cleanup. This means that public comment periods are still required for compliance even though the standard has been somewhat relaxed. PRPs that have made some attempt at public comment periods, or some substitute for it, have not been denied recovery. Only those who have not even arguably provided for public comment have been held not to be in compliance with the NCP. The same is true of all the major provisions of the NCP. Only those who have not made an attempt to satisfy one or more provisions of the NCP have been denied any recovery. Therefore, it is important that PRPs make some attempt to satisfy each of the general requirements of the NCP in order to recover response costs under CERCLA.[433]

V. **DOD's cost recovery at an non-NPL site.**

A. *Who's in charge: DOD or EPA?* The application of state law to CERCLA response activities varies depending on whether the site is listed on the NPL.[434] CERCLA § 120 imposes on federal facilities the obligation to apply state law in the same manner and to the same extent as any nongovernmental entity at non-NPL sites:

> State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at

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[433] Charles C. Steincamp, *Toeing the Line: Compliance with the National Contingency Plan for Private Party Cost Recovery Under CERCLA*, 32 WASHBURN L. J. 190, 227-28 (Winter, 1993).

[434] Inclusion on the NPL invokes requirements that significantly affect how remedial actions are implemented. CERCLA § 120(e) establishes schedules for completion of certain tasks once a federal facility is placed on the NPL. For instance, at the completion of a remedial investigation and feasibility study, the head of the federal agency must enter into an interagency agreement (IAG) with the Administrator of EPA for the "expeditious completion ... of all necessary remedial actions at such facility." CERCLA § 120(e)(2), 42 U.S.C. § 9620(e)(2) (West 1994). Under the IAG, the agency and the EPA review remedial action alternatives, with selection of a remedial action by the Administrator in the event of a disagreement, and provide a schedule for completion of a remedial action and long-term monitoring and maintenance. CERCLA § 120(e)(4), 42 U.S.C. § 9620(e)(4) (West 1994).

> facilities owned or operated by a department, agency, or instrumentality of the United States when such facilities are not included on the National Priorities List. The preceding sentence shall not apply to the extent a State law would apply a standard or requirement to such facilities which is more stringent than the standards and requirements applicable to facilities which are not owned or operated by any such department, agency, or instrumentality.[435]

Even though state law applies in the development of cleanup standards at federal facilities not listed on the NPL, DOD is nevertheless the "lead agency" for CERCLA response actions:

> ...it is important to note that pursuant to CERCLA section 115 and E.O. 12,580, the federal agencies and departments have been delegated the responsibility under CERCLA section 104 for evaluating and taking response actions, as necessary, for most releases that occur at non-NPL facilities within their jurisdiction, custody, or control (E.O. 12,580, at section 2(d) and (e)). The federal agencies also have responsibilities for the conduct of response actions at NPL sites pursuant to CERCLA section 120.[436]

Regardless of whether the facility is listed on the NPL, DOD must nevertheless comply with the full scope of procedures found in the NCP. Under CERCLA § 120, DOD is forbidden to "adopt or utilize any such guidelines, rules, regulations, or criteria which are inconsistent with the guidelines, rules, regulations, and criteria established by the Administrator..."[437] Furthermore, CERCLA § 121 addresses cleanup standards in the context of

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[435] CERCLA § 120(a)(4), 42 U.S.C. § 9620(a)(4) (West 1994).

[436] 55 Fed. Reg. 8666, 8676 (March 8, 1990); 54 Fed. Reg. 10,520, 10,524 (March 13, 1989) ("This is especially true for Federal facility sites, as the President has delegated his authority to take CERCLA section 104 response actions (including RI/FSs) to the Federal agencies for most non-NPL sites (Executive Order 12,580, at section 2(e)(1)).").

[437] CERCLA § 120(a)(2), 42 U.S.C. § 9620(a)(2) (West 1994).

CERCLA § 104 response actions.[438] At times, the requirements to comply with the NCP and/or CERCLA § 121 may conflict with DOD's additional requirement to comply with state law and state standards at non-NPL facilities.[439]

B. *The elusive "Subpart K".* A discussion of the application of the NCP to federal facilities would be incomplete without some reference to the long-awaited, yet unseen, "Subpart K" of the NCP. According to EPA, the new Subpart K will "consolidate in one subpart of the NCP references to other subparts that federal agencies must follow when conducting CERCLA response actions where the release is on, or the sole source of the release is from, their facility."[440] The preamble to the 1990 NCP gives some hint as to the kinds of issues—at both NPL and non-NPL sites—that may be addressed by the new subpart:

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[438] CERCLA § 121(a), 42 U.S.C. § 9621(a) (West 1994) ("The President shall select appropriate remedial actions determined to be necessary to be carried out under [CERCLA § 104]... which are in accordance with this section and, to the extent practicable, the national contingency plan...").

[439] *See* Kyle E. McSlarrow, *The Department of Defense Environmental Cleanup Program: Application of State Standards to Federal Facilities After SARA*, 17 Envtl. L. Rep. 10120 (April, 1987) where the author writes:

> Congress has, in § 121, specifically identified the procedures that are to be followed when federal agencies and states disagree on cleanup standards. Although not free from doubt, the better interpretation of § 120(a)(4) and § 121 gives effect to both and concludes § 104 actions are to comply with state ARARs through § 121 rather than § 120(a)(4). This is not to suggest that § 120(a)(4) is meaningless. Rather, the reference in § 120(a)(4) to "[s]tate laws concerning removal and remedial action" should be read, in light of § 121, to refer to the detailed provisions on state standards and requirements found in § 121 when performing § 104 response actions. In circumstances presented by response actions outside the authorities of § 104, there is no conflict between § 120(a)(4) and § 121.

[440] *Superfund: OMB Suspends Review of Subpart K Rule, Solicits Comments From Affected Agencies*, Current Developments, 22 Env't. Rep. (BNA) 1563 (October 18, 1991).

> A number of commentators on the proposal made statements relating to federal facilities, including suggestions for how subpart K of the NCP should address their concerns. Issues raised by commentators included the applicability of the NCP at non-NPL federal facilities, state involvement at federal facilities, the role of federal agencies as lead agency at their facilities, and the applicability of the removal time and dollar limits to removal actions at federal facilities. These are important issues that EPA is considering in the development of the proposed subpart K, which is the subject of a separate rulemaking. EPA will address these comments as well as additional comments received on the proposed subpart K in the preamble and support document to the final rule on subpart K.
>
> Subpart K will provide a roadmap to those requirements in the NCP that federal agencies must follow when conducting CERCLA response actions where either the release is on, or the sole source of the release is from, any facility or vessel under their jurisdiction, custody, or control, including vessels bare-boat chartered or operated.[441]

As of this date, however, all that is included in the NCP under the heading of Subpart K is one word: "[Reserved]".[442] And the rulemaking that would create Subpart K is on hold.[443]

C. *State law alternatives.* Many states have enacted environmental statutes that can be used to recover the costs incurred in the remediation of environmental damages.[444] Some statutes are the equivalent of their federal counterparts while others are much less

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[441] 55 Fed. Reg. 8666, 8667 (March 8, 1990).

[442] 40 C.F.R. Subpart K (1992).

[443] *Superfund: Cost Evaluation Expected 'Very Soon' On Expanding Mixed Funding, Official Says,* Current Developments, 24 Env't Rep. (BNA) 778 (August 27, 1993) ("Rule-making also pertaining to the cleanup of federal facilities has been put on hold, Ellen Brown, an official with EPA's Office of Solid Waste and Emergency Response, said Aug. 24.").

[444] *See* Elaine C. Warren, *State Hazardous Waste Superfunds and CERCLA: Conflict or Complement?*, 13 Envtl. L. Rep. 10348 (November, 1983).

comprehensive.[445] There are at least two ostensible reasons for proceeding under state law rather than under federal law and CERCLA. First, the costs sought may not be recoverable under the more stringent federal law. For instance, an irreconcilable difference between what is mandated under state law at a non-NPL site and what is required of the lead agency by the NCP may thwart any cost recovery under CERCLA § 107. Such costs may nevertheless be recoverable under a less stringent state law. Second, the damages sought through the cost recovery are beyond the scope of recoverable damages under federal law and CERCLA. For instance, CERCLA provides only for the recovery of response costs. If the plaintiff seeks to recover property damages or personal injury, he must do so under state law.

CERCLA's substantive provisions cover three basic areas: response actions, liability, and the Superfund trust. CERCLA-like state statutes may address just one or all of these areas. And the manner in which these areas are addressed may vary significantly from state to state. Consider the operative liability provisions of the California[446] and Florida[447] statutes. California specifically adopts the CERCLA definition for liable or responsible parties.[448] This

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[445] Unlike statutes such as the CLEAN AIR ACT and CLEAN WATER ACT, CERCLA does not mandate specific requirements for comprehensive state programs. *See* CAA § 110, 42 U.S.C. § 7410 (West 1994); CWA § 402, 33 U.S.C. § 1342 (West 1994).

[446] CAL. HEALTH & SAFETY CODE § 25323.5 (West 1994).

[447] FLA. STAT. ANN. §§ 403.141 and 403.161 (West 1994).

[448] CAL. HEALTH & SAFETY CODE § 25323.5 (West 1994) provides:

§ 25323.5. **Responsible party or liable person**

(a) "Responsible party" or "liable person," for the purposes of this chapter, means those persons described in Section 107(a) of the federal act (42 U.S.C. Sec. 9607(a)).

would, by implication, include the strict liability standard under CERCLA recognized by the courts.[449] Florida, on the other hand, simply states that anyone who commits a violation specified in the statute "is liable" and goes on to note that such liability is joint and several.[450] The statute does not expressly address strict liability; if it is to be found it must be implied. However, both California and Florida allow responsible parties to apportion or otherwise

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(b) For the purposes of this chapter, the defenses available to a responsible party or liable person shall be those defenses specified in Sections 101(35) and 107(b) of the federal act (42 U.S.C. Secs. 9601(35) and 9607(b)).

[449] *See* United States v. Monsanto, 858 F.2d 160, 167-68 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989); United States v. Northeastern Pharmaceutical & Chemical Co., 810 F.2d 726, 738 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

[450] FLA. STAT. ANN. § 403.141(1) and (2) (West 1994) provides, in part:

403.141. **Civil liability; joint and several liability**

(1) Whoever commits a violation specified in s. 403.161(1) is liable to the state for any damage caused to the air, waters, or property, including animal, plant, or aquatic life, of the state and for reasonable costs and expenses of the state in tracing the source of the discharge, in controlling and abating the source and the pollutants, and in restoring the air, waters, and property, including animal, plant, and aquatic life, of the state to their former condition...

(2) Whenever two or more persons pollute the air or waters of the state in violation of this chapter or any rule, regulation, or order of the department so that the damage is indivisible, each violator shall be jointly and severally liable for such damage and for the reasonable cost and expenses of the state incurred in tracing the source of discharge, in controlling and abating the source and the pollutants, and in restoring the air, waters, and property, including the animal, plant, and aquatic life of the state, to their former condition. However, if said damage is divisible and may be attributed to a particular violator or violators, each violator is liable only for that damage attributable to his violation.

(3) ....

(4) ....

devise the cleanup costs.[451]

Consider also the purposes for which the state trust funds may be used and how those purposes compare to CERCLA and the Superfund. For example, both the California[452] and Florida[453] statutes go beyond CERCLA and permit compensation for loss or injury incurred by third parties. Under the California statute "one hundred percent of uninsured, out-of-pocket medical expenses" are covered.[454] Florida's statute establishing its Hazardous Waste Management Trust Fund provides that one purpose of the fund is "to pay for all provable property damages which are the proximate results of hazardous wastes released into the environment after the effective date of this act."[455]

D. *Common law alternatives.* When it becomes necessary to look beyond the scope of federal law when pursuing cost recovery alternatives, one should consider common law theories of liability in addition to any state environmental statutes. Where fault can be

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[451] CAL. HEALTH & SAFETY CODE § 25363(a) (West 1994) ("...any party found liable for any costs or expenditures recoverable under this chapter who establishes by a preponderance of the evidence that only a portion of those costs or expenditures are attributable to that party's actions, shall be required to pay only for that portion."); FLA. STAT. ANN. § 403.141(2) (West 1994) ("However, if said damage is divisible and may be attributed to a particular violator or violators, each violator is liable only for that damage attributable to his violation.").

[452] CAL. HEALTH & SAFETY CODE § 25375 (West 1994). *See* also CAL. HEALTH & SAFETY CODE § 25301(West 1994) which states that it is "the intent of the Legislature to.... [c]ompensate persons, under certain circumstances, for out-of-pocket medical expenses and lost wages or business income resulting from injuries proximately caused by exposure to releases of hazardous substances."

[453] FLA. STAT. ANN. § 403.725 (West 1994).

[454] CAL. HEALTH & SAFETY CODE § 25375(a)(1) (West 1994).

[455] FLA. STAT. ANN. § 403.725(1) (West 1994).

shown, environmental contamination and damages therefrom may be actionable through such remedies as nuisance, trespass, or negligence. If the activity is one usually described as "ultrahazardous", common law doctrine of strict liability may be applicable.[456]

E. *Planning for cost recovery at a non-NPL site.* Where DOD undertakes a response action under CERCLA § 104 at a non-NPL site on a DOD facility, cost recovery should be no different than it would be at an NPL site. To recover its clean up cost, the removal or remedial action must substantially comply with the NCP. Even when performed under state laws that lack rigor equivalent to the NCP, the agency must consider, and plan to include, certain "threshold" requirements of the NCP such as community relations activities, sufficient investigation and development of alternatives (whether removal or remedial in scope), and cost-effective.[457]

VI. Conclusion.

Structuring a response action at a federal facility in a manner that in all cases will preserve the agency's ability to pursue a successful cost recovery action may be difficult, but not impossible. Indeed, there may be overriding practical considerations that make it unreasonable to pursue a more costly—in terms of both time and dollars—response compliant with the NCP. Such as when there are no other viable, solvent PRPs from whom response

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[456] For a discussion of the applicability of common law remedies to environmental damages, *see* Charles C. Steincamp, *Toeing the Line: Compliance With the National Contingency Plan For Private Party Cost Recovery Under CERCLA*, 32 WASHBURN L. J. 190 (Winter, 1993); James R. Haisley, *Private Party Recovery of Environmental Response Costs*, 6 BYU J. PUB. L. 261 (1992); Robert I. McMurry and David H. Pierce, *New Developments for Environmental Practitioners in Hazardous Materials Litigation*, C750 ALI-ABA 343 (August 19, 1992).

[457] *See supra* pp. 73-92.

costs may be recovered or such PRPs are ultimately DOD contractors for whom the agency will ultimately bear the CERCLA response costs. However, the lessons learned from *Metropolitan Services Dist. v. Oregon Metal Finishers, Inc.*[458] and *Versatile Metals, Inc. v. Union Corp.*[459] should remind all that the courts will not forgive compliance with the NCP in the name of cost-cutting short-cuts or expediency. One must *plan* for cost recover, not plunge headlong into a cleanup and then at some later time, usually after the costs of response activities balloon to more than anyone anticipated, hope to assemble sufficient evidence of compliance with the NCP to permit cost recovery.[460]

If the site to be remediated is an NPL site, the CERCLA cleanup progress *should* proceed naturally in a manner that is consistent with the NCP and that preserves DOD's ability to pursue cost recovery. The difficulties arise most often when the site to be remediated is not listed on the NPL and the cleanup activity is pursuant to some other law such as RCRA corrective action or a state's own superfund law. In such cases, however, cleanup actions may nevertheless be structured in such a manner that they comply with both the NCP and the statutory authority impelling the action.

As noted by the Third Circuit Court of Appeals, "...if a particular government action

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[458] 1990 WL 134537, 32 Envtl. Rep. Cas. (BNA) 1102 (D. Or. 1990). *See supra* p. 99.

[459] 693 F. Supp. 1563 (E.D. Pa. 1988). *See supra* p. 103.

[460] DOD practitioners must remember that CERCLA § 120 forbids DOD to "adopt or utilize any such guidelines, rules, regulations, or criteria which are inconsistent with the guidelines, rules, regulations, and criteria established by the Administrator..." CERCLA § 120(a)(2), 42 U.S.C. § 9620(a)(2) (West 1994). Therefore, regardless of whether or not the facility is listed on the NPL, DOD must nevertheless comply with the full scope of procedures found in the NCP.

qualifies as a 'removal action' under the definition contained in CERCLA, the government's costs are recoverable under the unambiguous language of [CERCLA § 107], regardless of what statutory authority was invoked by EPA in connection with its action."[461] This proposition is consistent with *Reading Co. v. City of Philadelphia*[462] where the plaintiff brought a cost recovery action against the defendants for their share of $8.6 million in clean-up costs already incurred by the plaintiff, as well as any future costs incurred, in removing polychlorinated biphenyls ("PCBs") from the contaminated sites.[463] The cleanup activities performed by the plaintiff were accomplished pursuant to the TOXIC SUBSTANCES CONTROL ACT[464] rather than CERCLA. The defendants filed a motion for summary judgement claiming, in part, that the cleanup activities performed under TSCA were not recoverable under CERCLA. In denying the defendant's motion for summary judgement, the court first acknowledged that "TSCA, unlike CERCLA, does not create a private right of action authorizing a private party to recover response costs from other responsible parties."[465] Nevertheless, the court concluded:

> No conflict exists between the two statutory schemes. CERCLA, the later of the two statutes, expressly states that liability under the statute may be imposed upon a covered person "[n]otwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this

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[461] United States v. Rohm and Haas Co., 2 F.3d 1265, 1274-75 (3rd Cir. 1993) ("...a 'removal' is a removal whether it is undertaken pursuant to CERCLA or another statute...").

[462] 823 F. Supp. 1218 (E.D. Pa. 1993).

[463] *Id.* at 1221-22.

[464] 15 U.S.C. §§ 2601 to 2692 (West 1994).

[465] *Reading Co. v. City of Philadelphia* at 1229.

> section." [CERCLA § 107(a)] This statutory language indisputably evidences Congress' intention to prohibit implied exclusions from or exceptions to CERCLA liability....
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> The relevant inquiry is whether Reading conducted a cleanup comporting with CERCLA requirements, regardless of whether the cleanup also complied with TSCA standards... In fact, the EPA has stated that cleanups under other environmental statutes may serve as the basis of a CERCLA suit.[466]

Reading Co. v. City of Philadelphia exemplifies how cleanup pursuant to some statutory authority other than CERCLA, in this case TSCA, are recoverable as response costs when they nevertheless meet the requirements of the NCP. Regardless of whether DOD has the burden of proving consistency with the NCP as a *prima facia* element of its cost recovery action under CERCLA § 107(a)(4)(B) or if it enjoys the same deferential preference as the EPA under CERCLA § 107(a)(4)(A), it is of paramount importance that response actions be consistent with the NCP. For response actions that can be characterized as "removals," this means an adequate site evaluation (preliminary assessment/removal site inspection), selection of an appropriate removal action, and the proper level of community relations activity

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[466] *Id.* The court acknowledged that other courts have similarly concluded that RCRA does not create and exception to CERCLA liability. *See, e.g.* United States v. Rohm and Haas Co., 790 F. Supp. 1255, 1262 (E.D. PA.1992) ("The overwhelming evidence is that Congress intended CERCLA to be cumulative and not merely an alternative to RCRA.... There is no statutory expression that would prevent EPA from recovering costs incurred in supervising a so-called RCRA managed site.... Without a clear statutory statement to the contrary, this CERCLA remedy must be upheld as an available tool of environmental protection. The defense of an implied exclusion of CERCLA remedies, must, therefore, be rejected."); Accord Mardan Corp. v. C.G.C. Music, Ltd., 600 F. Supp. 1049, 1054 (D. Ariz.1984), *aff'd*, 804 F.2d 1454 (9th Cir.1986) ("That CERCLA was intended to operate independently of and in addition to RCRA is indicated by the first clause of Section 107 of CERCLA which provides 'Notwithstanding any other provision or rule of law ... [liability may be established].'"). *See also* 55 Fed. Reg. 8666, 8796 (March 8, 1990) ("...even if a party takes a cleanup action under an authority other than CERCLA (e.g., RCRA corrective action), it may have a right of cost recovery under CERCLA section 107 if the action was a necessary response to a release of hazardous substances, and was performed consistent with the NCP.").

consistent with the exigencies of the situation. More stringent standards are imposed on response actions that are properly characterized as "remedial." The NCP requires such actions to include an appropriate site investigation and analysis, development of appropriate remedial alternatives, selection of a cost-effective remedial response, and involvement of the public in the remedial process.

There are instances where response costs will not be recoverable under CERCLA. For instance, if there is an irreconcilable conflict between the application of state law at a non-NPL site and some integral requirement of the NCP that renders the remedial action cost *in*efficient. Or where the costs sought are beyond the scope of CERCLA such as uninsured, out-of-pocket medical expenses. In such cases where the response costs are not recoverable under CERCLA, one should scrutinize applicable state environmental statutes that may provide broader cost recovery options or state common law that may provide more traditional theories of liability under extant tort law. Consider the example of Otis ANG Base given in opening introduction. In that case, the National Guard Bureau is not only pursuing cost recovery under CERCLA, but is also bringing a more traditional contract claim for damages for failure of the pipeline's owners to remove the pipeline and to restore the premises upon termination of the grant of easement.

As DOD procures the goods and services of government contractors more smartly, preserving its ability to pursue such contractors without fear of indemnity,[467] and as DERA funds are limited by the fiscal realities of the federal budget, cost recovery actions—under

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[467] *E.g.*, 10 U.S.C. § 2708, added by Defense Authorization Act for 1992 and 1993 § 311, requires contractors engaged in the offsite treatment and disposal of hazardous waste to be liable for their own actions.

federal, state, or common law—will be come increasingly important and provide an ever-expanding portion of the resources available to DOD remediate the serious problems facing many of its installations.

APPENDIX A

40 C.F.R. § 300.410 Removal site evaluation.

(a) A removal site evaluation includes a removal preliminary assessment and, if warranted, a removal site inspection.

(b) A removal site evaluation of a release identified for possible CERCLA response pursuant to § 300.415 shall, as appropriate, be undertaken by the lead agency as promptly as possible. The lead agency may perform a removal preliminary assessment in response to petitions submitted by a person who is, or may be, affected by a release of a hazardous substance, pollutant, or contaminant pursuant to § 300.420(b)(5).

(c)(1) The lead agency shall, as appropriate, base the removal preliminary assessment on readily available information. A removal preliminary assessment may include, but is not limited to:

(i) Identification of the source and nature of the release or threat of release;

(ii) Evaluation by ATSDR or by other sources, for example, state public health agencies, of the threat to public health;

(iii) Evaluation of the magnitude of the threat;

(iv) Evaluation of factors necessary to make the determination of whether a removal is necessary; and

(v) Determination of whether a nonfederal party is undertaking proper response.

(2) A removal preliminary assessment of releases from hazardous waste management facilities may include collection or review of data such as site management practices, information from generators, photographs, analysis of historical photographs, literature searches, and personal interviews conducted, as appropriate.

(d) A removal site inspection may be performed if more information is needed. Such inspection may include a perimeter (i.e., off-site) or on-site inspection, taking into consideration whether such inspection can be performed safely.

(e) A removal site evaluation shall be terminated when the OSC or lead agency determines:

(1) There is no release;

(2) The source is neither a vessel nor a facility as defined in § 300.5 of the NCP;

(3) The release involves neither a hazardous substance, nor a pollutant or contaminant that may present an imminent and substantial danger to public health or welfare;

(4) The release consists of a situation specified in § 300.400(b)(1) through (3) subject to limitations on response;

(5) The amount, quantity, or concentration released does not warrant federal response;

(6) A party responsible for the release, or any other person, is providing appropriate response, and on-scene monitoring by the government is not required; or

(7) The removal site evaluation is completed.

(f) The results of the removal site evaluation shall be documented.

(g) If natural resources are or may be injured by the release, the OSC or lead agency shall ensure that state and federal trustees of the affected natural resources are promptly notified in order that the trustees may initiate appropriate actions, including those identified in subpart G of this part. The OSC or lead agency shall seek to coordinate necessary assessments, evaluations, investigations, and planning with such state and federal trustees.

(h) If the removal site evaluation indicates that removal action under § 300.415 is not required, but that remedial action under § 300.430 may be necessary, the lead agency shall, as appropriate, initiate a remedial site evaluation pursuant to § 300.420.

40 C.F.R. § 300.415 Removal action.

(a)(1) In determining the appropriate extent of action to be taken in response to a given release, the lead agency shall first review the removal site evaluation, any information produced through a remedial site evaluation, if any has been done previously, and the current site conditions, to determine if removal action is appropriate.

(2) Where the responsible parties are known, an effort initially shall be made, to the extent practicable, to determine whether they can and will perform the necessary removal action promptly and properly.

(3) This section does not apply to removal actions taken pursuant to section 104(b) of CERCLA. The criteria for such actions are set forth in section 104(b) of CERCLA.

(b)(1) At any release, regardless of whether the site is included on the National Priorities List, where the lead agency makes the determination, based on the factors in paragraph (b)(2) of this section, that there is a threat to public health or welfare or the environment, the lead agency may take any appropriate removal action to abate, prevent, minimize, stabilize, mitigate, or eliminate the release or the threat of release.

(2) The following factors shall be considered in determining the appropriateness of a removal action pursuant to this section:

(i) Actual or potential exposure to nearby human populations, animals, or the food chain from hazardous substances or pollutants or contaminants;

(ii) Actual or potential contamination of drinking water supplies or sensitive ecosystems;

(iii) Hazardous substances or pollutants or contaminants in drums, barrels, tanks, or other bulk storage containers, that may pose a threat of release;

(iv) High levels of hazardous substances or pollutants or contaminants in soils largely at or near the surface, that may migrate;

(v) Weather conditions that may cause hazardous substances or pollutants or contaminants to migrate or be released;

(vi) Threat of fire or explosion;

(vii) The availability of other appropriate federal or state response mechanisms to respond to the release; and

(viii) Other situations or factors that may pose threats to public health or welfare or the environment.

(3) If the lead agency determines that a removal action is appropriate, actions shall, as appropriate, begin as soon as possible to abate, prevent, minimize, stabilize, mitigate, or eliminate the threat to public health or welfare or the environment. The lead agency shall, at the earliest possible time, also make any necessary determinations pursuant to paragraph (b)(4) of this section.

(4) Whenever a planning period of at least six months exists before on-site activities must be initiated, and the lead agency determines, based on a site evaluation, that a removal action is appropriate:

(i) The lead agency shall conduct an engineering evaluation/cost analysis (EE/CA) or its equivalent. The EE/CA is an analysis of removal alternatives for a site.

(ii) If environmental samples are to be collected, the lead agency shall develop sampling and analysis plans that shall provide a process for obtaining data of sufficient quality and quantity to satisfy data needs. Sampling and analysis plans shall be reviewed and approved by EPA. The sampling and analysis plans shall consist of two parts:

(A) The field sampling plan, which describes the number, type, and location of samples and the type of analyses; and

(B) The quality assurance project plan, which describes policy, organization, and functional activities and the data quality objectives and measures necessary to achieve adequate data for use in planning and documenting the removal action.

(5) Fund-financed removal actions, other than those authorized under section 104(b) of CERCLA, shall be terminated after $2 million has been obligated for the action or 12 months have elapsed from the date that removal activities begin on-site, unless the lead agency determines that:

(i) There is an immediate risk to public health or welfare or the environment; continued response actions are immediately required to prevent, limit, or mitigate an emergency; and such assistance will not otherwise be provided on a timely basis; or

(ii) Continued response action is otherwise appropriate and consistent with the remedial action to be taken.

(c) Removal actions shall, to the extent practicable, contribute to the efficient performance of any anticipated long-term remedial action with respect to the release concerned.

(d) The following removal actions are, as a general rule, appropriate in the types of situations shown; however, this list is not exhaustive and is not intended to prevent the lead agency from taking any other actions deemed necessary under CERCLA or other appropriate federal or state enforcement or response authorities, and the list does not create a duty on the lead agency to take action at any particular time:

(1) Fences, warning signs, or other security or site control precautions-- where humans or animals have access to the release;

(2) Drainage controls, for example, run-off or run-on diversion--where needed to reduce migration of hazardous substances or pollutants or contaminants off- site or to prevent precipitation or run-off from other sources, for example, flooding, from entering the release area from other areas;

(3) Stabilization of berms, dikes, or impoundments or drainage or closing of lagoons--where needed to maintain the integrity of the structures;

(4) Capping of contaminated soils or sludges--where needed to reduce migration of hazardous substances or pollutants or contaminants into soil, ground or surface water, or air;

(5) Using chemicals and other materials to retard the spread of the release or to mitigate its effects--where the use of such chemicals will reduce the spread of the release;

(6) Excavation, consolidation, or removal of highly contaminated soils from drainage or other areas--where such actions will reduce the spread of, or direct contact with, the contamination;

(7) Removal of drums, barrels, tanks, or other bulk containers that contain or may contain hazardous substances or pollutants or contaminants--where it will reduce the likelihood of spillage; leakage; exposure to humans, animals, or food chain; or fire or explosion;

(8) Containment, treatment, disposal, or incineration of hazardous materials-- where needed to reduce the likelihood of human, animal, or food chain exposure; or

(9) Provision of alternative water supply--where necessary immediately to reduce exposure to contaminated household water and continuing until such time as local authorities can satisfy the need for a permanent remedy.

(e) Where necessary to protect public health or welfare, the lead agency shall request that FEMA conduct a temporary relocation or that state/local officials conduct an evacuation.

(f) If the lead agency determines that the removal action will not fully address the threat posed by the release and the release may require remedial action, the lead agency shall ensure an orderly transition from removal to remedial response activities.

(g) Removal actions conducted by states under cooperative agreements, described in subpart F of this part, shall comply with all requirements of this section.

(h) Facilities operated by a state or political subdivision at the time of disposal require a state cost share of at least 50 percent of Fund-financed response costs if a Fund-financed remedial action is conducted.

(i) Fund-financed removal actions under CERCLA section 104 and removal actions pursuant to CERCLA section 106 shall, to the extent practicable considering the exigencies of the situation, attain applicable or relevant and appropriate requirements under federal environmental or state environmental or facility siting laws. Waivers described in § 300.430(f)(1)(ii)(C) may be used for removal actions. Other federal and state advisories, criteria, or guidance may, as appropriate, be considered in formulating the removal action (see § 300.400(g)(3)). In determining whether compliance with ARARs is practicable, the lead agency may consider appropriate factors, including:

(1) The urgency of the situation; and

(2) The scope of the removal action to be conducted.

(j) Removal actions pursuant to section 106 or 122 of CERCLA are not subject to the following requirements of this section:

(1) Section 300.415(a)(2) requirement to locate responsible parties and have them undertake the response;

(2) Section 300.415(b)(2)(vii) requirement to consider the availability of other appropriate federal or state response and enforcement mechanisms to respond to the release;

(3) Section 300.415(b)(5) requirement to terminate response after $2 million has been obligated or 12 months have elapsed from the date of the initial response; and

(4) Section 300.415(f) requirement to assure an orderly transition from removal to remedial action.

(k) To the extent practicable, provision for post-removal site control following a Fund-financed removal action at both NPL and non-NPL sites is encouraged to be made prior to the initiation of the removal action. Such post-removal site control includes actions necessary to ensure the effectiveness and integrity of the removal action after the completion of the on-site removal action or after the $2 million or 12-month statutory limits are reached for sites that do not meet the exemption criteria in paragraph (b)(5) of this section. Post-removal site control may be conducted by:

(1) The affected state or political subdivision thereof or local units of government for any removal;

(2) Potentially responsible parties; or

(3) EPA's remedial program for some federal-lead Fund-financed responses at NPL sites.

(l) OSCs/RPMs conducting removal actions shall submit OSC reports to the RRT as required by § 300.165.

(m) Community relations in removal actions. (1) In the case of all removal actions taken pursuant to § 300.415 or CERCLA enforcement actions to compel removal response, a spokesperson shall be designated by the lead agency. The spokesperson shall inform the community of actions taken, respond to inquiries, and provide information concerning the release. All news releases or statements made by participating agencies shall be coordinated with the OSC/RPM. The spokesperson shall notify, at a minimum, immediately affected citizens, state and local officials, and, when appropriate, civil defense or emergency management agencies.

(2) For actions where, based on the site evaluation, the lead agency determines that a removal is appropriate, and that less than six months exists before on-site removal activity must begin, the lead agency shall:

(i) Publish a notice of availability of the administrative record

file established pursuant to § 300.820 in a major local newspaper of general circulation within 60 days of initiation of on-site removal activity;

(ii) Provide a public comment period, as appropriate, of not less than 30 days from the time the administrative record file is made available for public inspection, pursuant to § 300.820(b)(2); and

(iii) Prepare a written response to significant comments pursuant to § 300.820(b)(3).

(3) For removal actions where on-site action is expected to extend beyond 120 days from the initiation of on-site removal activities, the lead agency shall by the end of the 120-day period:

(i) Conduct interviews with local officials, community residents, public interest groups, or other interested or affected parties, as appropriate, to solicit their concerns, information needs, and how or when citizens would like to be involved in the Superfund process;

(ii) Prepare a formal community relations plan (CRP) based on the community interviews and other relevant information, specifying the community relations activities that the lead agency expects to undertake during the response; and

(iii) Establish at least one local information repository at or near the location of the response action. The information repository should contain items made available for public information. Further, an administrative record file established pursuant to subpart I for all removal actions shall be available for public inspection in at least one of the repositories. The lead agency shall inform the public of the establishment of the information repository and provide notice of availability of the administrative record file for public review. All items in the repository shall be available for public inspection and copying.

(4) Where, based on the site evaluation, the lead agency determines that a removal action is appropriate and that a planning period of at least six months exists prior to initiation of the on-site removal activities, the lead agency shall at a minimum:

(i) Comply with the requirements set forth in paragraphs (m)(3)(i), (ii), and (iii) of this section, prior to the completion of the engineering evaluation/cost analysis (EE/CA), or its equivalent, except that the information repository and the administrative record file will be established no later than when the EE/CA approval memorandum is signed;

(ii) Publish a notice of availability and brief description of the EE/CA in a major local newspaper of general circulation pursuant to § 300.820;

(iii) Provide a reasonable opportunity, not less than 30 calendar days, for submission of written and oral comments after completion of the EE/CA pursuant to § 300.820(a). Upon timely request, the lead agency will extend the public comment period by a minimum of 15 days; and

(iv) Prepare a written response to significant comments pursuant to § 300.820(a).

40 C.F.R. § 300.420 Remedial site evaluation.

(a) General. The purpose of this section is to describe the methods, procedures, and criteria the lead agency shall use to collect data, as required, and evaluate releases of hazardous substances, pollutants, or contaminants. The evaluation may consist of two steps: a remedial preliminary assessment (PA) and a remedial site inspection (SI).

(b) Remedial preliminary assessment. (1) The lead agency shall perform a remedial PA on all sites in CERCLIS as defined in § 300.5 to:

(i) Eliminate from further consideration those sites that pose no threat to public health or the environment;

(ii) Determine if there is any potential need for removal action;

(iii) Set priorities for site inspections; and

(iv) Gather existing data to facilitate later evaluation of the release pursuant to the Hazard Ranking System (HRS) if warranted.

(2) A remedial PA shall consist of a review of existing information about a release such as information on the pathways of exposure, exposure targets, and source and nature of release. A remedial PA shall also include an off-site reconnaissance as appropriate. A remedial PA may include an on-site reconnaissance where appropriate.

(3) If the remedial PA indicates that a removal action may be warranted, the lead agency shall initiate removal evaluation pursuant to § 300.410.

(4) In performing a remedial PA, the lead agency may complete the EPA Preliminary Assessment form, available from EPA regional offices, or its equivalent, and shall prepare a PA report, which shall include:

(i) A description of the release;

(ii) A description of the probable nature of the release; and

(iii) A recommendation on whether further action is warranted, which lead agency should conduct further action, and whether an SI or removal action or both should be undertaken.

(5) Any person may petition the lead federal agency (EPA or the appropriate federal agency in the case of a release or suspected release from a federal facility), to perform a PA of a release when such person is, or may be, affected by a release of a hazardous substance, pollutant, or contaminant. Such petitions shall be addressed to the EPA Regional Administrator for the region in which the release is located, except that petitions for PAs involving federal facilities should be addressed to the head of the appropriate federal agency.

(i) Petitions shall be signed by the petitioner and shall contain the following:

(A) The full name, address, and phone number of petitioner;

(B) A description, as precisely as possible, of the location of the release; and

(C) How the petitioner is or may be affected by the release.

(ii) Petitions should also contain the following information to the extent available:

(A) What type of substances were or may be released;

(B) The nature of activities that have occurred where the release is located; and

(C) Whether local and state authorities have been contacted about the release.

(iii) The lead federal agency shall complete a remedial or removal PA within one year of the date of receipt of a complete petition pursuant to paragraph (b)(5) of this section, if one has not been performed previously, unless the lead federal agency determines that a PA is not appropriate. Where such a determination is made, the lead federal agency shall notify the petitioner and will provide a reason for the determination.

(iv) When determining if performance of a PA is appropriate, the lead federal agency shall take into consideration:

(A) Whether there is information indicating that a release has occurred or there is a threat of a release of a hazardous substance, pollutant, or contaminant; and

(B) Whether the release is eligible for response under CERCLA.

(c) Remedial site inspection. (1) The lead agency shall perform a remedial SI as appropriate to:

(i) Eliminate from further consideration those releases that pose no significant threat to public health or the environment;

(ii) Determine the potential need for removal action;

(iii) Collect or develop additional data, as appropriate, to evaluate the release pursuant to the HRS; and

(iv) Collect data in addition to that required to score the release pursuant to the HRS, as appropriate, to better characterize the release for more effective and rapid initiation of the RI/FS or response under other authorities.

(2) The remedial SI shall build upon the information collected in

the remedial PA. The remedial SI shall involve, as appropriate, both on- and off-site field investigatory efforts, and sampling.

(3) If the remedial SI indicates that removal action may be appropriate, the lead agency shall initiate removal site evaluation pursuant to § 300.410.

(4) Prior to conducting field sampling as part of site inspections, the lead agency shall develop sampling and analysis plans that shall provide a process for obtaining data of sufficient quality and quantity to satisfy data needs. The sampling and analysis plans shall consist of two parts:

(i) The field sampling plan, which describes the number, type, and location of samples, and the type of analyses, and

(ii) The quality assurance project plan (QAPP), which describes policy, organization, and functional activities, and the data quality objectives and measures necessary to achieve adequate data for use in site evaluation and hazard ranking system activities.

(5) Upon completion of a remedial SI, the lead agency shall prepare a report that includes the following:

(i) A description/history/nature of waste handling;

(ii) A description of known contaminants;

(iii) A description of pathways of migration of contaminants;

(iv) An identification and description of human and environmental targets; and

(v) A recommendation on whether further action is warranted.

40 C.F.R. § 300.425 Establishing remedial priorities.

(a) General. The purpose of this section is to identify the criteria as well as the methods and procedures EPA uses to establish its priorities for remedial actions.

(b) National Priorities List. The NPL is the list of priority releases for long-term remedial evaluation and response.

(1) Only those releases included on the NPL shall be considered eligible for Fund-financed remedial action. Removal actions (including remedial planning activities, RI/FSs, and other actions taken pursuant to CERCLA section 104(b)) are not limited to NPL sites.

(2) Inclusion of a release on the NPL does not imply that monies will be expended, nor does the rank of a release on the NPL establish the precise priorities for the allocation of Fund resources. EPA may also pursue other appropriate authorities to remedy the release, including enforcement actions under CERCLA and other laws. A site's rank on the NPL serves, along with other factors, including enforcement actions, as a basis to guide the allocation of Fund resources among releases.

(3) Federal facilities that meet the criteria identified in paragraph (c) of this section are eligible for inclusion on the NPL. Except as provided by CERCLA sections 111(e)(3) and 111(c), federal facilities are not eligible for Fund-financed remedial actions.

(4) Inclusion on the NPL is not a precondition to action by the lead agency under CERCLA sections 106 or 122 or to action under CERCLA section 107 for recovery of non-Fund-financed costs or Fund-financed costs other than Fund- financed remedial construction costs.

(c) Methods for determining eligibility for NPL. A release may be included on the NPL if the release meets one of the following criteria:

(1) The release scores sufficiently high pursuant to the Hazard Ranking System described in Appendix A to this part.

(2) A state (not including Indian tribes) has designated a release as its highest priority. States may make only one such designation; or

(3) The release satisfies all of the following criteria: (i) The Agency for Toxic Substances and Disease Registry has issued a health advisory that recommends dissociation of individuals from the release;

(ii) EPA determines that the release poses a significant threat to public health; and

(iii) EPA anticipates that it will be more cost-effective to use its remedial authority than to use removal authority to respond to the release.

(d) Procedures for placing sites on the NPL. Lead agencies may submit candidates to EPA by scoring the release using the HRS and providing the appropriate backup documentation.

(1) Lead agencies may submit HRS scoring packages to EPA anytime throughout the year.

(2) EPA shall review lead agencies' HRS scoring packages and revise them as appropriate. EPA shall develop any additional HRS scoring packages on releases known to EPA.

(3) EPA shall compile the NPL based on the methods identified in paragraph (c) of this section.

(4) EPA shall update the NPL at least once a year.

(5) To ensure public involvement during the proposal to add a release to the NPL, EPA shall:

(i) Publish the proposed rule in the Federal Register and solicit comments through a public comment period; and

(ii) Publish the final rule in the Federal Register, and make available a response to each significant comment and any significant new data submitted during the comment period.

(6) Releases may be categorized on the NPL when deemed appropriate by EPA.

(e) Deletion from the NPL. Releases may be deleted from or recategorized on the NPL where no further response is appropriate.

(1) EPA shall consult with the state on proposed deletions from the NPL prior to developing the notice of intent to delete. In making a determination to delete a release from the NPL, EPA shall consider, in consultation with the state, whether any of the following criteria has been met:

(i) Responsible parties or other persons have implemented all appropriate response actions required;

(ii) All appropriate Fund-financed response under CERCLA has been implemented, and no further response action by responsible parties is appropriate; or

(iii) The remedial investigation has shown that the release poses no significant threat to public health or the environment and, therefore, taking of remedial measures is not appropriate.

(2) Releases shall not be deleted from the NPL until the state in which the release was located has concurred on the proposed deletion. EPA shall provide the state 30 working days for review of the deletion notice prior to its publication in the Federal Register.

(3) All releases deleted from the NPL are eligible for further Fund-financed remedial actions should future conditions warrant such action. Whenever there is a significant release from a site deleted from the NPL, the site shall be restored to the NPL without application of the HRS.

(4) To ensure public involvement during the proposal to delete a release from the NPL, EPA shall:

(i) Publish a notice of intent to delete in the Federal Register and solicit comment through a public comment period of a minimum of 30 calendar days;

(ii) In a major local newspaper of general circulation at or near the release that is proposed for deletion, publish a notice of availability of the notice of intent to delete;

(iii) Place copies of information supporting the proposed deletion in the information repository, described in § 300.430(c)(2)(iii), at or near the release proposed for deletion. These items shall be available for public inspection and copying; and

(iv) Respond to each significant comment and any significant new data submitted during the comment period and include this response document in the final deletion package.

(5) EPA shall place the final deletion package in the local information repository once the notice of final deletion has been published in the Federal Register.

40 C.F.R. § 300.430 Remedial investigation/feasibility study and selection of remedy.

(a) General--(1) Introduction. The purpose of the remedy selection process is to implement remedies that eliminate, reduce, or control risks to human health and the environment. Remedial actions are to be implemented as soon as site data and information make it possible to do so. Accordingly, EPA has established the following program goal, expectations, and program management principles to assist in the identification and implementation of appropriate remedial actions.

(i) Program goal. The national goal of the remedy selection process is to select remedies that are protective of human health and the environment, that maintain protection over time, and that minimize untreated waste.

(ii) Program management principles. EPA generally shall consider the following general principles of program management during the remedial process:

(A) Sites should generally be remediated in operable units when early actions are necessary or appropriate to achieve significant risk reduction quickly, when phased analysis and response is necessary or appropriate given the size or complexity of the site, or to expedite the completion of total site cleanup.

(B) Operable units, including interim action operable units, should not be inconsistent with nor preclude implementation of the expected final remedy.

(C) Site-specific data needs, the evaluation of alternatives, and the documentation of the selected remedy should reflect the scope and complexity of the site problems being addressed.

(iii) Expectations. EPA generally shall consider the following expectations in developing appropriate remedial alternatives:

(A) EPA expects to use treatment to address the principal threats posed by a site, wherever practicable. Principal threats for which treatment is most likely to be appropriate include liquids, areas contaminated with high concentrations of toxic compounds, and highly mobile materials.

(B) EPA expects to use engineering controls, such as containment, for waste that poses a relatively low long-term threat or where treatment is impracticable.

(C) EPA expects to use a combination of methods, as appropriate, to achieve protection of human health and the environment. In appropriate site situations, treatment of the principal threats posed by a site, with priority placed on treating waste that is liquid, highly toxic or highly mobile, will be combined with engineering controls (such as containment) and institutional controls, as appropriate, for treatment residuals and untreated waste.

(D) EPA expects to use institutional controls such as water use and deed restrictions to supplement engineering controls as appropriate for short- and long-term management to prevent or limit exposure to hazardous substances, pollutants, or contaminants. Institutional controls may be used during the conduct of the remedial investigation/feasibility study (RI/FS) and implementation of the remedial action and, where necessary, as a component of the completed remedy. The use of institutional controls shall not substitute for active response measures (e.g., treatment and/or containment of source material, restoration of ground waters to their beneficial uses) as the sole remedy unless such active measures are determined not to be practicable, based on the balancing of trade-offs among alternatives that is conducted during the selection of remedy.

(E) EPA expects to consider using innovative technology when such technology offers the potential for comparable or superior treatment performance or implementability, fewer or lesser adverse impacts than other available approaches, or lower costs for similar levels of performance than demonstrated technologies.

(F) EPA expects to return usable ground waters to their beneficial uses wherever practicable, within a timeframe that is reasonable given the particular circumstances of the site. When restoration of ground water to beneficial uses is not practicable, EPA expects to prevent further migration of the plume, prevent exposure to the contaminated ground water, and evaluate further risk reduction.

(2) Remedial investigation/feasibility study. The purpose of the remedial investigation/feasibility study (RI/FS) is to assess site conditions and evaluate alternatives to the extent necessary to select a remedy. Developing and conducting an RI/FS generally includes the following activities: project scoping, data collection, risk assessment, treatability studies, and analysis of alternatives. The scope and timing of these activities should be tailored to the nature and complexity of the problem and the response alternatives being considered.

(b) Scoping. In implementing this section, the lead agency should consider the program goal, program management principles, and expectations contained in this rule. The investigative and analytical studies should be tailored to site circumstances so that the scope and detail of the analysis is appropriate to the complexity of site problems being addressed. During scoping, the lead and support agencies shall confer to identify the optimal set and sequence of actions necessary to address site problems. Specifically, the lead agency shall:

(1) Assemble and evaluate existing data on the site, including the results of any removal actions, remedial preliminary assessment and site inspections, and the NPL listing process.

(2) Develop a conceptual understanding of the site based on the evaluation of existing data described in paragraph (b)(1) of this section.

(3) Identify likely response scenarios and potentially applicable technologies and operable units that may address site problems.

(4) Undertake limited data collection efforts or studies where this information will assist in scoping the RI/FS or accelerate response actions, and begin to identify the need for treatability studies, as appropriate.

(5) Identify the type, quality, and quantity of the data that will be collected during the RI/FS to support decisions regarding remedial response activities.

(6) Prepare site-specific health and safety plans that shall specify, at a minimum, employee training and protective equipment, medical surveillance requirements, standard operating procedures, and a contingency plan that conforms with 29 C.F.R. 1910.120 (l)(1) and (l)(2).

(7) If natural resources are or may be injured by the release, ensure that state and federal trustees of the affected natural resources have been notified in order that the trustees may initiate appropriate actions, including those identified in subpart G of this part. The lead agency shall seek to coordinate necessary assessments, evaluations, investigations, and planning with such state and federal trustees.

(8) Develop sampling and analysis plans that shall provide a process for obtaining data of sufficient quality and quantity to satisfy data needs. Sampling and analysis plans shall be reviewed and approved by EPA. The sampling and analysis plans shall consist of two parts:

(i) The field sampling plan, which describes the number, type, and location of samples and the type of analyses; and

(ii) The quality assurance project plan, which describes policy, organization, and functional activities and the data quality objectives and measures necessary to achieve adequate data for use in selecting the appropriate remedy.

(9) Initiate the identification of potential federal and state ARARs and, as appropriate, other criteria, advisories, or guidance to be considered.

(c) Community relations. (1) The community relations requirements described in this section apply to all remedial activities undertaken pursuant to CERCLA section 104 and to section 106 or section 122 consent orders or decrees, or section 106 administrative orders.

(2) The lead agency shall provide for the conduct of the following community relations activities, to the extent practicable, prior to commencing field work for the remedial investigation:

(i) Conducting interviews with local officials, community residents, public interest groups, or other interested or affected parties, as appropriate, to solicit their concerns and information needs, and to learn how and when citizens would like to be involved in the Superfund process.

(ii) Preparing a formal community relations plan (CRP), based on the community interviews and other relevant information, specifying the community relations activities that the lead agency expects to undertake during the remedial response. The purpose of the CRP is to:

(A) Ensure the public appropriate opportunities for involvement in a wide variety of site-related decisions, including site analysis and characterization, alternatives analysis, and selection of remedy;

(B) Determine, based on community interviews, appropriate activities to ensure such public involvement, and

(C) Provide appropriate opportunities for the community to learn about the site.

(iii) Establishing at least one local information repository at or near the location of the response action. Each information repository should contain a copy of items made available to the public, including information that describes the technical assistance grants application process. The lead agency shall inform interested parties of the establishment of the information repository.

(iv) Informing the community of the availability of technical assistance grants.

(3) For PRP actions, the lead agency shall plan and implement the community relations program at a site. PRPs may participate in aspects of the community relations program at the discretion of and with oversight by the lead agency.

(4) The lead agency may conduct technical discussions involving PRPs and the public. These technical discussions may be held separately from, but contemporaneously with, the negotiations/settlement discussions.

(5) In addition, the following provisions specifically apply to enforcement actions:

(i) Lead agencies entering into an enforcement agreement with de minimis parties under CERCLA section 122(g) or cost recovery settlements under section 122(h) shall publish a notice of the proposed agreement in the Federal Register at least 30 days before the agreement becomes final, as required by section 122(i). The notice must identify the name of the facility and the parties to the proposed agreement and must allow an opportunity for comment and consideration of comments; and

(ii) Where the enforcement agreement is embodied in a consent decree, public notice and opportunity for public comment shall be provided in accordance with 28 C.F.R. 50.7.

(d) Remedial investigation. (1) The purpose of the remedial investigation (RI) is to collect data necessary to adequately characterize the site for the purpose of developing and evaluating effective remedial alternatives. To characterize the site, the lead agency shall, as appropriate, conduct field investigations, including treatability studies; and conduct a baseline risk assessment. The RI provides information to assess the risks to human health and the environment and to support the development, evaluation, and selection of appropriate response alternatives. Site characterization may be conducted in one or more phases to focus sampling efforts and increase the efficiency of the investigation. Because estimates of actual or potential exposures and associated impacts on human and environmental receptors may be refined throughout the phases of the RI as new information is obtained, site characterization activities should be fully integrated with the development and evaluation of alternatives in the feasibility study. Bench- or pilot-scale treatability studies shall be conducted, when appropriate and practicable, to provide additional data for the detailed analysis and to support engineering design of remedial alternatives.

(2) The lead agency shall characterize the nature of and threat posed by the hazardous substances and hazardous materials and gather data necessary to assess the extent to which the release poses a threat to human health or the environment or to support the analysis and design of potential response actions by conducting, as appropriate, field investigations to assess the following factors:

(i) Physical characteristics of the site, including important surface features, soils, geology, hydrogeology, meteorology, and ecology;

(ii) Characteristics or classifications of air, surface water, and ground water;

(iii) The general characteristics of the waste, including quantities, state, concentration, toxicity, propensity to bioaccumulate, persistence, and mobility;

(iv) The extent to which the source can be adequately identified and characterized;

(v) Actual and potential exposure pathways through environmental media;

(vi) Actual and potential exposure routes, for example, inhalation and ingestion; and

(vii) Other factors, such as sensitive populations, that pertain to the characterization of the site or support the analysis of potential remedial action alternatives.

(3) The lead and support agency shall identify their respective potential ARARs related to the location of and contaminants at the site in a timely manner. The lead and support agencies may also, as appropriate, identify other pertinent advisories, criteria, or guidance in a timely manner (see § 300.400(g)(3)).

(4) Using the data developed under paragraphs (d) (1) and (2) of this section, the lead agency shall conduct a site-specific baseline risk assessment to characterize the current and potential threats to human health and the environment that may be posed by contaminants migrating to ground water or surface water, releasing to air, leaching through soil, remaining in the soil, and bioaccumulating in the food chain. The results of the baseline risk assessment will help establish acceptable exposure levels for use in developing remedial alternatives in the FS, as described in paragraph (e) of this section.

(e) Feasibility study. (1) The primary objective of the feasibility study (FS) is to ensure that appropriate remedial alternatives are developed and evaluated such that relevant information concerning the remedial action options can be presented to a decision-maker and an appropriate remedy selected. The lead agency may develop a feasibility study to address a specific site problem or the entire site. The development and evaluation of alternatives shall reflect the scope and complexity of the remedial action under consideration and the site problems being addressed. Development of alternatives shall be fully integrated with the site characterization activities of the remedial investigation described in paragraph (d) of this section. The lead agency shall include an alternatives screening step, when needed, to select a reasonable number of alternatives for detailed analysis.

(2) Alternatives shall be developed that protect human health and the environment by recycling waste or by eliminating, reducing, and/or controlling risks posed through each pathway by a site. The number and type of alternatives to be analyzed shall be determined at each site, taking into account the scope, characteristics, and complexity of the site problem that is being addressed. In developing and, as appropriate, screening the alternatives, the lead agency shall:

(i) Establish remedial action objectives specifying contaminants and media of concern, potential exposure pathways, and remediation goals. Initially, preliminary remediation goals are developed based on readily available information, such as chemical-specific ARARs or other reliable information. Preliminary remediation goals should be modified, as necessary, as more information becomes available during the RI/FS. Final remediation goals will be determined when the remedy is selected. Remediation goals shall establish acceptable exposure levels that are protective of human health and the environment and shall be developed by considering the following:

(A) Applicable or relevant and appropriate requirements under federal environmental or state environmental or facility siting laws, if available, and the following factors:

(1) For systemic toxicants, acceptable exposure levels shall represent concentration levels to which the human population, including sensitive subgroups, may be exposed without adverse effect during a lifetime or part of a lifetime, incorporating an adequate margin of safety;

(2) For known or suspected carcinogens, acceptable exposure levels are generally concentration levels that represent an excess upper bound lifetime cancer risk to an individual of between 10 super-4 and 10 super-6 using information on the relationship between dose and response. The 10 super-6 risk level shall be used as the point of departure for determining remediation goals for alternatives when ARARs are not available or are not sufficiently protective because of the presence of multiple contaminants at a site or multiple pathways of exposure;

(3) Factors related to technical limitations such as detection/quantification limits for contaminants;

(4) Factors related to uncertainty; and

(5) Other pertinent information.

(B) Maximum contaminant level goals (MCLGs), established under the Safe Drinking Water Act, that are set at levels above zero, shall be attained by remedial actions for ground or surface waters that are current or potential sources of drinking water, where the MCLGs are relevant and appropriate under the circumstances of the release based on the factors in § 300.400(g)(2). If an MCLG is determined not to be relevant and appropriate, the corresponding maximum contaminant level (MCL) shall be attained where relevant and appropriate to the circumstances of the release.

(C) Where the MCLG for a contaminant has been set at a level of zero, the MCL promulgated for that contaminant under the Safe Drinking Water Act shall be attained by remedial actions for ground or surface waters that are current or potential sources of drinking water, where the MCL is relevant and appropriate under the circumstances of the release based on the factors in § 300.400(g)(2).

(D) In cases involving multiple contaminants or pathways where attainment of chemical-specific ARARs will result in cumulative risk in excess of 10 super-4, criteria in paragraph (e)(2)(i)(A) of this section may also be considered when determining the cleanup level to be attained.

(E) Water quality criteria established under sections 303 or 304 of the Clean Water Act shall be attained where relevant and appropriate under the circumstances of the release.

(F) An alternate concentration limit (ACL) may be established in accordance with CERCLA section 121(d)(2)(B)(ii).

(G) Environmental evaluations shall be performed to assess threats to the environment, especially sensitive habitats and critical habitats of species protected under the Endangered Species Act.

(ii) Identify and evaluate potentially suitable technologies, including innovative technologies;

(iii) Assemble suitable technologies into alternative remedial actions.

(3) For source control actions, the lead agency shall develop, as appropriate:

(i) A range of alternatives in which treatment that reduces the toxicity, mobility, or volume of the hazardous substances, pollutants, or contaminants is a principal element. As appropriate, this range shall include an alternative that removes or destroys hazardous substances, pollutants, or contaminants to the maximum extent feasible, eliminating or minimizing, to the degree possible, the need for long-term management. The lead agency also shall develop, as appropriate, other alternatives which, at a minimum, treat the principal threats posed by the site but vary in the degree of treatment employed and the quantities and characteristics of the treatment residuals and untreated waste that must be managed; and

(ii) One or more alternatives that involve little or no treatment, but provide protection of human health and the environment primarily by preventing or controlling exposure to hazardous substances, pollutants, or contaminants, through engineering controls, for example, containment, and, as necessary, institutional controls to protect human health and the environment and to assure continued effectiveness of the response action.

(4) For ground-water response actions, the lead agency shall develop a limited number of remedial alternatives that attain site-specific remediation levels within different restoration time periods utilizing one or more different technologies.

(5) The lead agency shall develop one or more innovative treatment technologies for further consideration if those technologies offer the potential for comparable or superior performance or implementability; fewer or lesser adverse impacts than other available approaches; or lower costs for similar levels of performance than demonstrated treatment technologies.

(6) The no-action alternative, which may be no further action if some removal or remedial action has already occurred at the site, shall be developed.

(7) As appropriate, and to the extent sufficient information is available, the short- and long-term aspects of the following three criteria shall be used to guide the development and screening of remedial alternatives:

(i) Effectiveness. This criterion focuses on the degree to which an alternative reduces toxicity, mobility, or volume through treatment, minimizes residual risks and affords long-term protection, complies with ARARs, minimizes short-term impacts, and how quickly it achieves protection. Alternatives providing significantly less effectiveness than other, more promising alternatives may be eliminated. Alternatives that do not provide adequate protection of human health and the environment shall be eliminated from further consideration.

(ii) Implementability. This criterion focuses on the technical feasibility and availability of the technologies each alternative would employ and the administrative feasibility of implementing the alternative. Alternatives that are technically or administratively infeasible or that would require equipment, specialists, or facilities that are not available within a reasonable period of time may be eliminated from further consideration.

(iii) Cost. The costs of construction and any long-term costs to operate and maintain the alternatives shall be considered. Costs that are grossly excessive compared to the overall effectiveness of alternatives may be considered as one of several factors used to eliminate alternatives. Alternatives providing effectiveness and implementability similar to that of another alternative by employing a similar method of treatment or engineering control, but at greater cost, may be eliminated.

(8) The lead agency shall notify the support agency of the alternatives that will be evaluated in detail to facilitate the identification of ARARs and, as appropriate, pertinent advisories, criteria, or guidance to be considered.

(9) Detailed analysis of alternatives. (i) A detailed analysis shall be conducted on the limited number of alternatives that represent viable approaches to remedial action after evaluation in the screening stage. The lead and support agencies must identify their ARARs related to specific actions in a timely manner and no later than the early stages of the comparative analysis. The lead and support agencies may also, as appropriate, identify other pertinent advisories, criteria, or guidance in a timely manner.

(ii) The detailed analysis consists of an assessment of individual alternatives against each of nine evaluation criteria and a comparative analysis that focuses upon the relative performance of each alternative against those criteria.

(iii) Nine criteria for evaluation. The analysis of alternatives under review shall reflect the scope and complexity of site problems and alternatives being evaluated and consider the relative significance of the factors within each criteria. The nine evaluation criteria are as follows:

(A) Overall protection of human health and the environ-

ment. Alternatives shall be assessed to determine whether they can adequately protect human health and the environment, in both the short- and long-term, from unacceptable risks posed by hazardous substances, pollutants, or contaminants present at the site by eliminating, reducing, or controlling exposures to levels established during development of remediation goals consistent with § 300.430(e)(2)(i). Overall protection of human health and the environment draws on the assessments of other evaluation criteria, especially long-term effectiveness and permanence, short-term effectiveness, and compliance with ARARs.

(B) Compliance with ARARs. The alternatives shall be assessed to determine whether they attain applicable or relevant and appropriate requirements under federal environmental laws and state environmental or facility siting laws or provide grounds for invoking one of the waivers under paragraph (f)(1)(ii)(C) of this section.

(C) Long-term effectiveness and permanence. Alternatives shall be assessed for the long-term effectiveness and permanence they afford, along with the degree of certainty that the alternative will prove successful. Factors that shall be considered, as appropriate, include the following:

(1) Magnitude of residual risk remaining from untreated waste or treatment residuals remaining at the conclusion of the remedial activities. The characteristics of the residuals should be considered to the degree that they remain hazardous, taking into account their volume, toxicity, mobility, and propensity to bioaccumulate.

(2) Adequacy and reliability of controls such as containment systems and institutional controls that are necessary to manage treatment residuals and untreated waste. This factor addresses in particular the uncertainties associated with land disposal for providing long-term protection from residuals; the assessment of the potential need to replace technical components of the alternative, such as a cap, a slurry wall, or a treatment system; and the potential exposure pathways and risks posed should the remedial action need replacement.

(D) Reduction of toxicity, mobility, or volume through treatment. The degree to which alternatives employ recycling or treatment that reduces toxicity, mobility, or volume shall be assessed, including how treatment is used to address the principal threats posed by the site. Factors that shall be considered, as appropriate, include the following:

(1) The treatment or recycling processes the alternatives employ and materials they will treat;

(2) The amount of hazardous substances, pollutants, or contaminants that will be destroyed, treated, or recycled;

(3) The degree of expected reduction in toxicity, mobility, or volume of the waste due to treatment or recycling and the specification of which reduction(s) are occurring;

(4) The degree to which the treatment is irreversible;

(5) The type and quantity of residuals that will remain following treatment, considering the persistence, toxicity, mobility, and propensity to bioaccumulate of such hazardous substances and their constituents; and

(6) The degree to which treatment reduces the inherent hazards posed by principal threats at the site.

(E) Short-term effectiveness. The short-term impacts of alternatives shall be assessed considering the following:

(1) Short-term risks that might be posed to the community during implementation of an alternative;

(2) Potential impacts on workers during remedial action and the effectiveness and reliability of protective measures;

(3) Potential environmental impacts of the remedial action and the effectiveness and reliability of mitigative measures during implementation; and

(4) Time until protection is achieved.

(F) Implementability. The ease or difficulty of implementing the alternatives shall be assessed by considering the following types of factors as appropriate:

(1) Technical feasibility, including technical difficulties and unknowns associated with the construction and operation of a technology, the reliability of the technology, ease of undertaking additional remedial actions, and the ability to monitor the effectiveness of the remedy.

(2) Administrative feasibility, including activities needed to coordinate with other offices and agencies and the ability and time required to obtain any necessary approvals and permits from other agencies (for off-site actions);

(3) Availability of services and materials, including the availability of adequate off-site treatment, storage capacity, and disposal capacity and services; the availability of necessary equipment and specialists, and provisions to ensure any necessary additional resources; the availability of services and materials; and availability of prospective technologies.

(G) Cost. The types of costs that shall be assessed include the following:

(1) Capital costs, including both direct and indirect costs;

(2) Annual operation and maintenance costs; and

(3) Net present value of capital and O&M costs.

(H) State acceptance. Assessment of state concerns may not be completed until comments on the RI/FS are received but may be discussed, to the extent possible, in the proposed plan issued for public comment. The state concerns that shall be assessed include the following:

(1) The state's position and key concerns related to the preferred alternative and other alternatives; and

(2) State comments on ARARs or the proposed use of waivers.

(I) Community acceptance. This assessment includes determining which components of the alternatives interested persons in the community support, have reservations about, or oppose. This assessment may not be completed until comments on the proposed plan are received.

(f) Selection of remedy--(1) Remedies selected shall reflect the scope and purpose of the actions being undertaken and how the action relates to long- term, comprehensive response at the site.

(i) The criteria noted in paragraph (e)(9)(iii) of this section are used to select a remedy. These criteria are categorized into three groups.

(A) Threshold criteria. Overall protection of human health and the environment and compliance with ARARs (unless a specific ARAR is waived) are threshold requirements that each alternative must meet in order to be eligible for selection.

(B) Primary balancing criteria. The five primary balancing criteria are long- term effectiveness and permanence; reduction of toxicity, mobility, or volume through treatment; short-term effectiveness; implementability; and cost.

(C) Modifying criteria. State and community acceptance are modifying criteria that shall be considered in remedy selection.

(ii) The selection of a remedial action is a two-step process and shall proceed in accordance with § 300.515(e). First, the lead agency, in conjunction with the support agency, identifies a preferred alternative and presents it to the public in a proposed plan, for review and comment. Second, the lead agency shall review the public comments and consult with the state (or support agency) in order to determine if the alternative remains the most appropriate remedial action for the site or site problem. The lead agency, as specified in § 300.515(e), makes the final remedy selection decision, which shall be documented in the ROD. Each remedial alternative selected as a Superfund remedy will employ the criteria as indicated in paragraph (f)(1)(i) of this section to make the following determination:

(A) Each remedial action selected shall be protective of human health and the environment.

(B) On-site remedial actions selected in a ROD must attain those ARARs that are identified at the time of ROD signature or

provide grounds for invoking a waiver under § 300.430(f)(1)(ii)(C).

(1) Requirements that are promulgated or modified after ROD signature must be attained (or waived) only when determined to be applicable or relevant and appropriate and necessary to ensure that the remedy is protective of human health and the environment.

(2) Components of the remedy not described in the ROD must attain (or waive) requirements that are identified as applicable or relevant and appropriate at the time the amendment to the ROD or the explanation of significant difference describing the component is signed.

(C) An alternative that does not meet an ARAR under federal environmental or state environmental or facility siting laws may be selected under the following circumstances:

(1) The alternative is an interim measure and will become part of a total remedial action that will attain the applicable or relevant and appropriate federal or state requirement;

(2) Compliance with the requirement will result in greater risk to human health and the environment than other alternatives;

(3) Compliance with the requirement is technically impracticable from an engineering perspective;

(4) The alternative will attain a standard of performance that is equivalent to that required under the otherwise applicable standard, requirement, or limitation through use of another method or approach;

(5) With respect to a state requirement, the state has not consistently applied, or demonstrated the intention to consistently apply, the promulgated requirement in similar circumstances at other remedial actions within the state; or

(6) For Fund-financed response actions only, an alternative that attains the ARAR will not provide a balance between the need for protection of human health and the environment at the site and the availability of Fund monies to respond to other sites that may present a threat to human health and the environment.

(D) Each remedial action selected shall be cost-effective, provided that it first satisfies the threshold criteria set forth in § 300.430(f)(1)(ii) (A) and (B). Cost-effectiveness is determined by evaluating the following three of the five balancing criteria noted in § 300.430(f)(1)(i)(B) to determine overall effectiveness: long-term effectiveness and permanence, reduction of toxicity, mobility, or volume through treatment, and short-term effectiveness. Overall effectiveness is then compared to cost to ensure that the remedy is cost- effective. A remedy shall be cost-effective if its costs are proportional to its overall effectiveness.

(E) Each remedial action shall utilize permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable. This requirement shall be fulfilled by selecting the alternative that satisfies paragraph (f)(1)(ii) (A) and (B) of this section and provides the best balance of trade-offs among alternatives in terms of the five primary balancing criteria noted in paragraph (f)(1)(i)(B) of this section. The balancing shall emphasize long-term effectiveness and reduction of toxicity, mobility, or volume through treatment. The balancing shall also consider the preference for treatment as a principal element and the bias against off-site land disposal of untreated waste. In making the determination under this paragraph, the modifying criteria of state acceptance and community acceptance described in paragraph (f)(1)(i)(C) of this section shall also be considered.

(2) The proposed plan. In the first step in the remedy selection process, the lead agency shall identify the alternative that best meets the requirements in § 300.430(f)(1), above, and shall present that alternative to the public in a proposed plan. The lead agency, in conjunction with the support agency and consistent with § 300.515(e), shall prepare a proposed plan that briefly describes the remedial alternatives analyzed by the lead agency, proposes a preferred remedial action alternative, and summarizes the information relied upon to select the preferred alternative. The selection of remedy process for an operable unit may be initiated at any time during the remedial action process. The purpose of the proposed plan is to supplement the RI/FS and provide the public with a reasonable opportunity to comment on the preferred alternative for remedial action, as well as alternative plans under consideration, and to participate in the selection of remedial action at a site. At a minimum, the proposed plan shall:

(i) Provide a brief summary description of the remedial alternatives evaluated in the detailed analysis established under paragraph (e)(9) of this section;

(ii) Identify and provide a discussion of the rationale that supports the preferred alternative;

(iii) Provide a summary of any formal comments received from the support agency; and

(iv) Provide a summary explanation of any proposed waiver identified under paragraph (f)(1)(ii)(C) of this section from an ARAR.

(3) Community relations to support the selection of remedy. (i) The lead agency, after preparation of the proposed plan and review by the support agency, shall conduct the following activities:

(A) Publish a notice of availability and brief analysis of the proposed plan in a major local newspaper of general circulation;

(B) Make the proposed plan and supporting analysis and information available in the administrative record required under subpart I of this part;

(C) Provide a reasonable opportunity, not less than 30 calendar days, for submission of written and oral comments on the proposed plan and the supporting analysis and information located in the information repository, including the RI/FS. Upon timely request, the lead agency will extend the public comment period by a minimum of 30 additional days;

(D) Provide the opportunity for a public meeting to be held during the public comment period at or near the site at issue regarding the proposed plan and the supporting analysis and information;

(E) Keep a transcript of the public meeting held during the public comment period pursuant to CERCLA section 117(a) and make such transcript available to the public; and

(F) Prepare a written summary of significant comments, criticisms, and new relevant information submitted during the public comment period and the lead agency response to each issue. This responsiveness summary shall be made available with the record of decision.

(ii) After publication of the proposed plan and prior to adoption of the selected remedy in the record of decision, if new information is made available that significantly changes the basic features of the remedy with respect to scope, performance, or cost, such that the remedy significantly differs from the original proposal in the proposed plan and the supporting analysis and information, the lead agency shall:

(A) Include a discussion in the record of decision of the significant changes and reasons for such changes, if the lead agency determines such changes could be reasonably anticipated by the public based on the alternatives and other information available in the proposed plan or the supporting analysis and information in the administrative record; or

(B) Seek additional public comment on a revised proposed plan, when the lead agency determines the change could not have been reasonably anticipated by the public based on the information available in the proposed plan or the supporting analysis and information in the administrative record. The lead agency shall, prior to adoption of the selected remedy in the ROD, issue a revised proposed plan, which shall include a discussion of the significant changes and the reasons for such changes, in accordance with the public participation requirements described in paragraph (f)(3)(i) of this section.

(4) Final remedy selection. (i) In the second and final step in the remedy selection process, the lead agency shall reassess its initial determination that the preferred alternative provides the best balance

of trade-offs, now factoring in any new information or points of view expressed by the state (or support agency) and community during the public comment period. The lead agency shall consider state (or support agency) and community comments regarding the lead agency's evaluation of alternatives with respect to the other criteria. These comments may prompt the lead agency to modify aspects of the preferred alternative or decide that another alternative provides a more appropriate balance. The lead agency, as specified in § 300.515(e), shall make the final remedy selection decision and document that decision in the ROD.

(ii) If a remedial action is selected that results in hazardous substances, pollutants, or contaminants remaining at the site above levels that allow for unlimited use and unrestricted exposure, the lead agency shall review such action no less often than every five years after initiation of the selected remedial action.

(iii) The process for selection of a remedial action at a federal facility on the NPL, pursuant to CERCLA section 120, shall entail:

(A) Joint selection of remedial action by the head of the relevant department, agency, or instrumentality and EPA; or

(B) If mutual agreement on the remedy is not reached, selection of the remedy is made by EPA.

(5) Documenting the decision. (i) To support the selection of a remedial action, all facts, analyses of facts, and site-specific policy determinations considered in the course of carrying out activities in this section shall be documented, as appropriate, in a record of decision, in a level of detail appropriate to the site situation, for inclusion in the administrative record required under subpart I of this part. Documentation shall explain how the evaluation criteria in paragraph (e)(9)(iii) of this section were used to select the remedy.

(ii) The ROD shall describe the following statutory requirements as they relate to the scope and objectives of the action:

(A) How the selected remedy is protective of human health and the environment, explaining how the remedy eliminates, reduces, or controls exposures to human and environmental receptors;

(B) The federal and state requirements that are applicable or relevant and appropriate to the site that the remedy will attain;

(C) The applicable or relevant and appropriate requirements of other federal and state laws that the remedy will not meet, the waiver invoked, and the justification for invoking the waiver;

(D) How the remedy is cost-effective, i.e., explaining how the remedy provides overall effectiveness proportional to its costs;

(E) How the remedy utilizes permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable; and

(F) Whether the preference for remedies employing treatment which permanently and significantly reduces the toxicity, mobility, or volume of the hazardous substances, pollutants, or contaminants as a principal element is or is not satisfied by the selected remedy. If this preference is not satisfied, the record of decision must explain why a remedial action involving such reductions in toxicity, mobility, or volume was not selected.

(iii) The ROD also shall:

(A) Indicate, as appropriate, the remediation goals, discussed in paragraph (e)(2)(i) of this section, that the remedy is expected to achieve. Performance shall be measured at appropriate locations in the ground water, surface water, soils, air, and other affected environmental media. Measurement relating to the performance of the treatment processes and the engineering controls may also be identified, as appropriate;

(B) Discuss significant changes and the response to comments described in paragraph (f)(3)(i)(F) of this section;

(C) Describe whether hazardous substances, pollutants, or contaminants will remain at the site such that a review of the remedial action under paragraph (f)(4)(ii) of this section no less often than every five years shall be required; and

(D) When appropriate, provide a commitment for further analysis and selection of long-term response measures within an appropriate time-frame.

(6) Community relations when the record of decision is signed. After the ROD is signed, the lead agency shall:

(i) Publish a notice of the availability of the ROD in a major local newspaper of general circulation; and

(ii) Make the record of decision available for public inspection and copying at or near the facility at issue prior to the commencement of any remedial action.

40 C.F.R. § 300.435 Remedial design/remedial action, operation and maintenance.

(a) General. The remedial design/remedial action (RD/RA) stage includes the development of the actual design of the selected remedy and implementation of the remedy through construction. A period of operation and maintenance may follow the RA activities.

(b) RD/RA activities. (1) All RD/RA activities shall be in conformance with the remedy selected and set forth in the ROD or other decision document for that site. Those portions of RD/RA sampling and analysis plans describing the QA/QC requirements for chemical and analytical testing and sampling procedures of samples taken for the purpose of determining whether cleanup action levels specified in the ROD are achieved, generally will be consistent with the requirements of § 300.430(b)(8).

(2) During the course of the RD/RA, the lead agency shall be responsible for ensuring that all federal and state requirements that are identified in the ROD as applicable or relevant and appropriate requirements for the action are met. If waivers from any ARARs are involved, the lead agency shall be responsible for ensuring that the conditions of the waivers are met.

(c) Community relations. (1) Prior to the initiation of RD, the lead agency shall review the CRP to determine whether it should be revised to describe further public involvement activities during RD/RA that are not already addressed or provided for in the CRP.

(2) After the adoption of the ROD, if the remedial action or enforcement action taken, or the settlement or consent decree entered into, differs significantly from the remedy selected in the ROD with respect to scope, performance, or cost, the lead agency shall consult with the support agency, as appropriate, and shall either:

(i) Publish an explanation of significant differences when the differences in the remedial or enforcement action, settlement, or consent decree significantly change but do not fundamentally alter the remedy selected in the ROD with respect to scope, performance, or cost. To issue an explanation of significant differences, the lead agency shall:

(A) Make the explanation of significant differences and supporting information available to the public in the administrative record established under § 300.815 and the information repository; and

(B) Publish a notice that briefly summarizes the explanation of significant differences, including the reasons for such differences, in a major local newspaper of general circulation; or

(ii) Propose an amendment to the ROD if the differences in the remedial or enforcement action, settlement, or consent decree fundamentally alter the basic features of the selected remedy with respect to scope, performance, or cost. To amend the ROD, the lead agency, in conjunction with the support agency, as provided in § 300.515(e), shall:

(A) Issue a notice of availability and brief description of the proposed amendment to the ROD in a major local newspaper of general circulation;

(B) Make the proposed amendment to the ROD and information supporting the decision available for public comment;

(C) Provide a reasonable opportunity, not less than 30 calendar days, for submission of written or oral comments on the amendment to the ROD. Upon timely request, the lead agency will extend the public comment period by a minimum of 30 additional

days;

(D) Provide the opportunity for a public meeting to be held during the public comment period at or near the facility at issue;

(E) Keep a transcript of comments received at the public meeting held during the public comment period;

(F) Include in the amended ROD a brief explanation of the amendment and the response to each of the significant comments, criticisms, and new relevant information submitted during the public comment period;

(G) Publish a notice of the availability of the amended ROD in a major local newspaper of general circulation; and

(H) Make the amended ROD and supporting information available to the public in the administrative record and information repository prior to the commencement of the remedial action affected by the amendment.

(3) After the completion of the final engineering design, the lead agency shall issue a fact sheet and provide, as appropriate, a public briefing prior to the initiation of the remedial action.

(d) Contractor conflict of interest. (1) For Fund-financed RD/RA and O&M activities, the lead agency shall:

(i) Include appropriate language in the solicitation requiring potential prime contractors to submit information on their status, as well as the status of their subcontractors, parent companies, and affiliates, as potentially responsible parties at the site.

(ii) Require potential prime contractors to certify that, to the best of their knowledge, they and their potential subcontractors, parent companies, and affiliates have disclosed all information described in § 300.435(d)(1)(i) or that no such information exists, and that any such information discovered after submission of their bid or proposal or contract award will be disclosed immediately.

(2) Prior to contract award, the lead agency shall evaluate the information provided by the potential prime contractors and:

(i) Determine whether they have conflicts of interest that could significantly impact the performance of the contract or the liability of potential prime contractors or subcontractors.

(ii) If a potential prime contractor or subcontractor has a conflict of interest that cannot be avoided or otherwise resolved, and using that potential prime contractor or subcontractor to conduct RD/RA or O&M work under a Fund- financed action would not be in the best interests of the state or federal government, an offeror or bidder contemplating use of that prime contractor or subcontractor may be declared nonresponsible or ineligible for award in accordance with appropriate acquisition regulations, and the contract may be awarded to the next eligible offeror or bidder.

(e) Recontracting. (1) If a Fund-financed contract must be terminated because additional work outside the scope of the contract is needed, EPA is authorized to take appropriate steps to continue interim RAs as necessary to reduce risks to public health and the environment. Appropriate steps may include extending an existing contract for a federal-lead RA or amending a cooperative agreement for a state-lead RA. Until the lead agency can reopen the bidding process and recontract to complete the RA, EPA may take such appropriate steps as described above to cover interim work to reduce such risks, where:

(i) Additional work is found to be needed as a result of such unforeseen situations as newly discovered sources, types, or quantities of hazardous substances at a facility; and

(ii) Performance of the complete RA requires the lead agency to rebid the contract because the existing contract does not encompass this newly discovered work.

(2) The cost of such interim actions shall not exceed $2 million.

(f) Operation and maintenance. (1) Operation and maintenance (O&M) measures are initiated after the remedy has achieved the remedial action objectives and remediation goals in the ROD, and is determined to be operational and functional, except for ground- or surface-water restoration actions covered under § 300.435(f)(4). A state must provide its assurance to assume responsibility for O&M, including, where appropriate, requirements for maintaining institutional controls, under § 300.510(c).

(2) A remedy becomes "operational and functional" either one year after construction is complete, or when the remedy is determined concurrently by EPA and the state to be functioning properly and is performing as designed, whichever is earlier. EPA may grant extensions to the one-year period, as appropriate.

(3) For Fund-financed remedial actions involving treatment or other measures to restore ground- or surface-water quality to a level that assures protection of human health and the environment, the operation of such treatment or other measures for a period of up to 10 years after the remedy becomes operational and functional will be considered part of the remedial action. Activities required to maintain the effectiveness of such treatment or measures following the 10-year period, or after remedial action is complete, whichever is earlier, shall be considered O&M. For the purposes of federal funding provided under CERCLA section 104(c)(6), a restoration activity will be considered administratively "complete" when:

(i) Measures restore ground- or surface-water quality to a level that assures protection of human health and the environment;

(ii) Measures restore ground or surface water to such a point that reductions in contaminant concentrations are no longer significant, or

(iii) Ten years have elapsed, whichever is earliest.

(4) The following shall not be deemed to constitute treatment or other measures to restore contaminated ground or surface water under § 300.435(f)(3):

(i) Source control maintenance measures; and

(ii) Ground- or surface-water measures initiated for the primary purpose of providing a drinking-water supply, not for the purpose of restoring ground water.