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New York v. Shore Reality

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NEW YORK v. SHORE REALTY
759 F.2d 1032 (2d Cir. 1985)

CERCLA: The non-listing of a hazardous waste site on the National Priorities List does not bar a state's recovery of costs incurred in an independent response action to the release of hazardous wastes.

INTRODUCTION

New York v. Shore Realty[1] concerns a state's independent response to a release of hazardous wastes at a site that was not on the National Priorities List [NPL].[2] The state is seeking to recover its costs of response from the party responsible for the contamination. Under the Comprehensive Environmental Response, Compensation, and Liabilities Act of 1980 [CERCLA],[3] however, cost recovery is limited to response costs that are consistent with the National Contingency Plan [NCP].[4] Part of the NCP is the national inventory of hazardous waste sites, called the NPL. The focus of this case is a hazardous waste site which is not listed on the NPL. New York's ability to recover turns on whether a site's presence on the National Priorities List is a general requirement for consistency with the National Contingency Plan. The Court of Appeals for the Second Circuit [Second Circuit] decided that presence on the NPL was not generally required for consistency with the NCP and, therefore, the state was not barred from recovering its response costs.

The first section of this Note focuses on the background and statutory underpinnings of CERCLA. The second section analyzes district court decisions which consider whether presence on the NPL is required for consistency with the NCP so that the state may recover response costs under CERCLA. The Note compares the Second Circuit's decision in *Shore Realty* with these cases. The final section of the Note explores some of the ramifications of *Shore Realty*, with particular attention to the effect the holding may have on response cost recovery actions where the plaintiff is a private non-governmental party.

CERCLA HISTORY

The Comprehensive Environmental Response, Compensation, and

1. New York v. Shore Realty, 759 F.2d 1032 (2d Cir. 1985) [hereinafter Shore Realty].

2. The NPL is an inventory which ranks the worst hazardous waste sites in the nation in need of immediate federal attention. *Infra* notes 14-16.

3. 42 U.S.C. §§ 9601-57 (1982). For the sake of convenience, all references to CERCLA in this Note use the public law numbering, *i.e.* CERCLA 101-15.

4. The National Contingency Plan guides federal cleanup actions in response to a release of hazardous wastes. *Infra* notes 13-16 and accompanying text. The state's suit for recovery of response costs is based on CERCLA 107(a)(4)(A) which states that responsible parties are liable for "all costs of removal or remedial action incurred by . . . a State not inconsistent with the national contingency plan." Shore Realty, 759 F.2d at 1042.

Liabilities Act of 1980 was the Congressional response to cataclysmic environmental disasters caused by abandoned hazardous waste sites.[5] Congress found that improper hazardous waste disposal occurred extensively throughout the country.[6] Prior to CERCLA, Congress enacted the Resource Conservation and Recovery Act [RCRA],[7] a cradle-to-grave regulatory scheme designed to track and control the passage of hazardous wastes from generation to disposal. However, RCRA proved to be inadequate[8] in addressing problems caused by releases[9] of hazardous wastes at abandoned or inactive sites.[10] Consequently, CERCLA was specifically designed to address these problems.[11]

The primary goals of CERCLA were to inventory inactive hazardous waste sites, provide the federal government with the tools necessary to pursue the immediate cleanup of improperly disposed hazardous waste, and make the parties responsible for the problems bear the cost of the response actions.[12] Several key sections of CERCLA implement these goals.

Inventorying the nation's hazardous waste sites is accomplished through the use of the National Contingency Plan [NCP].[13] The NCP provides the federal government with guidelines and describes methods for discovering, investigating, evaluating, and responding to releases of hazardous

5. CONGRESSIONAL QUARTERLY ALMANAC 584 (1980). The most notorious example of such a disaster occurred at the Love Canal subdivision in Niagara Falls, New York, where families suffered injuries, severe in some cases, as a result of leaking toxic wastes.

6. H.R. REP. NO. 1016, 96th Cong. 2nd Sess. 1, 18-20, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 6119, 6121-23.

7. 42 U.S.C. §§ 6901-6987 (1982).

8. H.R. REP. NO. 1016, 96th Cong. 2nd Sess. 1, 17, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 6119, 6120. RCRA's principal fault was that it was directed towards regulation of the source of hazardous wastes and was not concerned with the results of hazardous waste disposal. United States v. Northeastern Pharm. & Chem. Co. [NEPACCO], 579 F.Supp. 823, 835 (W.D.S.D. 1984).

9. Release is a comprehensive term. It is defined as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment." CERCLA 101(22).

10. Abandoned or inactive hazardous waste sites are not directly defined in CERCLA. However they are effectively included within the definition of facility: "any building, structure, installation, equipment, pipe or pipeline . . . storage container, rolling stock . . . or any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." CERCLA 101(9).

11. CERCLA was intended "to bring order to the array of partly redundant, partly inadequate federal hazardous substances cleanup and compensation laws." F. ANDERSON, D. MANDELKER, & D. TARLOCK, ENVIRONMENTAL PROTECTION: LAW AND POLICY 568 (1984). CERCLA was signed into law by President Carter on Dec. 11, 1980.

12. H.R. REP. NO. 1016, 96th Cong. 2nd Sess. 1, 17, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 6119, 6120. Subsequent judicial interpretations of CERCLA verify these as the principal Congressional concerns. United States v. Reilly Tar & Chemical Corp., 546 F.Supp. 1100, 1112 (D. Minn. 1982); United States v. Wade, 577 F.Supp. 1326, 1332 (E.D. Penn. 1983).

13. The NCP appears at 40 C.F.R. 300.61-.72 (1986).

wastes.[14] An important function of the NCP is to identify, on a National Priorities List [NPL], the worst hazardous waste sites in the nation.[15] The NPL ranking reflects a prioritization of those sites in need of immediate federal response actions.[16]

Congress also provided the federal government with authority to respond[17] to releases of hazardous wastes. Whenever a release poses an imminent and substantial threat to public health or welfare, the federal government may act immediately.[18] Federal responses are financed by the Superfund [Fund].[19] The government can seek Superfund reimbursement through a

14. Congress directed the Environmental Protection Agency [EPA] to develop a plan "to reflect and effectuate the responsibilities and powers created by this Act [and] establish procedures and standards for responding to releases of hazardous substances, pollutants, and contaminants." CERCLA 105. Consequently, the NCP outlines the process of inventorying hazardous waste sites, it contains criteria for determining priorities of response actions among the highest priority sites in each state, and it aids in determining appropriate response actions. The NCP also defines the roles and responsibilities of federal, state, and local governments.

15. CERCLA 105(B). The NPL appears at 40 C.F.R. 300 App. B (1986).

16. 40 C.F.R. 300.68(a) (1986). The NPL is part of the NCP. Hazardous waste sites which appear on the NPL are selected by means of a hazard ranking system. States wishing to submit sites for inclusion on the NPL perform the hazard ranking. The hazard ranking system is found at 40 C.F.R. 300 App. A (1986).

The criteria for ranking a site include the possible risk to the population, the potential hazard of substances at a given site, the potential for contamination of drinking water supplies and other pathways which may affect human health, and the potential for the destruction of sensitive ecosystems. After potential sites are ranked and submitted to the EPA, they are reviewed and consolidated into the NPL. Any site which scores 28.5 or more is included on the NPL.

17. Responses include removal or short-term actions as well as remedial or long-term actions. CERCLA 101(23), (24), and (25).

18. CERCLA 104(a). The President gave the EPA the authority to act in his stead. Exec. Order No. 12,316, 3 C.F.R. 168 (1982). Herein, federal government and EPA are used interchangeably.

The EPA has two options when it responds to a release. It can compel the responsible party to perform the cleanup. CERCLA 106. In the alternative, the EPA itself can cleanup the hazardous waste using money from the Superfund. CERCLA 104, and 111(a). Federal responses include removal or short-term actions as well as remedial or long-term actions. If the EPA performs the response action, it can seek reimbursement from the responsible parties in a cost recovery action. CERCLA 107(a)(4)(A).

19. "Superfund" is the popular name referring to CERCLA in general. However, the Superfund [Fund] itself was established primarily for financing government cleanup of hazardous wastes or reimbursing parties who performed the cleanup. CERCLA 111. The original $1.6 billion Fund was supported through two avenues: from appropriations of general revenue and from a tax imposed on crude oil, imported petroleum products, and basic chemicals. CERCLA 221.

With the passage of the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) [SARA], the funding rates and mechanisms of the Fund changed significantly. Instead of two sources of funding the new Hazardous Substances Superfund, CERCLA 221(a), five tax resource pool will generate $8.5 billion over a five-year period: $2.759 billion from an excise tax on petroleum; $1.365 billion from an excise tax on feedstock chemicals; $.057 billion from a tax on imported chemical derivatives; $2.522 billion from an environmental tax; and $1.250 billion appropriation from general revenues. 16 ELR 10,413 (1986).

There are several changes in the new funding mechanisms worth noting. Whereas the tax on petroleum used to be .79 cents per barrel, with SARA there is a two-tiered tax of 8.2 cents per barrel on domestic crude oil and 11.7 cents per barrel on all imported petroleum products. D. HAYES

response cost recovery action[20] against the parties responsible for the hazardous substance release.[21] With CERCLA, Congress attempted to provide the federal government with a framework for rational management of the immense task of cleaning up hazardous waste sites.

CERCLA also addresses cleanups performed by parties other than the federal government.[22] However, difficult problems of interpretation arise when a cleanup is performed without any federal involvement. Because CERCLA was drafted primarily to guide cleanup actions undertaken by the federal government, it is difficult to transfer its provisions to non-federal response actions. For example, the federal government is required to follow a specific set of procedures when responding to a release.[23] However, there is no explicit requirement that these same procedures apply when a non-federal party responds to a release, and almost no legislative guidance on whether they are implicitly required in such a case.

New York v. Shore Realty presented this difficult question of statutory construction, because there, a non-federal party, New York State, sought to recover its costs of response from a private party. New York's response to the hazardous waste site had taken place entirely without federal involvement and outside the contours of the NCP. The specific question in the case was whether a state's response costs could be consistent with

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& C. MACKERRON, SUPERFUND II: A NEW MANDATE 84 (1987) (Bureau of National Affairs Special Report). In addition, a new broad-based industry wide environmental tax was adopted rather than imposing a tax on hazardous chemical generators alone. *Id.* at 85.

Principal uses of the Fund include payment for: response costs incurred by the government (CERCLA 111(a)(1)); response costs incurred by any other party as a result of carrying out the NCP (CERCLA 111(a)(2)); the costs of restoring or replacing destroyed natural resources (CERCLA 111(c)(3)); and certain medical costs such as epidemiologic and long-term health effect studies (CERCLA 111(c)(4)).

20. CERCLA 107 (a)(4)(A).

21. The four classes of potentially responsible parties found in CERCLA 107(a) include:
    (1) the owner and operator of a vessel . . . or a facility,
    (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
    (3) any person who by contract, agreement, or otherwise arranged for the disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity and containing such hazardous substances, and
    (4) any person who accepts or accepted any hazardous substance for transport to disposal or treatment facilities selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance.

22. The statute permits states to recover response costs from responsible parties. CERCLA 107(a)(4)(A). Additionally, the statute contains a private (non-governmental) right of action to recover response costs. CERCLA 107(a)(4)(B). Walls v. Waste Resource Corp., 761 F.2d 311, 318 (6th Cir. 1985).

23. The procedures are the NCP. *Supra* notes 13-16 and accompanying text.

the NCP and therefore recoverable when the site was not listed on the NPL, which is itself a part of the NCP.

STATEMENT OF THE CASE

Donald LeoGrande [LeoGrande] was the principal officer and owner of Shore Realty Corporation [Shore].[24] LeoGrande incorporated Shore for the express purpose of purchasing a 3.2 acre peninsular site on which he intended to construct condominiums.[25] The purchase agreement provided LeoGrande with an option to withdraw from the purchase of the property subsequent to an environmental study.[26]

At the time of the purchase agreement, the property was operated as an illegal[27] hazardous waste storage facility[28] by the tenants Applied Environmental Services, Inc. [AES] and Hazardous Waste Disposal, Inc. [HWD].[29] Roughly 700,000 gallons of hazardous wastes, chemicals, and contaminated solids were stored on the property in various containers.[30] Shore's environmental consultant, WTM Management Corporation [WTM], conducted a detailed study of the property in July, 1983.[31] The study indicated the facility was deteriorating due to "little if any preventive maintenance,"[32] and there were signs of corrosion and seepage from many of the containers.[33] In addition, WTM's testing indicated several spills of hazardous wastes had occurred at the site, and hazardous substances were continuing to leach into the ground water and the neighboring harbor.[34]

LeoGrande did not choose to void the purchase agreement.[35] Instead, he sought a waiver of liability[36] for the disposal of the hazardous wastes

24. *Shore Realty*, 759 F.2d at 1038.

25. *Id.* The property was located at Glenwood Landing, Nassau County, New York.

26. *Id.* The purchase agreement was dated July 14, 1983.

27. *Id.* The tenants violated state requirements by not having a permit to operate either a hazardous waste storage facility or a permanent hazardous waste disposal facility.

28. Facility is a comprehensive term. *Supra* note 10.

29. *Shore Realty*, 759 F.2d at 1038.

30. *Id.* The wastes were placed in over 400 drums, eleven tanks, four roll-on/roll-off containers, and one tank truck trailer. The wastes are various hazardous substances such as benzene, dichlorobenzenes, ethyl benzene, tetrachlorethylene, trichloroethylene, 1,1,1-trichloroethene, chlordane, polychlorinated biphenyls (PCBs), and bis (2-ethylhexyl) phthalate. These toxics are dangerous to the environment and humans can develop cancer if the substances are touched, inhaled, or ingested.

31. *Id.*

32. *Id.* (quoting from the environmental study).

33. *Id.*

34. *Id.*

35. *Id.* at 1039.

36. *Id.* The request for a waiver was an attempt to separate ownership of the land from responsibility for cleaning up the hazardous wastes. Shore attempted to avoid liability for the cleanup by arguing that it did not cause the release; it merely took possession of the land which was already contaminated. The court ultimately rejected this argument because Shore had full knowledge of the illegal operations conducted by AES and HWD at the property. *Id.* at 1048-49 (discussion of CERCLA affirmative defense). *See also infra* note 56.

from the New York State Department of Environmental Conservation [DEC].[37] The waiver was denied, and after taking title, Shore evicted AES and HWD.[38] However, for three months after Shore had taken title and before leaving the property, AES and HWD continued to deposit hazardous wastes at the site.[39]

Subsequent to a DEC inspection of the site, the State of New York[40] brought suit against Shore and LeoGrande in the United States District Court for the Eastern District of New York. The state sought an injunction requiring LeoGrande and Shore to cleanup the hazardous waste disposal site at Glenwood Landing.[41] The site was not listed on the NPL.[42] The state claim was based on CERCLA abatement authority and pendent state law of public nuisance.[43] The state requested damages for costs resulting from both an assessment of conditions at the site and from supervising the removal of several drums of hazardous waste from the site.[44]

Although Shore did remove some of the drums pursuant to court order,[45] a subsequent DEC inspection revealed that the site was approaching a critical danger point.[46] One month later, the district court granted the state a partial summary judgment, finding Shore and LeoGrande liable for response costs.[47] The district court issued a permanent injunction ordering the defendants to cleanup the hazardous waste site.[48] Shore appealed to the United States Court of Appeals for the Second Circuit.

The issue before the Second Circuit was whether New York's

37. *Shore Realty*, 759 F.2d at 1039.

38. *Id.* Shore took title on Oct. 13, 1983, and evicted AES and HWD on Jan. 5, 1984.

39. *Id.*

40. New York v. Shore Realty, 21 ERC 1430 (E.D. N.Y. 1984).

41. *Id*

42. *Shore Realty*, 759 F.2d at 1045.

43. *Id.* at 1037. The state sought to ground its abatement authority on CERCLA 106. The public nuisance claims stem from common law and New York's property law. *See* N.Y.Real Prop. Actions and Proceedings Law § 841 (McKinney 1979).

44. *Shore Realty*, 759 F.2d at 1039, 1042. The state's suit for recovery of response costs is based on CERCLA 107(a)(4)(A) which states that responsible parties are liable for "all costs of removal or remedial action incurred by . . . a State not inconsistent with the national contingency plan."

45. *Shore Realty*, 759 F.2d at 1038 n. 3. After a state inspection was requested by Shore's employees, a stipulation and order were entered on June 15, 1984, requiring Shore to minimize the threats to the health and environment.

46. *Id.* at 1039. The inspection occurred on Sept. 19, 1984.

47. *Id.* at 1037. The district court based its decision on CERCLA 107(a)(4)(A). *See also supra* note 44.

48. *Shore Realty*, 759 F.2d at 1037. The district court originally based the injunction partly on CERCLA 106 and partly on state common law of public nuisance. However, on remand from the Court of Appeals for the Second Circuit, the district court grounded the injunction solely on New York state law of public nuisance because CERCLA 106 abatement authority is available only to the EPA. *Id.* at 1049-52 (discussion of CERCLA injunctive relief and common law of public nuisance).

independent[49] response was consistent with the NCP even though the site was not on the NPL.[50] The issue arises in a cost recovery action[51] because response costs are recoverable only if they are consistent with the NCP.[52] The Second Circuit affirmed the district court's holding that Shore and LeoGrande were liable for the state's response costs.[53] The court also upheld the permanent injunction based on New York's law of public nuisance.[54] In addition, the court held CERCLA does not require the state to show the defendants caused the presence or release of hazardous waste at the site.[55] Since it concluded that causation was not an issue, the court also rejected Shore's affirmative defense that the releases were caused by a third party not within its control.[56] Most importantly, the court held

49. The term "independent" refers to the state performing the response without involvement of any kind by the federal government. For example, the federal government did not perform any response actions nor was the site on the federal inventory, the NPL.

50. *Shore Realty*, 759 F.2d at 1045.

51. CERCLA 107(a)(4)(A) or CERCLA 107(a)(4)(B).

52. Both CERCLA 107(a)(4)(A) and CERCLA 107 (a)(4)(B) provide for the recovery of response costs but the requirement of consistency with the NCP appears in slightly different forms. The federal and state response cost recovery action, CERCLA 107(a)(4)(A), limits recoverable response costs to those costs that are *not inconsistent* with the NCP. The private, non-governmental, response cost recovery action, CERCLA 107(a)(4)(B), limits recoverable response costs to those costs that are *consistent* with the NCP. The difference in language reflects the shifting of the burden of proof. Under CERCLA 107(a)(4)(A), the federal government or state which seeks recovery of response costs only has to allege consistency with the NCP and the defendant to the action must prove that the costs were inconsistent. In contrast, a person bringing suit under CERCLA 107(a)(4)(B) bears the burden of proof and must affirmatively plead consistency with the NCP. NEPACCO, 579 F.Supp. at 850.

53. *Shore Realty*, 759 F.2d at 1043. Under CERCLA, current owners and operators of a facility are liable for response costs. CERCLA 107(a)(1). The definition of owner and operator includes: "any person owning or operating . . . or [who] otherwise controlled activities at [a] facility immediately prior to such abandonment." CERCLA 101(20)(A). Shore is the undisputed owner of the facility. LeoGrande is also included within the term owner and operator because of the control he exercised over corporate activities. Thus both LeoGrande and Shore are responsible for the costs of response. The leading case concerning the imposition of joint and several liability is United States v. Chem-Dyne, 572 F.Supp. 802 (S.D. Ohio 1983).

54. *Shore Realty*, 759 F.2d at 1050.

55. *Id.* at 1044-45. The court reasoned that a requirement of causation in CERCLA 107(a) would render superfluous the affirmative defense exceptions to liability that are themselves based on causation. The court is following the trend in the district courts that CERCLA is strict, joint, and several liability. U.S. v. Conservation Chemical Co., 589 F.Supp. 59, 62 (W.D. Mo. 1985); NEPACCO, 579 F.Supp. at 844. Thus if a party is one of the enumerated classes of CERCLA 107, *supra* note 21, then they are liable for response costs.

56. *Shore Realty*, 759 F.2d at 1044, 1048-49. A potentially responsible party can avoid liability for response costs if the release was caused by the acts or omissions of a third party. CERCLA 107(b)(3). Shore argued that it was not the party responsible for the transportation of the wastes to the site and that it had exercised due care since taking control of the site. The court rejected this argument reasoning that the defendants knew of and had control of releases or threats of release at the time of purchase. Because Shore and LeoGrande allowed the prior tenants to continue operating the illegal hazardous waste facility the court rejected Shore's claim.

that the listing of a hazardous waste site on the NPL is not a general requirement of the NCP.[57]

ANALYSIS

Prior to *Shore*, district courts divided over the issue of the relationship between the NPL and the NCP. On one end of the spectrum, one district court held that a site must appear on the NPL in order for the response to be consistent with the NCP.[58] This court reasoned that since the NPL is part of the NCP, the requirement of consistency with the NCP in a cost recovery action demands listing on the NPL.[59] The court reached its conclusion by blending two separate sections of CERCLA together: federal response actions (CERCLA 104) and response cost recovery actions (CERCLA 107(a)). They are, however, two different types of actions and serve distinctly different purposes. CERCLA 104 guides and limits federal response actions.[60] But CERCLA 107(a) does not address the way in which the response is carried out. Instead, the function of CERCLA 107(a) is to assign liability for the costs of the response to the release.[61] By equating presence on the NPL with consistency under the NCP, however, the court inappropriately imposed a federal response limitation, the NPL, on cost recovery actions.[62]

Courts at the opposite end of the spectrum held the presence of a site on the NPL to be irrelevant to the issue of consistency with the NCP.[63] These courts reasoned that the response cost recovery sections are wholly

57. *Shore Realty*, 759 F.2d at 1046.

58. Cadillac Fairview/California Inc. v. Dow Chemical Co., 14 E.L.R. 20,376, 20,379 (D.C.C.D. Cal. 1984). In this case the plaintiff, *Cadillac/Fairview*, was a private, i.e. non-governmental, party suing under CERCLA 107(a)(4)(B) to recover response costs. In Shore Realty, however, the plaintiff is a state government that is seeking recovery of response costs under CERCLA 107(a)(4)(A). The fact that *Cadillac/Fairview* was a *private* cost recovery action whereas *Shore Realty* is a state cost recovery action is of no significance here. The only significance to the difference in type of plaintiff is a shifting of the burden of proof. *See supra* note 52.

59. *Cadillac Fairview*, 14 E.L.R. at 20,379.

60. For a discussion of federal responses see *supra* note 18 and accompanying text.

61. The first step in a cost recovery action is the identification of the parties responsible for the release of hazardous substances. These parties will be liable for the costs incurred in a response action. CERCLA 107(a)(1)-(4) identifies the four classes of potentially responsible parties liable for costs of response to a hazardous substance release. *See supra* note 21.

62. The court's conclusion follows one trend of judicial reasoning which interprets consistency with the NCP to mean federal approval of any private response action prior to commencement of the response. Such federal preapproval is required in order for the costs to be recoverable. *See, e.g.*, Artesian Water Co. v. Government of New Castle County, 605 F.Supp. 1348 (D. Del. 1985); Bulk Distribution Centers, Inc. v. Monsanto Co., 589 F.Supp. 1437 (S.D. Fla. N.D. 1984). The furthest extension of the idea of federal preapproval would require that the site must appear on the NPL for the response to be consistent with the NCP.

63. State of New York v. General Electric Co., 592 F.Supp. 291 (N.D. N.Y. 1984); Pinole Point Properties v. Bethlehem Steel Corp., 596 F.Supp. 283 (N.D. Cal. 1984).

independent of the federal response sections.[64] Consequently, restrictions that are imposed on federal response actions do not apply to any cost recovery actions.

The Second Circuit rejected both sides of the split among the district courts.[65] Whereas the district courts' reasoning implies limitations in the scope of the two sections based on an interpretation of a single phrase, the Second Circuit read several sections together in an effort to find internal consistency within CERCLA.[66] The Second Circuit held that where a state has responded to a release without any federal involvement, a site's presence on the NPL is not the appropriate measure for determining consistency with the NCP.[67] The court looked to the functions of the NPL to reach its conclusion that listing on the NPL was not generally required for consistency with the NCP.[68] The Second Circuit found, in those sections of CERCLA which direct the EPA to create the NPL, that the purpose of listing a site on the NPL was to establish priorities for *remedial*, or long term, responses.[69] But, in *Shore Realty*, the plaintiff performed a *removal*, or emergency, response action.[70] Furthermore, the court ob-

64. New York v. General Electric Co., 592 F.Supp. at 302; Pinole Point Properties v. Bethlehem Steel Corp., 596 F.Supp. at 288-89. The reasoning of these courts is much the same as *supra* note 60-62 and accompanying text. Most courts reach the conclusion that the two sections are completely separate through a plain reading of CERCLA 107: "notwithstanding any other provision or rule of law . . . [the responsible parties] . . . shall be liable for . . . all costs [of response]." U.S. v. Wade, 577 F.Supp. at 1336; U.S. v. NEPACCO, 579 F.Supp. at 850-51. It should be noted that some of the cases cited for the separateness of CERCLA 107 and CERCLA 104 refer to CERCLA 107 and CERCLA 111 as being separate. However, CERCLA 111 lists permissible uses of the Superfund which include payment for response actions pursuant to CERCLA 104. Therefore, by extension, both CERCLA 104 and CERCLA 111 are separate from CERCLA 107.

65. *Shore Realty*, 759 F.2d at 1046.

66. The Second Circuit specifically rejected the reasoning of two district courts which based the conclusion that CERCLA 104 and CERCLA 107 were entirely severable on their interpretation of the single isolated phrase introducing CERCLA 107 "notwithstanding any other provision or rule of law." CERCLA 107(a). Both of these courts found the language meant section 107 is distinct in its application and not limited by any other sections of CERCLA or other statutory laws. U.S. v. Wade, 577 F.Supp. at 1336; U.S. v. NEPACCO, 579 F.Supp. at 850. By extension, therefore, limitations on federal response actions would not apply in cost recovery actions.

67. *Shore Realty*, 759 F.2d at 1046.

68. *Id.* at 1046-47.

69. Remedial responses are defined as "actions consistent with permanent remedy taken instead of or in addition to removal actions." CERCLA 101(24). In CERCLA 105(8)(A), the EPA is required to draft the NCP and include criteria for determining the top priority response targets for *remedial* action. Based on this criteria the next section, CERCLA 105(8)(B), requires the EPA to determine which sites shall be on the list and then promulgate the NPL. In addition, CERCLA 104(a)(1) gives the EPA the authority to provide *remedial* action which is *consistent* with the NCP. Thus, the court concluded, that the NPL is applicable only to remedial responses.

70. *Supra* note 44 and accompanying text. Removal is defined as actions "necessary to prevent, minimize or mitigate damage to the public health or welfare or to the environment." CERCLA 101(23). Removal responses are generally emergency or short term actions in contrast to remedial actions which are long term actions.

served that the NPL was a limitation only on *federal* response actions.[71] In *Shore Realty*, however, the state of New York performed the response. Lastly, the court concluded from the legislative history that the NPL is primarily informational in nature for use in controlling Superfund expenditures.[72] Consequently, the Second Circuit held that where a state pursues a response without any involvement of the federal government, the non-listing of the site on the NPL will not bar the state's recovery of response costs.[73]

In effect, the Second Circuit strikes a middle ground between the district court holdings. Whereas the district courts construed the federal response section and the cost recovery section as totally separate or totally intertwined, the Second Circuit found they are interlinked in some, but not all, situations. The Second Circuit's holding suggests two factors that determine when the sections interlink and, consequently, when listing on the NPL is relevant in a response cost recovery action. The two factors focus on the identity of the parties in the response action and the type of response action anticipated.

The key questions surrounding the relevancy of the NPL in a response cost recovery action are whether the federal government is involved in the response and whether the response is remedial in nature. Focus on these factors suggests four scenarios where the two sections might interlink: (1) the state alone performs a removal response; (2) the state, together with the federal government, performs a removal response; (3) the state alone performs a remedial response; or (4) the state, together with the federal government, performs a remedial response.

Of these four possibilities, however, the federal response section interlinks with the cost recovery section in only one instance: where the state acts together with the federal government in performing a remedial response. The federal response section is not applicable where the state is acting alone. Therefore, listing on the NPL is not relevant. Nor is listing a requirement when the response is removal, even when the federal government is involved because the NPL applies only to remedial responses. However, in the case where both the federal government participates and the response is remedial in nature, then listing on the NPL is required. In this case the NPL performs dual functions: it serves as a

71. For example, in CERCLA 104(a)(1) the EPA is authorized to respond to a release and provide remedial action. However, before a federally funded remedial response action can begin, a federal-state cooperative cost sharing and cleanup agreement is required. CERCLA 104(c)(3). The federal-state cleanup must be in accordance with the criteria and priorities established in the NCP. CERCLA 104(d)(1). Because the prioritization in the NCP is the NPL, the NPL acts as a limitation on the response only when the federal government is involved in some way with the response action.

72. *Shore Realty*, 759 F.2d at 1047.

73. *Id.*

federal response management tool by ranking the sites most deserving of federal attention and Fund monies, and, at the same time, it limits the recoverability of response costs by requiring that the costs be incurred in a manner that is consistent with the NCP which includes listing on the NPL. Here response cost recoverability is conditioned on NPL listing *because* the federal government is involved.

The dual role of the NPL in this fourth scenario is evidence of the interlinking of the federal response limitation (CERCLA 104) and cost recovery actions (CERCLA 107(a)). Recognition of the NPL's dual role supports the interpretation that the two sections are primarily independent of one another, but acknowledges the fact when the federal government is involved in a cleanup that these two sections of CERCLA interlink. When the two sections do interlink, the cost recovery section is limited by the federal response section because in this situation the minimum requirement for the recovery of response costs, consistency with the NCP, is listed on the NPL. The reason for interlinking the two sections of CERCLA is the same reason the NPL was created: to promote the efficacious use of the limited Superfund monies.

RAMIFICATIONS

The Second Circuit's holding as to the relationship between the National Priorities List and consistency with the National Contingency Plan is very narrow. Listing on the NPL is mandatory only when the federal government is involved in a remedial (long-term) response to a release of hazardous substances. In such a situation the federal government is using Superfund monies directly,[74] and a site must appear on the NPL before Fund monies can be used to clean it up. The NPL thus serves as a management tool designed to preserve Fund resources by promoting efficient federal use of limited Superfund monies. Where direct payment from the Fund is not at issue, the management tool is unnecessary.

By removing the NPL as a limitation on a state's ability to recover cleanup costs, the holding increases the likelihood that more hazardous waste sites will be cleaned up. States, once fearful that recovery of response costs will be barred simply because the site is not on the NPL, will no longer be chilled from responding to non-NPL hazardous waste sites. Most importantly, the holding permits states to pursue cleanups of newly discovered hazardous waste sites without having to wait for the site to be listed on the NPL.

An additional benefit of the decision is that it may encourage private,

74. One of the permitted uses of Fund monies is payment of CERCLA 104 (federal) response costs. CERCLA 111(a)(1).

that is non-governmental, responses and cleanups of hazardous waste sites. Because the only difference between a governmental and a private response cost recovery action is the burden of proof,[75] a private party seeking non-Fund recovery of response costs is not limited by the NPL in the same way that the state of New York was not limited by the NPL in the present case. Consequently, private parties can be secure that if they respond to a release of hazardous substances, a site's non-listing on the NPL will not bar recovery of response costs.

CONCLUSION

Justice Oakes' reasoning in *Shore* provides a firm foundation for application and interpretation of a statute which was labeled as fraught with inconsistencies and ambiguities. The opinion resolves a conflict of authority which had arisen over the meaning of presence on the National Priorities List and consistency with the National Contingency Plan. No longer will state or private parties be deterred from cleaning up non-NPL hazardous waste sites for fear that the response costs are inconsistent with the NCP. As a result, more hazardous waste sites may be cleaned up through the added efforts of state and non-governmental parties. Consequently, the Congressional goal of removing threats to health and environment posed by such sites shall likely be accelerated.

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75. *See supra* note 52.