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# CERCLA, State Law, and Federalism in the 21st Century

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## INTRODUCTION

In 2004, I left a partnership at a large Minneapolis law firm for academia. During my time in private practice, I focused primarily on environmental, natural resources, and land use litigation and had the opportunity to try two unrelated cases in federal court that involved claims under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), the Minnesota Environmental Response and Liability Act ("MERLA"), and state common law theories of nuisance, trespass, negligence, and strict liability. Both lawsuits involved claims for recovery of response costs and damages arising from contaminated property by one private party against another private party. Thus, unlike the early CERCLA cases which were generally brought by the federal or state government or both and often involved multiple parties, these cases involved government entities and officials only as third-party witnesses and did not involve complicated PRP groups, government settlements, orphan shares, and the like. In each case, one corporation had spent money remediating contaminated property and was seeking to recover those costs as well as other damages from another corporation.

I learned many lessons from these two cases, three of which were particularly relevant as I began a career in legal academia focusing on environmental law, natural resources law, torts, and property. First, in cases where a cleanup is relatively modest and does not involve a major industrial site, landfill, or similar property with a history of heavy contamination and hundreds of millions of dollars of remediation costs, the

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real "money" in the case is often not in the cleanup costs one can recover under CERCLA or state superfund laws. Instead, it is in the damages that are potentially recoverable, including punitive damages, under state common law claims such as nuisance, negligence, or strict liability. Second, as complicated and convoluted as CERCLA and the related laws governing hazardous substance contamination appear to lawyers, courts, law students, and the business community, with good lawyers and judges and a comprehensive set of jury instructions, juries are capable of understanding and applying the differences between federal and state liability standards in this area to a particular set of facts. Third, simply because a set of federal standards under CERCLA and a set of state standards under common law or state statutory law might provide for different types of relief for the same harm, all of the various standards can be applied without resulting in multiple recoveries or interfering with CERCLA or state cleanup goals. Because the relevant provisions of CERCLA and related state laws are merely legal vehicles for recovering costs associated with past contamination, as opposed to legal frameworks that set standards of current conduct to prevent future pollution like the Clean Water Act, Clean Air Act, or Resource Conservation and Recovery Act, the potential for conflict between state and federal law is significantly lessened.

These lessons have led me to a few conclusions relevant to this essay. First, state law remains extremely important to lawyers and litigants in the area of environmental law, including the laws governing contaminated property, despite the expansive growth of the federal regulatory state in this area. Second, the court system and the jury system can reach supportable results based on facts and law in complicated environmental cases involving overlapping state and federal environmental laws. Third, principles of federalism that promote a robust role for state statutory and common law is acceptable and desirable in the law governing contaminated property.

A few caveats are important at this point. First, many CERCLA cases, including most CERCLA cases highlighted in legal textbooks, involve multiple parties, hundreds of millions of dollars in cleanup costs, years of discovery and negotiations, and few jury trials. Thus, my two small, two-party jury cases are not on their own representative of the thirty years of CERCLA litigation. Second, simply because two juries appear to have been able to see and apply the differences in federal and state liability standards does not mean that is always the case; in fact I am quite certain juries have erred in this regard on many occasions. Nevertheless, despite

these caveats, when I first began law teaching and reading environmental law textbooks, I was quite surprised at the cursory treatment of state law. Most textbooks in 2004 spent very little time on state environmental law, treating it mostly as historic artifact. The basic story was that state law, and particularly state common law, was something that litigants relied on in the past because that was all there was. It didn't work very well, so Congress enacted critical federal environmental laws in the 1970s, the EPA was created, and now we have the federal environmental administrative state that overshadows everything we do. While that story certainly was true, it lacked a full account of the continuing importance of state law in many areas, but particularly in the area of contaminated property where nuisance, trespass, and strict liability claims remained central to many actual contaminated property disputes.

Only a few years later, of course, the environmental law textbooks changed significantly. This was to account for the climate change lawsuits then being filed throughout the country, many of which were based on state common law nuisance and other state law theories of recovery. Today's environmental law textbooks now generally have significant sections on climate change nuisance litigation and use this area of law as an example of the importance of state common law and regulation in situations, like climate change, where the federal government has failed to act or has not acted as aggressively as the states. Despite this focus on state law in the area of climate change, however, it is important to recognize the critical role of state law even in areas where the federal government has played a central role for decades.

While I and other scholars have written in the past about the continuing importance of state law within the field of environmental law, the goal of this essay is simply to provide additional context for this position by detailing how overlapping federal and state claims in the area of contaminated property litigation have played out in two cases. Part I gives a brief overview of CERCLA, state superfund laws, and the state common law claims that generally arise in contaminated property cases. It also describes briefly the current disputes over whether federal remedies under CERCLA should preempt similar state remedies. Part II describes the case study lawsuits in detail, with particular emphasis on the relationship between the federal and state claims and the jury instructions and special verdicts in each case. Part III provides some observations about the role of state law in this area and concludes that while state law remains an important part of many aspects of environmental law, it has a particularly significant role in the field of contaminated property law.

## I. THE LEGAL LANDSCAPE GOVERNING CONTAMINATED PROPERTY

This Part provides a basic introduction to CERCLA and state statutory and common law governing the means of recovering costs and damages associated with the remediation of contaminated property. Section A discusses CERCLA, Section B covers state statutory claims, and Section C explores state common law tort theories of recovery. Finally, Section D shows how courts have struggled to set the parameters of when CERCLA should displace or "preempt" state common law claims for relief on grounds that such claims conflict with or stand as obstacles to achieving CERCLA's goals. This Part thus sets the stage for the discussion in Part II of the case studies exploring how the various federal and state law claims interacted with each other in litigation through dispositive motions, jury trials, and on appeal.

### *A. CERCLA*

CERCLA, also known as "Superfund,"[1] was enacted in 1980 to create a federal framework to address the problems associated with the existence of hazardous substances in the environment. Although, CERCLA's legislative history is not a model of clarity, most courts and commentators agree that two overarching purposes of the statute were to facilitate the remediation of hazardous waste sites and to make the polluter pay the costs of cleanup.[2] Indeed, CERCLA's legislative history is full of facts and horror stories justifying the need for federal legislation to address a national crisis associated with abandoned hazardous waste facilities like "Love Canal" and "Valley of the Drums."[3]

Unlike other environmental laws that govern the generation,

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1. The term "Superfund" is from the five-year, $1.6 billion Hazardous Substances Response Trust Fund created to finance cleanups at CERCLA's inception. *See* 28 U.S.C. § 9507 (establishing fund). Superfund is funded by special taxes on oil and chemical companies and other businesses and supplemented by general revenues, as well as cleanup costs recovered from responsible parties. *See* SUSAN M. COOKE, THE LAW OF HAZARDOUS WASTE: MANAGEMENT, CLEANUP, LIABILITY AND LITIGATION § 12.03[3] (2010).

2. *See* Mehrig v. KFC W., Inc., 516 U.S. 479, 483 (1996) (stating that the two main purposes of CERCLA are "prompt cleanup of hazardous waste sites and imposition of all cleanup costs on the responsible party.") (quoting Gen. Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1422 (8th Cir. 1990)); Ronald Aronovsky, *A Preemption Paradox: Preserving the Role of State Law in Private Cleanup Cost Disputes*, 16 N.Y.U. ENVTL. L.J. 225, 280-81 (2008) (discussing purposes of CERCLA and citing cases).

3. *See* Alexandra B. Klass, *From Reservoirs to Remediation: The Impact of CERCLA on Common Law Strict Liability Environmental Claims*, 39 WAKE FOREST L. REV. 903, 926-29 (2004) (discussing CERCLA's legislative history).

management, and disposal of hazardous materials and waste, CERCLA provides a vehicle for the federal government, state and local governments, tribes, and private parties to recover costs associated with contamination that occurred in the past, often decades ago, during a time when there were few requirements associated with the disposal of hazardous substances.[4] Specifically, CERCLA provides that any private or governmental entity may sue under section 107(a) to recover for any "release"[5] of a "hazardous substance,"[6] from a "facility,"[7] resulting in "response costs,"[8] so long as those costs are incurred in a manner consistent with the National Contingency Plan ("NCP"). The NCP is a set of federal regulations which provides the procedures that the EPA and private parties must follow in selecting and conducting response actions if the party conducting the cleanup wishes to recover those costs from responsible parties under CERCLA.[9] The NCP requirements associated with "removal actions" and "remedial actions" are quite different, to account for the different nature of each response cleanup. A removal action is a short-term action to deal with an emergency-type situation in order to diminish the immediate threat of a hazardous waste site.[10] Such an action is generally done fairly quickly to stabilize the site and remove an immediate threat to human health and the environment.[11] A remedial action is a long-term cleanup designed to permanently eliminate any threat a site may pose and can take years or decades to complete.[12] Because a remedial action is a long-term, more

4. *See id.* at 920-23 (discussing CERCLA's liability provisions).

5. 42 U.S.C. § 9601(22) (2006) (defining "release").

6. *Id.* § 9601(14) (defining "hazardous substance").

7. *Id.* § 9601(9) (defining "facility").

8. *Id.* § 9601(25) defining "response").

9. *See id.* § 9607(a) (setting forth prima facie case for CERCLA recovery); Klass, *supra* note 3, at 920-23 (discussing CERCLA's liability provisions). Section 107(a)(4) of CERCLA provides that a responsible person under CERCLA is liable for all costs of removal or remedial action incurred by a federal or state governmental entity that are "not inconsistent with the national contingency plan" and is liable for any other necessary costs of response incurred by any other person (i.e., a private party or local government) "consistent with the national contingency plan." *See* 42 U.S.C. § 9607(a)(4). Courts have interpreted this provision to mean that the defendant bears the burden of proof that costs are not consistent with the NCP in an action brought by a federal or state entity and the plaintiff bears the burden of proof that costs are consistent with the NCP in an action brought by a local government or private party.

10. 42 U.S.C. § 9601(23) (defining "remove" and "removal"); *see also id.* § 9604(2) (requiring a "removal action" to contribute to a "long term remedial action").

11. *See* 42 U.S.C. § 9601(23).

12. *Id.* § 9601(24) (2006) (defining "remedy" and "remedial action"); 40 C.F.R. §§ 300.410-300.415 (2010) (providing regulation for removal action); *id.* §§ 300.435-300.440 (2010) (providing regulation for remedial action).

permanent remedy, the NCP requirements associated with remedial actions, particularly with regard to report preparation, notice, and public comment, are more burdensome than the requirements associated with removal actions.[13] Specifically, for a remedial action, the party conducting the action must prepare a Remedial Investigation and Feasibility Study prior to proceeding with the remedy, and must also provide the public with an opportunity for notice and comment on the remedy.[14] Because of the emergency and short-term nature of removal actions, such report preparation and public notice and comment are not always required.[15]

In addition to the section 107(a) cost recovery provisions,[16] the federal government (and only the federal government) may seek judicial relief under CERCLA section 106 to require a responsible party to abate an imminent and substantial endangerment to the public health or welfare or to the environment as a result of a release or threatened release of a hazardous substance.[17] CERCLA also creates a right to contribution under section 113(f) "during or following" a section 106 or 107(a) civil action asserted against a plaintiff seeking contribution from other responsible parties.[18] CERCLA's contribution provisions provide that (1) section 113(f) settlements "shall be governed by federal law;" (2) "[i]n resolving contribution claims the court may allocate response costs among liable parties using . . . equitable factors;" (3) nothing in section 113(f) diminishes contribution rights in the absence of section 106 or 107 action; (4) a responsible party who resolves its CERCLA liability with the government in a settlement may seek contribution from a non-settling responsible party; and (5) a settling responsible party "shall not be liable for claims for contribution regarding matters addressed in the settlement."[19]

In addition to the cost recovery and contribution provisions under CERCLA sections 107(a) and 113(f), federal and state governments and tribes may seek recovery for damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from a release.[20] Liability under CERCLA is retroactive, joint, and several and is imposed on current as well as past

13. *See* 40 C.F.R. §§ 300.435–300.440.
14. *Id.* § 300.430.
15. *See id.* §§ 300.410–300.415.
16. 42 U.S.C. § 9607(a) (2006).
17. *Id.* § 9606.
18. *Id.* § 9613(f).
19. *Id.*
20. *See id.* § 9601(16).

owners and operators of facilities where there has been a release of a hazardous substance, as well as on those who have generated or transported hazardous substances.[21] The broad nature of the liability coupled with the ability of private parties to recover under CERCLA has made CERCLA a powerful vehicle to recover costs associated with contamination resulting from a wide range of harmful substances.

Despite its broad liability provisions, CERCLA has significant limitations. Private parties are limited to recovering "response costs" or monies paid toward a cleanup under section 107(a).[22] CERCLA does not provide a means for private parties to recover damages associated with personal injury, diminution in property value (often called "stigma damages"), lost profits, lost rents, or other damages that are typically associated with contaminated property.[23] CERCLA also does not allow for plaintiffs to recover attorneys' fees and expert fees associated with the extensive litigation that is often necessary to recover response costs.[24] Moreover, Congress defined the term "hazardous substance" to exclude petroleum and natural gas, which means the widespread contamination resulting from activities such as petroleum refining, gas stations spills, and natural gas pipeline leaks is not covered by CERCLA at all.[25] Thus, while

21. *See* 42 U.S.C. § 9607(a) (2006); *see also* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, & POLICY 370–71 (5th ed. 2006) (discussing retroactivity of CERCLA's liability provisions).

22. *See* 42 U.S.C. § 9607(a)(4) (limiting recovery to "response costs").

23. *See id.*; COOKE, *supra* note 1, § 16.01[8] (collecting cases holding that lost business profits and diminution in value to property are not within the definition of response costs); Joseph L. Falcone III & Daniel Utain, Comment, *You Can Teach An Old Dog New Tricks: The Application of Common Law in Present-Day Environmental Disputes*, 11 VILL. ENVTL. L.J. 59, 60-61 (2000) ("CERCLA does not offer a private plaintiff the opportunity to collect damages other than those which are necessary to cover the cleanup costs of the subject site."); *see also* James R. Zazzali & Frank P. Grad, *Hazardous Wastes: New Rights and Remedies? The Report and Recommendation of the Superfund Study Group*, 13 SETON HALL L. REV. 446, 458-63 (1983) (summarizing report of Superfund Study Group conducted under Section 301(e) of CERCLA to evaluate the adequacy of existing common law and statutory remedies and concluding that a private litigant faces substantial barriers to recovery for property damage and personal injury); ROGER W. FINDLEY, DANIEL A FARBER & JODY FREEMAN, CASES AND MATERIALS ON ENVIRONMENTAL LAW 842-45 (6th ed. 2003) (discussing inability to recover for personal injury and property damage under CERCLA as well as conclusions of Superfund Study Group).

24. Key Tronic Corp. v. United States, 511 U.S. 809, 819 (1994).

25. *See* 42 U.S.C. § 9601(14)(F) ("The term [hazardous substance] does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under paragraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas)."). Courts interpreting the exclusion have generally held that the petroleum exclusion covers crude oil, crude oil fractions, and hazardous substances that are indigenous to crude oil or are typically added to crude oil during the

CERCLA has been monumental in governmental and private party efforts to remediate contaminated property and recover those costs from responsible parties, there remain significant types of contamination and damages CERCLA does not cover, and thus state statutory law and common law continue to play an important role.[26]

### *B. State Statutory Claims Related to Contaminated Property*

Several states have their own superfund-type statutes that allow plaintiffs to recover response costs in a manner similar to that provided under CERCLA.[27] In contrast with CERCLA, however, some state superfund statutes, such as those in Alaska, Minnesota, and Washington, allow recovery for personal injury, lost profits, diminution in value to property, attorneys' fees, expenses, or other losses stemming from the contamination of property or harm to human health and the environment.[28] Minnesota's superfund statute, MERLA, is a good example of how at least one state modeled its statute after CERCLA but included additional provisions to provide less liability for defendants in some situations and

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refining process, such as benzene, toluene, xylene, ethyl benzene and lead. *See, e.g.,* United States v. Gurley, 43 F.3d 1188, 1199 (8th Cir. 1994) (holding re-refined used motor oil that picked up PCBs, sulfuric acid and other contaminants during re-refining process not covered by the exclusion because PCBs and sulfuric acid do not occur naturally in crude oil); Cose v. Getty Oil Co., 4 F.3d 700, 705 (9th Cir. 1993) (petroleum exemption did not apply to crude oil tank bottoms disposed on land where solids and liquids had separated from the crude oil); United States v. Alcan Aluminum Corp., 964 F.2d 252 (3d Cir. 1992) (mineral oil emulsion that picked up traces of hazardous substance during production process not covered by exclusion because used oil was contaminated during production process); Wilshire Westwood Assoc. v. Atlantic Richfield Co., 881 F.2d 801 (9th Cir. 1989) (exclusion exempted refined, leaded gasoline from CERCLA coverage even though it contained substances which, on their own, would have met the definition of hazardous substance).

26. Congress provided an explicit savings provision to ensure that those costs not recoverable under CERCLA could still be recovered under other statutes and the common law. *See* 42 U.S.C. § 9652(d); PMC, Inc. v. Sherwin-Williams Co., 151 F.3d 610, 617 (7th Cir. 1998) (noting that the purpose of 42 U.S.C. § 9652 "is to preserve to victims of toxic wastes the other remedies they may have under federal or state law."), *cert. denied*, 525 U.S. 1104 (1999). *See also infra* notes 102-105 and accompanying text (discussing CERCLA savings provisions).

27. *See, e.g.,* ARIZ. REV. STAT. ANN § 49-1019 (West 2005) (providing recovery for "reasonable costs of corrective actions."); CONN. GEN. STAT. ANN. § 22a-452 (providing "reimbursement for containment or removal costs.").

28. *See, e.g.,* ALASKA STAT. § 46.03.422(a), 46.03.824, and 46.03.822(m) (LexisNexis 2010) (allowing cost recovery and broadly defined damages as well as costs of containment and cleanup in connection with the release of hazardous substances); MINN. STAT. ANN. §§ 115B.05, 115B.14 (West 2005) (allowing recovery for personal injury, lost profits, diminution in value to property and other damages associated with the release of hazardous substances as well as reasonable costs and attorneys' fees); WASH. REV. CODE ANN. § 70.105D.080 (West 2011) (allowing recovery of expenses and reasonable attorneys' fees in connection with cost recovery actions).

more liability for defendants in others.[29]

For instance, CERCLA's primary liability provision as originally enacted imposed strict, joint, and several liability on current owners and operators of facilities regardless of whether that owner or operator caused any releases of hazardous substances.[30] While subsequent amendments to CERCLA have tempered that liability somewhat, creating the "innocent owner exception" and the "bona fide prospective purchaser exemption,"[31] for many years CERCLA resulted in significant liability for many defendants who did nothing but own property that had been previously contaminated and who were unaware of the contamination prior to purchase.[32] MERLA, by contrast, imposes liability on current owners and operators of facilities only if they owned or operated the facility at the time the hazardous substance was placed or came to be located on the facility, when the hazardous substance was located in or on the facility but before the release, or during the time of the release or threatened release.[33] Thus, one of CERCLA's most controversial provisions on liability for current owners was never part of MERLA. Another difference between CERCLA and MERLA is that in order to recover response costs under CERCLA, the plaintiff must incur "necessary" costs that comply with the NCP while under MERLA, response costs must only be "reasonable and necessary."[34]

MERLA also allows for recovery of costs and damages not available under CERCLA. CERCLA's primary liability provision allows only for recovery of "response costs" (i.e., costs incurred for the actual remediation of contaminated property). MERLA, by contrast, provides for recovery of those costs but also has a separate provision that allows for recovery of: (1) damages for actual economic loss, including injury to or destruction of real

29. *See* MINN. STAT. ANN. §§ 115B.05, 115B.14 (West 2005).

30. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96–510, 94 Stat. 2767 (relevant portion of statute codified at 42 U.S.C. § 9607(a)).

31. *See* Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 101, 100 Stat. 1613, 1616-17 ("innocent owner exception" codified at 42 U.S.C. § 9601(35)(B) (2006)); Brownfields Revitalization and Environmental Restoration Act of 2001, Pub. L. No. 107-118, 115 Stat. 2360, 2370 ("bona fide prospective purchaser" codified at 42 U.S.C. §§ 9601(40), 9607(q)(1)(C)).

32. *See, e.g.*, United States v. Maryland, 632 F. Supp. 573, 578-79 (D. Md. 1986) (finding that a bank which owned a property but did not contaminate the property was liable for the contamination and stating that "section 9607(a)(1) [107(a)(1)] unequivocally imposes strict liability on the current owner of a facility from which there is a release or a threat of release, without regard to causation.") (quoting New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985)).

33. *See* MINN. STAT. ANN. §115B.03, subdiv. 1 (West 2005).

34. *See id.* § 115B.04, subdiv. 1.

or personal property, loss of use of real or personal property, and loss of past or future income or profits resulting from injury to, destruction of, or loss of real or personal property; and (2) all damages for death, personal injury or disease, including medical expenses, rehabilitation costs, burial expenses, loss of past or future income, loss of earning capacity, and damages for pain, suffering, and impairment.[35] Moreover, while the U.S. Supreme Court has held that CERCLA does not allow for recovery of attorneys fees associated with litigating cost recovery cases,[36] MERLA expressly provides that such attorneys' fees are recoverable by prevailing parties, along with expert fees incurred in litigating the action.[37]

Finally, there are differences between the statutes of limitations applicable to CERCLA and MERLA actions. Under CERCLA, there are different limitations periods to bring an action to recover costs associated with removal actions, remedial actions, and contribution actions. The statute of limitations to recover response costs associated with a removal action is generally three years after completion of the removal action.[38] The statute of limitations to recover response costs associated with a remedial action is generally six years after initiation of physical on-site construction of the remedial action.[39] Contribution actions must be brought within three years of the date of judgment in any cost recovery action under section 107(a) or within three years of the date of an administrative order or judicially-approved settlement.[40] In addition, CERCLA provides that in any action brought under state law for personal injury or property damage (actions not available under CERCLA), which are caused or contributed to by exposure to hazardous substances, pollutants, or contaminants, the state limitations period may not begin to run prior to the time the plaintiff knew or reasonably should have known that the personal injury or property damages were caused or contributed to by the hazardous substance or pollutant or contaminant concerned.[41] Thus, while CERCLA does not alter any state's limitations period for bringing an action to recover for personal

35. *See id.* § 115B.05, subdiv. 1.

36. Key Tronic Corp. v. United States, 511 U.S. 809, 819 (1994).

37. *See* MINN. STAT. ANN. § 115B.14 ("Upon motion of a party prevailing in an action under sections 115B.01 to 115B.15 the court may award costs, disbursements, and reasonable attorney fees and witness fees to that party.").

38. *See* 42 U.S.C. § 9613(g)(2)(A) (2006).

39. *See id.* § 9613(g)(2)(B). If a remedial action is initiated within three years after completion of the removal action, costs incurred in the removal action may be recovered in the action brought to recover remedial action costs. *Id.*

40. *See* 42 U.S.C. § 9613(g)(3).

41. *See id.* § 9658(a)(1).

injury or damages associated with hazardous substances, it does impose a "discovery rule" on the accrual of such claims for those states that do not already have a discovery rule under their own state statutory or common law.

By contrast, under MERLA, until 1998, an action for recovery of response costs or for damages had to be brought within six years of the date "when the cause of action accrues," which was interpreted to mean six years from the time the plaintiff knew or reasonably should have known of the injury and the likely cause.[42] In 1998, the Minnesota Legislature amended the statute to provide that in an action for recovery of response costs, the action must be commenced any time after costs and expenses are occurred but not later than six years after initiation of on-site construction of a response action, thus bringing the limitations period in line with CERCLA.[43] The legislature retained the six years from the time the "cause of action accrues" language for actions for damages.[44] The original limitations period for recovery of response costs under MERLA was subject to significant litigation, thus leading to the statutory change, and is discussed in further detail in Part III. MERLA also provides that while a plaintiff can bring an action for recovery of response costs for contamination that occurred at any time within the limitations period, a plaintiff may not bring an action for economic loss or personal injury damages arising out of the release of a hazardous substance that was placed or came to be located in or on the facility wholly before July 1, 1983, the date of MERLA's enactment.[45] Thus, the legislature wished to impose retroactive liability for cleanup costs associated with pre-MERLA releases but did not wish to impose retroactive liability for economic loss and personal injury damages associated with pre-MERLA releases.

Finally, Minnesota has an additional statute, the Minnesota Environmental Rights Act ("MERA") that has been used to obtain injunctive relief in contaminated property cases. MERA gives any natural person, corporation, state agency, or municipality the right to bring a civil action in district court for declaratory or equitable relief against any person "for the protection of the air, water, land or other natural resources" within the state, whether publicly or privately owned, "from pollution, impairment

42. *See* MINN. STAT. ANN. § 115B.11 (West 2005) (amended by 1998 Minn. Laws Ch. 341 (H.F. 3297)); *see also* Union Pac. R.R. Co. v. Reilly Indus., Inc., 215 F.3d 830 (8th Cir. 2000).

43. MINN. STAT. ANN. § 115B.11; 42 U.S.C. § 9613(g)(2) (2006).

44. MINN. STAT. ANN. § 115B.11 (West 2005).

45. *Id.* § 115B.06.

or destruction."[46] "Natural resources" include, but are not limited to "all mineral, animal, botanical, air, water, land, timber, soil, quietude, recreational and historical resources" as well as scenic and esthetic resources when owned by the government.[47] A plaintiff can establish "pollution, impairment or destruction" of natural resources either by showing the conduct at issue will violate an environmental standard or permit or by showing that the conduct at issue "materially adversely affects or is likely to materially adversely affect the environment."[48]

Minnesota courts have interpreted MERA very expansively, broadly granting citizens standing to challenge state, local, and private actions, and concluding that the "natural resources" protected under the law include birds and the trees they nest in,[49] historic buildings,[50] marsh and wildlife areas,[51] the view from a state forest and the wilderness experience in visiting the forest,[52] quietude in residential areas,[53] drinking water wells and

46. *See* MINN. STAT. ANN. § 116B.03 (right of civil action); *id.* § 116B.02 (definitions); *see also* State ex rel. Wacouta Twp. v. Brunkow Hardwood Corp., 510 N.W.2d 27, 30 (Minn. Ct. App. 1993) (stating that MERA was modeled after Michigan's Environmental Protection Act and adopting Michigan courts' four-factor test to determine whether an action's effect on natural resources is sufficient to justify judicial intervention).

47. MINN. STAT. ANN. § 116B.02, subdiv. 4 (West 2005).

48. *Id.* § 116B.02, subdiv. 5. The law is subject to some exceptions, namely that a plaintiff cannot show violation of a standard solely because of the introduction of odor into the air and no action is allowed for conduct taken pursuant to any environmental quality standard, license, stipulation agreement or permit issued by the Minnesota Pollution Control Agency or the Minnesota Department of Natural Resources. Moreover, if the plaintiff establishes a prima facie case, the defendant has the opportunity to present an affirmative defense that there is no feasible or prudent alternative to the action. Economic considerations alone are not a defense. *See id.; id.* §§ 116B.03, 116B.04.

49. *Wacouta Twp.*, 510 N.W.2d at 29 (holding that bald eagles and trees in which they roost are "natural resources" under MERA).

50. State ex rel. Archabal v. Cnty. of Hennepin, 495 N.W.2d 416, 418 (Minn. 1993) (holding that a MERA action was available to enjoin county from demolishing historic armory building to build a jail); State ex rel. Powderly v. Erickson, 285 N.W.2d 84, 88-89 (Minn. 1979) (finding that row houses were historical resources protected by MERA and defendant did not sustain burden of proving no feasible and prudent alternative to demolition).

51. Cnty. of Freeborn v. Bryson, 210 N.W.2d 290, 297-98 (Minn. 1973) (holding that marsh area is a "natural resource" within the statute, plaintiff met prima facie case of showing pollution, impairment and destruction, and remanding case for state to present affirmative defense of no feasible and prudent alternative).

52. Drabik v. Martz, 451 N.W.2d 893, 897 (Minn. Ct. App. 1990) (affirming district court order temporarily enjoining construction of private radio tower on private land that abutted state forest based on allegations that the tower would spoil the view and the wilderness experience in the park and would pose a risk for birds).

53. Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, 624 N.W.2d 796, 806 (Minn. Ct. App. 2001) (finding that quietude was a natural resource under MERA and evidence was sufficient to show gun club violated MERA).

wetlands.[54] Plaintiffs have used MERA to enjoin prospective actions that include a gravel pit,[55] a shooting range,[56] tree harvesting,[57] a private radio tower on private land[58] and condemnations for highway and jail projects.[59] In addition, courts have used the statute to require a party responsible for contamination to remediate that contamination so long as the plaintiff can establish that the existing contamination is causing ongoing pollution, impairment, or destruction of natural resources.[60]

### C. *State Common Law Claims*

Although not always highlighted in traditional environmental law textbooks, plaintiffs in many environmental contamination cases continue to rely heavily on common law claims of trespass, nuisance, negligence, and strict liability to obtain damages, injunctive relief, and punitive damages in addition to or instead of CERCLA and state superfund claims. Sometimes this is because the contamination is caused by a contaminant such as petroleum or natural gas that is excluded from CERCLA and state superfund law coverage, so common law claims are the only legal means of recovering damages and other costs. Sometimes this is because a party other than the plaintiff, such as the defendant, a third-party, or the government, is assuming responsibility for the actual cleanup of hazardous substances but the plaintiff still has incurred damages such as lost profits, lost rents, or personal injuries. Moreover, depending on the egregiousness of the conduct, a plaintiff may be in a position to seek punitive damages, which may dwarf any cleanup costs or other damages, and such relief is not available under CERCLA or state superfund statutes but may be available

54. State ex rel. Shakopee Mdwakanton Sioux Community v. City of Prior Lake, Case No. C-01-05286 (Scott County Dist. Ct., Nov. 22, 2002) (finding proposed gravel pit would interfere with tribe's drinking water well and a DNR-protected wetland and enjoining gravel pit in the absence of significant modifications).

55. *Id.*

56. *Citizens for a Safe Grant*, 624 N.W.2d at 800.

57. State ex rel. Wacouta Twp. v. Brunkow Hardwood Corp., 510 N.W.2d 27, 31 (Minn. Ct. App. 1993).

58. Drabik v. Martz, 451 N.W.2d 893, 897 (Minn. Ct. App. 1990).

59. Cnty. of Freeborn v. Bryson, 210 N.W.2d 290, 297 (Minn. 1973) (condemnation for highway); State ex rel. Archabal v. Cnty. of Hennepin, 495 N.W.2d 416, 426 (Minn. 1993) (condemnation for jail).

60. *See* Kennedy Bldg. Assoc. v. Viacom, Inc., 375 F.3d 731 (8th Cir. 2004); Werlein v. United States, 746 F. Supp. 887, 898 (D. Minn. 1990), *vacated in part on other grounds*, 793 F. Supp. 989 (D. Minn. 1992); Soo Line R.R. v. B.J. Carney & Co., 797 F. Supp. 1472 1486-87 (D. Minn. 1992); *infra* notes 244-48 and accompanying text.

under common law.[61] This Section provides a brief overview of the most frequently-used state common law claims in contaminated property cases.

1. Trespass

Common law trespass is an unauthorized intrusion or invasion that interferes with an interest in the plaintiff's property.[62] Historically, the plaintiff did not need to show the defendant's invasion was intentional or negligent or that there were any actual damages associated with the trespass.[63] Under modern theory though, particularly in environmental cases, courts often require plaintiffs to show the trespass was wrongful in some way, i.e., intentional, reckless, or negligent, and that the plaintiff suffered at least some damage from the trespass.[64] Plaintiffs have successfully relied upon common law trespass in a number of jurisdictions to obtain injunctive relief and damages associated with air pollution, water pollution, and property contamination, although other jurisdictions have placed limits on such claims.[65]

2. Negligence and Negligence per se

Common law negligence and negligence per se also provide potential bases for liability for harm associated with environmental contamination. To establish liability under a common law negligence theory, a plaintiff must establish by a preponderance of the evidence that the defendant owed a duty of care to the plaintiff, that the defendant breached that duty of care, that the defendant's breach of the duty was the actual and proximate cause of the plaintiff's harm, and that the plaintiff suffered damages (based on injury to person or property) as a result of the defendant's conduct.[66] In the context of harm from environmental contamination, the primary issues of

61. *See* Alexandra B. Klass, *Common Law and Federalism in the Age of the Regulatory State*, 92 IOWA L. REV. 545, 583 (2007); Klass, *supra* note 3, at 905.

62. James B. Witkin, *Common-Law Causes of Action for Environmental Claims*, *in* ENVIRONMENTAL ASPECTS OF REAL ESTATE AND COMMERCIAL TRANSACTIONS 41, 49-54 (James B. Witkin ed., 3d ed. 2004).

63. *See id.*; JAMES A. HENDERSON, JR. ET AL., THE TORTS PROCESS 385, 400 (7th ed. 2007).

64. Witkin, *supra* note 62, at 49-54.

65. *See* HENDERSON ET AL., *supra* note 63, at 400 (discussing cases); Witkin, *supra* note 62 at 49-54 (same); Hoery v. United States, 64 P.3d 214, 221-22 (Colo. 2003) (finding that migration of pollution from military base to plaintiff's property constituted a continuing trespass and continuing nuisance entitling the plaintiff to relief); Bradley v. Am. Smelting & Ref. Co., 709 P.2d 782 (Wash. 1985) (holding that trespass of microscopic particles not visible to the naked eye but resulting in air pollution could constitute a trespass in addition to a nuisance).

66. *See* 1 DAN B. DOBBS, THE LAW OF TORTS § 114 (2001).

concern are whether the defendant took reasonable care under the circumstances with regard to the activities resulting in contamination and whether the defendant caused the harm. With regard to the first issue, there are various formulations of reasonable care. The *Restatement (Second) of Torts* provides that where an act is one a reasonable person would recognize as involving a risk of harm to another, "the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done."[67] In determining the utility of the actor's conduct, courts and juries are to consider the social value the law attaches to the interest to be advanced or protected by the conduct, the extent to which this interest will be advanced or protected by the conduct, and the extent of the chance that such interest can be adequately protected by another less dangerous course of conduct.[68] In determining the magnitude of the risk, courts and juries are to consider the social value the law attaches to the interests that are imperiled, the extent of the chance the actor's conduct will cause an invasion of the interests of another, the extent of harm likely to be caused to the interests imperiled, and the number of persons whose interests are likely to be invaded if the risk takes effect in harm.[69]

As is evident, every negligence case involves a balancing of social costs and social benefits associated with the defendant's conduct. Putting aside any defenses to liability based on contributory negligence, assumption of the risk, other actions by the plaintiff that could have resulted in the harm, or statutory immunities, it may be very difficult for a plaintiff to establish precisely what as a matter of common law was the standard of care for contamination that occurred decades prior to the enactment of CERCLA and other environmental laws or even conduct that occurred in recent years. Thus, although negligence claims are certainly asserted in cases involving environmental harm,[70] in any case dealing with harm that

67. RESTATEMENT (SECOND) OF TORTS § 291 (1965); *see also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 3 (2010) ("A person acts negligently if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm."); HENDERSON ET AL., *supra* note 63, at 157 ("The general standard applicable in most negligence cases is one of reasonable care under the circumstances.").

68. RESTATEMENT (SECOND) OF TORTS § 292.

69. *Id.* § 293.

70. *See, e.g.*, Witkin, *supra* note 62, at 60–63 (summarizing various environmental cases involving common law negligence claims).

occurred decades ago, or harm that occurred in a specialized industry, it can be difficult or at least very fact-intensive (and thus expensive) to establish that the defendant breached a duty of care. In such cases, the defendant can argue that it was engaging in "state of the art" practices or technologies for that time, even if the technology has since developed in a manner that makes the activity far safer than in the past.[71]

Plaintiffs often are more successful in establishing negligence under a theory of negligence per se. Under negligence per se, a plaintiff can establish negligence if he or she can show that the defendant violated a statute "designed to protect against the type of accident the actor's conduct causes and if the accident victim is within the class of persons the statute was designed to protect."[72] The doctrine of negligence per se applies not only to state statutes but also federal statutes and federal and state administrative regulations.[73] Since the 1970s, courts have used federal, state, and local environmental statutes and regulations to help define the duty of care and to serve as a basis for liability in negligence per se cases.[74]

3. Nuisance

Common law nuisance law provides another means for plaintiffs in contaminated property cases to recover for harm. Nuisance law is based on the principle that a defendant may not engage in activity that unreasonably interferes with public rights or a private party's interest in land.[75] Nuisance law underlies much of environmental law, and has been used by private and public parties to obtain injunctive and monetary relief from air, water, soil, and noise pollution resulting from industrial and commercial activities such as landfills, sewage treatment plants, oil refineries, quarries and the like.[76]

There are two types of nuisance: public nuisance and private nuisance. A public nuisance is an "unreasonable interference with a right common to the general public" and may only be asserted by a public body (such as a

71. Witkin, *supra* note 62, at 64.

72. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 14 (2010).

73. *Id.* cmt. a.

74. *See* Klass, *supra* note 61, at 585 (discussing use of negligence per se in environmental cases and citing decisions).

75. *See* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 75, at 618 (5th ed. 1984).

76. *See* WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW § 2.1 at 112-113, 114-15 (2d ed. West 1994) (stating that to "a surprising degree, the legal history of the environment has been written by nuisance law" and detailing the various types of nuisance actions that have been brought in connection with harm arising from various industrial and commercial activities).

state or local government) or by a private party who has suffered a unique or special injury that differentiates his or her harm from that suffered by the general public.[77] A private nuisance is a "nontrespassory invasion of another's interest in the private use and enjoyment of land" and may be brought by anyone with an ownership or possessory interest in land.[78] Generally, for an activity to be a nuisance, the invasion of the private use and enjoyment of land must be (1) intentional and unreasonable or (2) unintentional but negligent, reckless, or subject to strict liability because it is an abnormally dangerous activity.[79] An invasion is unreasonable if the gravity of harm outweighs the utility of the actor's conduct or the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm would not be unreasonable.[80] Once a nuisance is established, the court balances the benefits of the alleged nuisance activity, the harm to the plaintiff and others, and other equitable factors to determine whether the defendant should pay damages to the plaintiff or whether the plaintiff is entitled to completely enjoin the conduct causing the nuisance.[81]

Notably, even lawful operations that result in harm to public resources or private property can be enjoined or subject to damages based on nuisance. In 1998, a Washington state court found that a pulp mill operating lawfully pursuant to a wastewater discharge permit was liable under a private nuisance theory for $2.5 million in damages to nearby potato farmers using irrigation water from the aquifer contaminated by the defendant's operations.[82] Also in 1998, the U.S. Court of Appeals for the Ninth Circuit upheld a lower court injunction against a metal tube manufacturer under a public nuisance theory where the defendant's dumping of hazardous chemicals contaminated a subterranean aquifer.[83]

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77. *See* RESTATEMENT (SECOND) OF TORTS §§ 821B, 821C (1965).

78. *See id.* §§ 821D-828 (setting forth principles of private nuisance).

79. *See id.* § 822. For a discussion of activities that are considered "abnormally dangerous," see *infra* notes 88-89, and accompanying text.

80. *See* RESTATEMENT (SECOND) OF TORTS §§ 826-27.

81. *See id.* § 936 (setting forth balancing factors for injunctions); DAN B. DOBBS, LAW OF REMEDIES § 5.7(2) (discussing judicial discretion in balancing benefits and harms in nuisance cases).

82. Tiegs v. Watts, 954 P.2d 877, 883 (Wash. 1998) (stating that pollution caused by the defendant constituted a nuisance even if the state had approved the discharge).

83. California v. Campbell, 138 F.3d 772 (9th Cir. 1998) (upholding lower court injunction finding that pollution of subterranean percolating waters caused by dumping of hazardous chemicals was a public nuisance); *see also* Denise E. Anolini & Clifford L. Rechtschaffen, *Common Law Remedies: A Refresher, in* CREATIVE COMMON LAW STRATEGIES FOR PROTECTING THE ENVIRONMENT 23-30 (Rechtshaffen & Antolini eds. 2007) (discussing theories of private and public nuisance and describing cases in which courts granted injunctions and awarded damages

4. Strict Liability

Unlike nuisance and negligence doctrines, the common law doctrine of strict liability allows for liability even where the defendant did not intend to interfere with a legally protected interest or did not act unreasonably or breach any duty of care in causing the harm.[84] Instead, the justification for imposing liability is that where the defendant has engaged in an activity for profit that causes harm, the defendant is in the best position to bear the loss under principles of justice.[85] In most jurisdictions, a defendant is strictly liable for harm associated with contaminated property under either the doctrine of *Rylands v. Fletcher* or for activities that are deemed "abnormally dangerous" under sections 519 and 520 of the Restatement (Second) of Torts.[86] Under *Rylands v. Fletcher*, a defendant is liable if it engages in a "non-natural" or "abnormal" use of the land which results in harm.[87] Under the Restatement, an activity is "abnormally dangerous" and thus subject to strict liability based on a judicial balancing of the following factors: (1) the existence of a high degree of risk of some harm to the person, chattel, or lands of others; (2) the likelihood that the harm that will result from the activity will be great; (3) the inability to eliminate the risk of harm by the exercise of reasonable care; (4) the extent to which the activity is not a matter of common usage; (5) the inappropriateness of the activity to the place where it is carried on; and (6) the extent to which the value of the activity to the community is outweighed by its dangerous attributes.[88] Courts have held defendants strictly liable under both *Rylands* and the Restatement for a broad range of activities that may also result in CERCLA or state superfund liability, including seeping salt water from an oil and gas

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under nuisance theories for polluting activities).

84. KEETON ET AL., *supra* note 75, § 75, at 534.

85. *See* Klass, *supra* note 3, at 907 (citing KEETON ET AL., *supra* note 75, § 75, at 536); Mark Geistfeld, *Should Enterprise Liability Replace the Rule of Strict Liability for Abnormally Dangerous Activities*, 45 UCLA L. REV. 611 (1998); William K. Jones, *Strict Liability for Hazardous Enterprises*, 92 COLUM. L. REV. 1705, 1728 (1992); Virginia E. Nolan & Edmund Ursin, *The Revitalization of Hazardous Activity Strict Liability*, 65 N.C. L. REV. 257, 297 (1987).

86. *See* Rylands v. Fletcher, [1868] L.R.E. & I. App. 330 (H.L.) (appeal taken from Eng.); RESTATEMENT (SECOND) OF TORTS §§ 519-20 (1965); Klass, *supra* note 3, at 904 (discussing strict liability under *Rylands* and the Restatement).

87. *Rylands*, [1868] L.R.E. & I. App. 330 (H.L.); KEETON ET AL., *supra* note 75, at 545-46 (discussing *Rylands* case).

88. RESTATEMENT (SECOND) OF TORTS § 520. *See also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 20 (2010) (revising the Restatement of Torts on abnormally dangerous activities to provide that an activity is abnormally dangerous if it (1) creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors and (2) the activity is not a matter of common usage).

well that contaminated a water supply, the release of toxic and hazardous wastes from industrial operations and disposal facilities, and the release of PCBs from a natural gas pipeline that contaminated neighboring property.[89]

5. Damages

Pursuant to any of the trespass, negligence, nuisance, and strict liability theories discussed above, parties responsible for environmental contamination may be liable for a wide range of relief, including remediation costs, diminution in value to private or public property, lost profits, personal injury, punitive damages (where the conduct was intentional, outrageous, or was done with a deliberate disregard for the rights or safety of others), or injunctive relief flowing from harm to human health and the environment.[90] Courts today are also willing to award "stigma" damages arising from property contamination in addition to cleanup costs. Environmental stigma is defined as an adverse impact on the value of property based on the market's perception that the property poses an environmental risk.[91] Thus, stigma can attach not only to property that is currently contaminated, but also to property that has a risk of future contamination or property that has been remediated but is still perceived as posing a risk of harm.[92] Although some jurisdictions require some minimal physical impact sufficient to interfere with the owner's use of the land for stigma damages to be recoverable, other jurisdictions recognize that the value of property can decrease through stigma simply by being near contamination.[93]

89. *See* Klass, *supra* note 3, at 942-61 (discussing cases).

90. *See* Ronald G. Aronovsky, *Federalism and CERCLA: Rethinking the Role of Federal Law in Private Cleanup Cost Disputes*, ECOLOGY L.Q. 1, 62 (2006).

91. *See* UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE, Advisory Op. 9, at A-17 (Appraisal Standards Bd. 2008), *available at* http://www.appraisalmanagementcompany.net/docs/USPAP.pdf.

92. *See* Klass, *supra* note 61, at 588-590; *see also* Dealers Mfg. Co. v. Cnty. of Anoka, 615 N.W.2d 76, 77 n.1 (Minn. 2000) (indicating that environmental risk resulting in stigma damages may be due to fear of potential liability for cleanup costs, potential liability to third parties affected by existing or prior contamination, or concerns regarding the ability to obtain financing for the property) (citing Peter J. Patchin, *Valuation of Contaminated Properties*, 56 APPRAISAL J. 7, 7-8 (1988)).

93. *Compare* Chance v. BP Chems., 670 N.E.2d 985, 993 (Ohio 1996) (requiring some type of physical damage or interference with use to recover stigma damages and holding that a trespass to subterranean rock strata by deepwell injectate is not sufficient) *with Dealers Mfg.*, 615 N.W.2d at 79-80 (finding that stigma may exist for a property that is merely in proximity to property that is contaminated because "of the heavy burden on the value of the property due to the perception of risk of liability, or government imposed restrictions on the use or transferability of the property, among other concerns.").

6. Statutes of Limitations

For all common law claims, defendants can take advantage of state statutes of limitations which limit the time (often between two and six years) within which a plaintiff may bring a lawsuit for injuries. Many courts and commentators have argued that proof of continuing harm supports a claim of continuing trespass or nuisance which prevents the statute of limitations from expiring until the defendant has abated the harm.[94] Other courts, however, have focused on the conduct as the triggering event, rather than the harm, meaning that the limitations period runs from when the plaintiff knew or should have known of the last wrongful act, regardless of whether the contamination continues into the future.[95]

*D. CERCLA and Preemption*

In cases where the plaintiff brings both a CERCLA claim to recover remediation costs and state law claims to provide additional grounds to recover such costs or to obtain other relief not available under CERCLA such as damages or an injunction, the issue of whether CERCLA preempts those state law claims can arise. Federal preemption occurs when (1) Congress preempts state law by saying so in express terms (express preemption); (2) Congress and federal agencies create a sufficiently comprehensive federal regulatory structure in an area where the federal interest is so dominant that it requires the inference that Congress left no room for state law (implied field preemption); or (3) Congress does not completely displace state regulation but the state law actually conflicts with federal law or "stands as an obstacle" to achieving the full purposes and

94. *See* Nieman v. NLO, Inc., 108 F.3d 1546, 1557-59 (6th Cir. 1997) (holding that under Ohio law, the statute of limitations does not expire because the time period has elapsed from the defendant's last affirmative act of wrongdoing but instead continues based on proof of continuing damages); Jacques v. Pioneer Plastics, Inc., 676 A.2d 504, 507 (Me. 1996) (focusing on the hazardous material that remained on the site rather than the dumping itself in deciding whether the limitations period had run); Hoery v. United States, 64 P.3d 214, 223 (2003) (holding that under Colorado law, continuing migration of contaminants and ongoing presence of contaminants constitute a continuing trespass and continuing nuisance rendering the plaintiff's claim timely); RESTATEMENT (SECOND) OF TORTS §§ 161(1) and 899 (1965) (discussing continuing nature of trespass when defendant fails to remove a thing from land that was wrongfully placed there).

95. *See, e.g.*, Carpenter v. Texaco, 646 N.E.2d 398, 399 (Mass. 1995) (finding plaintiffs' claim for damage due to contamination from leaking petroleum tank was time-barred because they failed to sue within three years of the last instance of unlawful conduct and a continuing nuisance or trespass must be based on "recurring tortious or unlawful conduct, and is not established by the continuation of harm caused by previous but terminated tortious or unlawful conduct.").

objectives of Congress (implied conflict preemption).[96]

Preemption issues raise concerns regarding federalism because the U.S. Constitution sets out a system of dual sovereignty between the federal government and the states. The federal government has enumerated powers that are limited in scope but are supreme within its realm of authority while the states have residual broad and plenary powers.[97] Moreover, apart from the few areas in which the Constitution grants the federal government exclusive authority, there are many areas that are subject to concurrent and overlapping federal and state regulation.[98] This federalist system assures "a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry."[99] In order to avoid excessive displacement of state law in our federalist system, courts generally apply a "presumption against preemption of state law" where Congress is regulating in an area of "traditional state concern," which includes the areas of public health, safety, and the environment.[100]

In the context of CERCLA and preemption, the inquiry begins with a determination of whether Congress intended that CERCLA preempt state law completely, partially, or not at all. On that basic level, virtually all courts are in agreement that Congress did not intend to preempt the field of hazardous substance remediation and did intend to leave considerable room for state law.[101] The question is, how much? Several provisions of

96. *See* Hillsborough Cnty. v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985) (citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941)); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 226-28 (2000) (describing the three types of preemption). The doctrine of federal preemption is based on the Supremacy Clause in the U.S. Constitution, which states that the Constitution and U.S. laws "shall be the supreme law of the Land" notwithstanding any state law to the contrary. U.S. CONST. art. VI, cl. 2.

97. Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

98. *See* Nelson, *supra* note 96, at 225 ("The powers of the federal government and the powers of the state overlap enormously. Although the Constitution makes a few of the federal government's powers exclusive, the states retain concurrent authority over most of the areas in which the federal government can act.").

99. *Gregory*, 501 U.S. at 458.

100. *See, e.g.*, Bates v. Dow Agrosciences LLC, 544 U.S. 431, 449 (2005) ("[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action." (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)); *Hillsborough*, 471 U.S. at 715 (discussing the "presumption that state or local regulation of matters related to health and safety is not invalidated under the Supremacy Clause.").

101. *See* Aronovsky, *supra* note 2, at 277 n.245.

CERCLA provide a partial answer. First, section 114 states that "[n]othing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State."[102] CERCLA also states, however, that any person who receives compensation for removal costs or damages or claims under CERCLA shall be precluded from recovering compensation for the same removal costs or claims or damages under any other state or federal law, and vice versa.[103] Second, section 302(d) states that "[n]othing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants."[104] Third, section 301(h) states that CERCLA "does not affect or otherwise impair the rights of any person under Federal, State, or common law, except with respect to the timing of review as provided in § 9613(h)."[105] Thus, it is fairly clear that CERCLA did not intend to occupy the field of hazardous substance remediation and intended to preserve a significant role for state law.

Courts have struggled with the extent of CERCLA preemption in two main areas. First, whether plaintiffs who incur response costs without complying with the NCP should be able to recover those costs under state superfund statutes or state common law claims such as nuisance, negligence, or strict liability if the costs are recoverable under those legal theories. Second, whether plaintiffs should be able to bring state law claims for contribution, restitution, unjust enrichment, and the like despite CERCLA's contribution provision under section 113(f).

Although there is variation in the case law, some consensus does exist. With regard to whether plaintiffs who incur response costs without complying with the NCP should be able to recover those costs under state superfund statutes, most courts have found that such state law claims are viable.[106] Courts also have generally found that state common law claims

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102. *See* 42 U.S.C. § 9614(a) (2006).

103. *See id.* § 9614(b).

104. *See id.* § 9652(d).

105. *See id.* § 9659(h).

106. *See, e.g.*, City of Waukegan, Ill. v. National Gypsum Co., 587 F. Supp. 2d 997, 1011 (N.D. Ill. 2008) (finding claims available under the Illinois Water Pollution Discharge Act that would not otherwise be available under CERCLA, including recovery for cleanup costs not in compliance with the NCP); One Wheeler Road Assocs. v. Foxboro Co., No. Civ. A. 90-12873, 1995 WL 7911937 at *12 (D. Mass. Dec. 13, 1995) (allowing for recovery of attorneys' fees under state environmental statute in a case where other damages were awarded under CERCLA); Vill. of DePue v. Exxon Mobile Corp., 537 F.3d 775, 787 (7th Cir. 2008) (finding that a local

for nuisance, negligence, strict liability, trespass and other substantive tort theories are not subject to preemption under CERCLA despite failure to comply with the NCP, and that damages and other relief not available under CERCLA can be recovered under such state law claims.[107] Moreover, in at least one case where a plaintiff brought claims for negligence, nuisance and trespass, the court found that CERCLA did not preempt recovery of future damages under state law even though such relief was not available under CERCLA.[108]

As to whether plaintiffs should be able to bring state law contribution, restitution, unjust enrichment, and other similar claims, most courts have found that such state law claims would disrupt CERCLA's contribution scheme and interfere with the settlement protection the federal statutes provides.[109] Circumstances exist, however, in which courts have found CERCLA does not preempt these state claims. In *New York v. West Side*

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claim was preempted by a state claim, but that CERCLA does not apply to a consent order handled only at the state level); N.J. Dept. of Envtl. Prot. v. Minn. Mining and Mf'g Co., No. 06-2612, 2007 WL 2027916 at *6 (D.N.J. Jul. 5, 2007) (finding no preemption of state law claims in a removal action and reasoning that preemption "would disturb the congressionally approved balance of federal and state judicial responsibilities."). For a fuller discussion of CERCLA preemption of state law claims see Aronovsky, *supra* note 2, at 284–292.

107. *See, e.g.*, Bd. of Cnty. Comm'rs v. Brown Grp. Retail, 598 F. Supp. 2d 1185, 1192 (D. Colo. 2009) (finding that claims including negligence, negligence per se, and strict liability for abnormally dangerous activities were not preempted because they provided for recovery not otherwise provided under CERCLA); Quapaw Tribe of Oklahoma v. Blue Tee Corp, No. 03-CV-0846, 2009 WL 455260 at *6 (N.D. Okla. Feb. 23, 2009) (finding that plaintiffs could recover under state common law claims for nuisance, private nuisance, trespass, strict liability, and natural resources damages because any interference with CERCLA compliance was too remote). *But see* Ashtabula River Corp. Group II v. Conrail, Inc., 549 F. Supp. 2d 981, 985–86 (N.D. Ohio 2008) (finding that common law nuisance claim seeking recovery for the same costs as claims made under CERCLA was preempted when CERCLA claims were barred because of CERCLA Section 114 prohibiting duplicative recoveries); *see also* Aronovsky, *supra* note 2, at 314–317 (discussing "Generic Preemption of State Common Law Claims").

108. Walnut Creek Manor, LLC v. Mayhew Ctr., LLC, No. C 07-5664 CW, 2010 WL 653661 at *5 (N.D. Cal. Feb. 22, 2010). The court clarified that double recovery was not a concern because CERCLA expressly limits double recovery and, therefore, if the party were to bring later claims for damages under CERCLA, those claims would be precluded. *Id.* at *5. For a discussion of preemption of future cleanup costs see Aronovsky, *supra* note 2, at 301–03 (discussing case law in which CERCLA preempted future recovery).

109. *See, e.g.*, Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc., 596 F.3d 112, 139 (2d Cir. 2010) (finding that state indemnification and unjust enrichment claims are preempted by CERCLA); Chitayat v. Vanderbilt Assocs., 702 F. Supp. 2d 68, 83 (E.D.N.Y. 2010) (state law contribution and unjust enrichment claims are preempted by CERCLA contribution claims); Ford Motor Co. v. Michigan Consol. Gas Co., No. 08-CV-13503-DT, 2009 WL 3190418 at *18 (E.D. Mich. Sept. 29, 2009) (ruling that the plaintiffs could not assert common law indemnification claims as a fallback if the CERCLA claims fail). For further discussion of CERCLA preemption of state law contribution claims, see Aronovsky, *supra* note 2, at 308–14, 312 n.399.

*Corp*,[110] a district court distinguished one of the most frequently cited contribution preemption cases, *Bedford Affiliates v. Sills*,[111] in situations where the plaintiff asserting the state claims is not a PRP.[112] The district court ruled both that conflict preemption could not apply where there was no claim under CERCLA section 113, and that the potential for double recovery was not enough to trigger preemption.[113] In addition, in *Board of County Commissioners v. Brown Group Retail*,[114] the district court found that because the plaintiff's unjust enrichment and other similar state law claims sought relief that was not identical to that pursued under the CERCLA claims, the state claims were not preempted.[115] These cases aside, however, in most cases courts generally have found state law contribution, indemnity, and similar claims preempted.

In addition to the viability of state statutory and common law claims, another group of cases addresses federal preemption in the context of whether CERCLA's "federal-required commencement date" preempts state law claims for damages where the applicable state limitations period has expired. Typically, when interpreting 42 U.S.C. § 9658, courts have found that CERCLA's authority preempts state statute of limitations accrual dates that would otherwise time bar state law claims, reasoning that where the deadline provided by CERCLA is more generous, preemption is appropriate.[116] As one court reasoned, "CERCLA is a remedial statute

110. 790 F. Supp.2d 13, 22 (E.D.N.Y. 2011).

111. 156 F.3d. 416 (2d Cir. 1998).

112. *West Side Corp.*, 790 F. Supp. 2d 13, 22 (E.D.N.Y. 2011). Specifically, in *New York v. West Side Corp.*, the court described Bedford's reach as "diminished or outright neutralized" in a CERCLA § 107 action because the state is bringing the cost recovery action, not private PRPs. *Id. See also* Aronovsky, *supra* note 2, at 309–10 (describing *Bedford* as a "frequently cited case[]" addressing the issue of CERCLA preemption of state law contribution claims).

113. *West Side Corp.*, 790 F. Supp. 2d at 13, 23, 26.

114. 598 F. Supp. 2d 1185 (D. Colo. 2009).

115. *Id.* at 1192-95 (stating specifically, "[p]laintiff seeks monetary damages that are unavailable to private parties under CERCLA."). It should also be noted that the decision was on a motion to dismiss, and the court indicated that regardless of any preemption question, the claims could stand because the plaintiff could argue alternative legal theories even if only one of those theories could "bear fruit at trial." *Id.* at 1192.

116. Barton v. NL Indus., Inc., No. 08-12558, 2010 WL 4038738 at *3 (E.D. Mich. Sept. 30, 2010) (applying O'Connor v. Boeing North American, Inc., 311 F.3d 1139 (9th Cir. 2002)). CERCLA states specifically the following:

> "In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute."

whose terms should be construed liberally to carry out its purposes."[117]

Thus, courts on the whole have been careful to limit CERCLA's preemptive scope, although some courts have arguably applied preemption too broadly and defendants continue to argue for more displacement of state law, particularly where the plaintiff may not have complied with the NCP or is seeking damages beyond those allowed under CERCLA. In these cases, few of which have actually gone to trial, it is often difficult to determine whether state law would in fact conflict with federal or law or whether the two sources of law can work in tandem to meet the goals of CERCLA, namely, to prompt the timely and efficient cleanup of contaminated sites and place responsibility for those costs on the parties most responsible for the contamination. Part II attempts to provide additional insight into these questions through the *Union Pacific Railroad Co.* and *Kennedy Building Associates* case studies.

## II. CASE STUDIES IN CONTAMINATED PROPERTY LITIGATION: UNION PACIFIC RAILROAD CO. V. REILLY INDUSTRIES AND KENNEDY BUILDING ASSOCIATES V. VIACOM

This Part discusses the facts, motions, trials, post-trial proceedings, and appeals in *Union Pacific Railroad Co. v. Reilly Industries*[118] and *Kennedy Building Associates v. Viacom.*[119] Both cases were tried in the U.S. District Court for the District of Minnesota to different judges and later went to the U.S. Court of Appeals for the Eighth Circuit. Both cases included claims under CERCLA, MERLA, and various state common law claims including nuisance, negligence, strict liability, contribution, and indemnity. The *Kennedy* case also included a claim under MERA for injunctive relief and claims for punitive damages under common law. In both cases the state law statutory and common law claims were ultimately more significant in terms of the outcome than the CERCLA claims. In both cases the court and the jury were able to proceed smoothly in distinguishing the different standards

42 U.S.C. § 9658 (2006). *But see* Angle v. Koppers, Inc., 42 So. 3d 1, 8-9 (Miss. 2010) (finding that appellant failed to provide any evidence in the record that CERCLA preempted the state statute of limitations and thus the district court was correct in dismissing her claims as time-barred under state law).

117. Abrams v. Ciba Specialty Chems. Corp., 659 F. Supp. 2d 1225, 1237 (S.D. Ala. 2009); *see also* McDonald v. Sun Oil Co., 548 F.3d 774, 783 (9th Cir. 2008) (stating that "Congress's primary concern in enacting § 309 was to adopt the discovery rule in situations where a plaintiff may lose a cause of action before becoming aware of it . . . .").

118. 215 F.3d 830 (8th Cir. 2000).

119. 476 F.3d 530 (8th Cir. 2007).

under the various federal and state law claims as evidenced by the findings, conclusions, jury instructions, and special verdicts. In one case, the defendant prevailed; in the other case, the plaintiff partially prevailed. Sections A and B discuss each of the cases in turn while Section C provides some observations and reflections on the cases.

### *A. Union Pacific Railroad Co. v. Reilly Industries*

#### 1. Background Facts

The *Union Pacific Railroad Co. v. Reilly Industries* case involved a 23.8 acre parcel of property that is now part of the University of Minnesota campus in Minneapolis.[120] From 1903 to 1919, the Chicago Great Western Railway Co. leased five acres of the property to Republic Creosoting Co. which operated a wood creosoting facility at the site.[121] According to evidence produced in the case, Republic treated various types of wood products including wood paving blocks, railroad ties, and telephone poles with creosote oil, which is a distillate of coal or wood tar and consists of polynuclear aromatic hydrocarbons ("PAHs"), which are hazardous substances.[122] In 1968, the Chicago Great Western Railway Co. merged with the Chicago and North Western Railway ("CNW") Co.,[123] which was in turn acquired by Union Pacific Railroad Co. in 1995.[124] For its part, Republic Creosoting Co. in later years changed its name to Reilly Tar and Chemical Co. and then to Reilly Industries.[125]

In 1987, the Minneapolis Community Development Agency ("MCDA") entered into an agreement with CNW to conduct tests on the property to assess environmental concerns associated with a potential purchase of the property.[126] Barr Engineering prepared a report in which it identified creosote contamination at the site and recommended further work to determine the vertical and horizontal extent of contamination if MCDA decided to move further on the site.[127] Evidence at trial established that a

120. *Reilly*, 215 F.3d at 832-33.

121. *Id.* at 832.

122. Union Pac. R.R. Co. v. Reilly Indus., Inc., 981 F. Supp. 1229, 1231 (D. Minn. 1997).

123. *Id.*

124. *Id.* at 1234.

125. Memorandum in Support of Reilly's Motion for Summary Judgment at 1, Union Pac. R.R. Co. v. Reilly Indus., Inc., 981 F. Supp. 1229 (D. Minn. 1997) (No. 4-95-960) [hereinafter Reilly Memorandum].

126. *Reilly*, 981 F. Supp. at 1231.

127. *Id.*

representative of MCDA gave the Barr report to a representative of CNW in January 1988.[128] The MCDA ultimately did not purchase the site.[129] In 1990, the University of Minnesota negotiated with CNW to purchase the site.[130] CNW retained Dahl & Associates to investigate the environmental condition of the site.[131] Dahl obtained a 1912 map of the area which showed the Republic Creosoting facility on the northeast portion of the property.[132] Dahl conducted a subsurface investigation in that area and found evidence of PAHs in the area of the former Republic facility.[133]

CNW and the University finalized the purchase agreement for the property in July 1990.[134] As part of the agreement, CNW agreed to remediate the contaminated portion of the property.[135] It enrolled the site in the Minnesota Pollution Control Agency's ("MPCA's") Voluntary Investigation and Cleanup ("VIC") program and began working with the MPCA regarding a bioremediation remedy for the site.[136] After disputes about the appropriate level of cleanup for the site, CNW ultimately proceeded with a more expensive, thermal desorption remedy in late 1994 and early 1995, incurring just over $1 million in remediation costs.[137] Prior to the remediation, there were two public meetings regarding the site.[138] In August 1994, the MPCA sent a notice to residents in the area regarding a community meeting on several different cleanup actions in the neighborhood, one of which was the former Republic site cleanup.[139] A fact sheet distributed at the meeting described redevelopment opportunities at the site, stated that bioremediation had been considered and discarded as a potential remedy, and that landfilling options had also been considered and rejected.[140] In October 1994, CNW submitted a Remedial Action Workplan for the thermal desorption remedy to the MPCA, MPCA gave verbal approval for the remedy on November 14, 1994, and excavation of the site soil began on November 16, 1994 and continued through December

128. *Id.*; Reilly Memorandum, *supra* note 125, at 4.
129. *See Reilly*, 981 F. Supp. at 1231-32.
130. *Id.* at 1231.
131. *Id.*
132. *Id.* at 1231-32.
133. *Id.* at 1232.
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.* at 1232-34.
138. *Id.* at 1233.
139. *Id.*
140. *Id.*

1994.[141] On November 30, 1994, MPCA and CNW held a public meeting to discuss and receive comments on the workplan.[142] At the meeting MPCA and CNW discussed the thermal desorption remedy, indicated soil excavation for the remedy had already begun, and that the comment period on the remedy would close the next morning.[143] Thermal treatment of the soil occurred from December 28, 1994 until January 27, 1995, after which the MPCA gave written approval of the remedy.[144] CNW did not prepare a Remedial Investigation or Feasibility Study for the remedy as MPCA did not require such reports as part of the site's enrollment in the VIC program.[145]

2. Lawsuit and Pretrial Motions

In March 1994, CNW (now UP) and Reilly entered into a tolling agreement that extended by one year the limitations period for any claims involving the site in order to conduct settlement negotiations.[146] Those negotiations failed, the tolling agreement expired, and UP filed a lawsuit in federal district court in Minnesota against Reilly in December 1995.[147] UP's claims were solely to recover the $1 million in remediation costs associated with the site under CERCLA and MERLA as well as state common law claims for trespass, negligence, nuisance, strict liability, waste, contribution, and indemnity.[148] In a 1997 order, the district court dismissed the CERCLA claims on grounds that UP's failure to prepare a Remedial Investigation and Feasibility Study for the remedy as well as its failure to provide meaningful public comment on the remedy resulted in a failure to substantially comply with the NCP.[149] The court rejected UP's claim that it could meet the NCP requirements through MPCA supervision and complying with all aspects of the state's VIC program.[150] It followed other courts in finding that state regulatory involvement in the remedial process cannot substitute for the public comment and report preparation

141. *Id.*

142. *Id.* at 1233-34.

143. *Id.*

144. *Id.* at 1234.

145. *Id.* at 1237-38.

146. Union Pacific R.R. Co. v. Reilly Indus., Inc., Order, No. 4-95-960, slip. op. at 6 (D. Minn. Dec. 28, 1998).

147. *See* Union Pac. R.R. Co. v. Reilly Indus., Inc., 215 F.3d 830, 833–34 (8th Cir. 2000).

148. *Id.*

149. Union Pac. R.R. Co. v. Reilly Indus., Inc., 981 F. Supp. 1229, 1238 (D. Minn. 1997).

150. *Id.* at 1236-38.

required for recovery under CERCLA.[151] The court found that the reports prepared to meet the requirements of the VIC program did not have the level of detail and remedy evaluation the NCP required and that the public meetings regarding the MPCA were merely informational and did not adequately seek or respond to public comment.[152] Indeed, the second meeting in which the proposed remedy was discussed was after the MPCA had approved the remedy and site excavation was already underway.[153]

Dismissal of the CERCLA claims left the state law claims for trial, as the court found that disputes of fact over whether those claims were timely precluded summary judgment.[154] Both parties agreed that a six-year limitations period applied to all the state statutory and common law claims.[155] UP argued as matter of law that the MERLA claim should not accrue until UP began to incur costs associated with the site[156] and that the harm was continuing until the contamination was remediated, both of which would render the MERLA claim timely.[157] Prior to trial, Reilly argued that once the CERCLA claim had been dismissed, there was no justification for applying CERCLA's provision preempting state law accrual dates for statutes of limitations, and that under Minnesota law the claims should accrue at the time of contamination, not knowledge of contamination.[158] The court rejected all of those arguments and found that the MERLA claim and the common law claims under Minnesota law accrued when UP knew or should have known of its injury and the likely cause.[159] It rejected UP's continuing harm argument[160] and also rejected Reilly's argument that Minnesota law would result in an accrual date prior to knowledge of the contamination.[161] The court also found in favor of UP that its nuisance

151. *Id.* at 1236-37.

152. *Id.* at 1238.

153. *Id.* at 1237.

154. The district court initially dismissed the state law claims without prejudice when it dismissed the CERCLA claims for lack of federal question jurisdiction. *Id.* at 1238. On a motion for reconsideration, the district court agreed to hear the state law claims because diversity jurisdiction between the parties still existed. Union Pac. R.R. Co. v. Reilly Indus., Inc., No. 95-CV-960, 1998 WL 1768404 at *2 (D. Minn. Jan. 12, 1998). The district court ultimately rendered its decision on the state law claims following a jury trial. Union Pac. R.R. Co. v. Reilly Indus., Inc., 4 F. Supp. 2d 860, 864–865 (D. Minn. 1998).

155. *Reilly*, 4 F. Supp. 2d at 865.

156. *Id.* at 864.

157. *Id.* at 866.

158. *Id.* at 864.

159. *See id.* at 865.

160. *Id.* at 867.

161. *Id.* at 865.

claim could proceed against Reilly because nothing in Minnesota's private nuisance statute limited the claim to disputes between neighbors rather than successors in interest or landlords and tenants on the same property.[162]

3. Trial and Appeal

At trial in August 1998, UP pursued its remaining MERLA, nuisance, trespass, waste, strict liability, contribution, and indemnity claims.[163] Because the MERLA claims (like CERCLA claims) are considered equitable in nature, the jury was advisory on the MERLA claims with the court making the ultimate factual and legal findings.[164] UP had to establish that its claims were timely,[165] that its costs were "reasonable and necessary" under MERLA,[166] and that it met the substantive elements of the common law claims.[167] At trial, Reilly argued that the costs were not reasonable and necessary under MERLA because UP could have used less expensive remedies of bioremediation or landfilling instead of thermal desorption.[168] Reilly also put in evidence that at least some of the contamination resulted from UP's own operations on the site before and after Reilly's lease period and that Reilly's operations in creosoting railroad ties were to benefit UP.[169] Finally, Reilly argued that representatives of UP had knowledge of the creosote contamination for decades as creosote contamination is highly visible[170] and has a strong odor[171] and at the very latest knew of the contamination when it received the Barr Engineering report in January 1988.[172]

In its special verdict, the jury found that the "reasonable and necessary" costs UP incurred were only $600,392 of the $1 million claimed, that both UP and Reilly were responsible parties under MERLA, that the response costs should be allocated 15% to UP and 85% to Reilly, that UP failed to prove trespass, nuisance, and waste claims against Reilly, that UP did prove its strict liability claim against Reilly, and that all the state law claims were

162. *Id.* at 867.

163. Union Pac. R.R. Co. v. Reilly Indus., Inc., No. 4-95-960 (D. Minn. Dec. 28, 1998).

164. *Id.* at 4.

165. *See id.* at 5-6.

166. *Id.* at 7-8.

167. *Id.* at 7.

168. Transcript of Closing Arguments at 37-42, Union Pac. R.R. Co. v. Reilly Indus., Inc., No. 4-95-960 (D. Minn. Dec. 28, 1998).

169. *Id.* at 32-34.

170. *Id.* at 12-13.

171. *Id.*

172. *Id.* at 21-22.

time-barred because UP knew or should have known that the property was damaged by creosote more than seven years (six years plus the one-year tolling agreement) before UP filed the lawsuit.[173] On the strict liability claim, the court had determined as a matter of law prior to trial that Reilly's activities on the site were sufficient to warrant strict liability under the *Rylands v. Fletcher* standard, and thus the only factual issue for the jury to determine was whether Reilly caused the contamination on the site.[174]

The court then issued proposed findings of fact and conclusions of law on the MERLA claims and the remaining equitable claims of contribution and indemnity in an order dated December 28, 1998.[175] The district court agreed with the jury that there was evidence to support the claim that UP knew or should have known of the creosote contamination as a result of receiving the Barr Engineering report and likely earlier because the contamination would have been open and obvious to representatives of UP's corporate predecessors well prior to that time.[176] Thus, the claims were time-barred.[177] The court also adopted the jury's advisory findings on the amount of reasonable and necessary response costs[178] as well as the allocation of responsibility between UP and Reilly.[179]

The court rejected the contribution and indemnity claims as a matter of Minnesota state law.[180] The court found there was no express contractual relationship or implied legal duty that required Reilly to indemnify UP[181] and that there was no common liability between joint tortfeasors that would result in a valid claim for contribution.[182] The court rejected UP's argument that the common liability arose out of the fact that both UP and Reilly were responsible for remediating the property under the statutory framework set out in MERLA.[183] The court found that while MERLA created a general statutory duty, in the current lawsuit, UP was the plaintiff and Reilly was

173. Union Pac. R.R. Co. v. Reilly Indus., Inc., No. 4-95-960, slip op. at 1-3 (D. Minn. Dec. 28, 1998).

174. The Court's Instructions to the Jury at 32, Union Pac. R.R. Co. v. Reilly Indus., Inc, No. 4-95-960 (D. Minn. Dec. 28, 1998) [hereinafter Reilly Jury Instructions].

175. Union Pac. R.R. Co. v. Reilly Indus., Inc., No. 4-95-960, slip op. at 4-15 (D. Minn. Dec. 28, 1998).

176. *Id.* at 4-6.

177. *Id.*

178. *Id.* at 7-8.

179. *Id.* at 8.

180. *Id.* at 9-15.

181. *Id.* at 11.

182. *Id.* at 12.

183. *See id.* at 13.

the defendant and at no prior time had a third party been mutually aligned against them.[184] The court also rejected UP's equitable argument that leaving it without a remedy was unfair because it had discharged a legal duty imposed by law to clean up property contaminated by Reilly.[185] The court found that this was not a case where UP was without a legal remedy for recovering its cleanup costs; MERLA provided precisely that remedy and UP was at fault for not bringing the claim soon enough to take advantage of it and no equitable factors mitigated UP's failure to bring a timely claim.[186] Thus, the jury and court's findings resulted in UP recovering nothing on its claims since its CERCLA claims had been dismissed on summary judgment and all of its remaining state law claims were found to be time-barred. After trial, Reilly sought to recover its attorneys fees as a "prevailing party" under MERLA but the district court held that even though the statute referred to "prevailing party," MERLA should be interpreted to allow attorneys fee recovery only for prevailing plaintiffs, and thus Reilly could not recover its fees under the statute.[187]

Notably, the jury instructions in the case illuminate many of the jury's findings that may appear inconsistent or unclear on their own. For instance, because the CERCLA claims had already been dismissed for failure to comply with the NCP and because at the time of trial, MERLA's limitations period accrued at the time of knowledge of contamination rather than the start of cleanup, UP's knowledge of the contamination was critical to the case. There was testimony at trial regarding the fact that creosote stains the soil and has a strong odor even decades underground mixed with dirt, and that based on aerial photographs of the site at various times between 1917 and the mid-1990s, UP would have seen and smelled the contamination not only at the time Reilly left the site but each time it re-graded the site for its own purposes in later decades.[188] Thus, it was important for Reilly to convey to the jury UP's predecessors' early knowledge of contamination as well as UP's receipt of the Barr Engineering report. Based on this testimony, one of the jury instructions stated that notice to an officer or agent of a corporation acting within the scope of his or her authority is deemed notice to the corporation and that the knowledge of a predecessor

184. *See id.*

185. *Id.*

186. *Id.* at 13-14.

187. Union Pac. R.R. Co. v. Reilly Indus., Inc., No. 4-95-960, Report and Recommendation at 8-9 (D. Minn., Apr. 23, 2001).

188. Transcript of Closing Arguments at 12-13 Union Pac. R.R. Co. v. Reilly Indus., Inc, No. 4-95-960 (D. Minn. Dec. 28, 1998).

corporation is imputed to the successor corporation.[189] Thus, Reilly could argue to the jury that UP missed the statute of limitations based both on knowledge of site conditions by its predecessors' employees decades ago as well as the receipt of the Barr Engineering report by one of its agents.

Moreover, with regard to the jury instructions regarding the common law claims of trespass, waste, nuisance, and strict liability the jury found UP had proved only its strict liability claim.[190] This is not surprising given that for the strict liability claim, the court had already determined as a matter of law that the creosoting operations were "unnatural" under the *Rylands* case and thus the activity itself was subject to strict liability. As a result, the jury was instructed to find Reilly liable for strict liability based solely on causation.[191] In other words, if Reilly caused at least a portion of the contamination and that contamination resulted in damages, which Reilly had fully admitted at trial, then UP had proved its claim. With regard to the other claims, UP had a more significant burden of proof with regard to meeting the liability standard as well as causation.[192]

On appeal, the U.S. Court of Appeals for the Eighth Circuit affirmed the district court's dismissal of the CERCLA claims and its findings on the state law claims.[193] With regard to the NCP compliance issue, the court found that the NCP "is designed to promote cost effective measures to protect public health and the environment" and that "a private party cannot recover its reasonable and necessary response costs from responsible parties unless it has complied with the NCP."[194] It agreed with the district court that the failure to prepare a Remedial Investigation and Feasibility Study along with the lack of meaningful notice and public comment on the remedy were fatal to the claim despite the MPCA's oversight and involvement in the remedy selection and implementation.[195] On the statute of limitations issue, the court of appeals agreed that CERCLA's preemption

189. Reilly Jury Instructions, *supra* note 174, at 5.

190. Union Pac. R.R. Co. v. Reilly Indus., Inc, No. 4-95-960, slip op. at 1-3 (D. Minn. Dec. 28, 1998).

191. Reilly Jury Instructions, *supra* note 174, at 32 ("In order to prevail on its claim for strict liability, Union Pacific must prove by a preponderance of the evidence that Reilly's wood treating operations directly caused damage to Union Pacific and the amount of any such damages.").

192. *See, e.g.*, *id* at 28-30 (jury instructions for trespass and nuisance). Notably, the district court asked the jury to answer the special verdict questions regarding the substantive issues in the case before answering the questions regarding statutes of limitations to avoid a retrial in the event that the court of appeals reversed the district court's ruling on when the cause of action accrued. Union Pac. R.R. Co. v. Reilly Indus., Inc., No. 4-95-960, slip op. at 1-3 (D. Minn. Dec. 28, 1998).

193. Union Pac. R.R. Co. v. Reilly Indus., Inc., 215 F.3d 830 (8th Cir. 2000).

194. *Id.* at 835.

195. *Id.* at 836-37, 838-39.

of state limitations period accrual dates applied even in the absence of a valid CERCLA claim.[196] It based this conclusion on Congress's intent to preempt state statutes of limitations if the claims are based on exposure to hazardous substances and the state limitations period would otherwise provide for an earlier date.[197] The court of appeals also agreed with the district court's analysis on the common law indemnity and contribution claims.[198]

### *B. Kennedy Building Associates v. Viacom*

#### 1. Background Facts and Claims

The *Kennedy Building Associates v. Viacom* case involved polychlorinated biphenyl ("PCB") contamination on a site in northeast Minneapolis.[199] From the 1920s until 1980, Westinghouse Electric Co. owned and operated an electric transformer repair facility at the site during which it handled PCBs on a regular basis.[200] PCBs were originally thought to be ideal transformer insulators because they are oily liquids that do not conduct electricity and are chemically stable and fire resistant.[201] As a result, Westinghouse drained and refilled PCB-containing transformers on a regular basis at the Kennedy Site for decades.[202] By the late 1960s, PCBs were recognized as potential carcinogens and, in 1976, Congress passed the Toxic Substances Control Act which singled out PCBs as hazardous substances and required the EPA to prescribe rules limiting their manufacture, use, and disposal.[203] In 1979, the EPA banned rebuilding transformers that contained PCBs over a certain level and ultimately banned the use of PCBs entirely.[204]

From 1971 to 1973, Westinghouse undertook a study of sites where it used PCBs, although the Kennedy site was not one of the sites studied.[205] The purpose of the study was to determine whether PCBs were leaking

196. *Id.* at 840-41.

197. *See id.* at 840.

198. *Id.* at 841-42.

199. Kennedy Bldg. Assocs. v. Viacom, Inc., 375 F.3d 731, 736 (8th Cir. 2004).

200. *Id.* at 735.

201. Kennedy Bldg. Assocs. v. Viacom, Inc., No. 99-CV-1833, slip op. at 2 (D. Minn. May 31, 2002).

202. *Id.*

203. Kennedy Bldg. Assocs. v. Viacom, Inc., 375 F.3d 731, 735 (8th Cir. 2004).

204. *Id.* at 735-36.

205. *Id.* at 736.

from the study sites and migrating off the Westinghouse property, and whether the PCBs could be detected and traced back to Westinghouse.[206] The head of the Westinghouse study, Dr. Thomas Munson, testified at trial that he and his team examined several facilities and they found PCBs wherever they looked.[207] Munson testified that Westinghouse stopped the study after sampling of four plants showed PCBs were leaving the site and showing up in wildlife and fish in rivers as well as in the fish filets from those rivers that were being sold in nearby fish markets.[208] Dr. Munson testified that it was "a given" that any transformer repair facility was contaminated with PCBs, that he told Westinghouse top management about the findings, that the study was canceled as a result of his findings, and that he was threatened with prosecution if he were to tell anyone outside Westinghouse about the study or the results.[209]

In 1980, Westinghouse sold the site to Hillcrest Development without conducting any investigation or decontamination of the site and without disclosing the nature of its operations at the site.[210] In 1982, Gerald Trooien, a partner in Kennedy Building Associates, purchased the property from Hillcrest and transferred the site to Kennedy, which in turn leased portions of the building to various commercial and light industrial tenants.[211] Evidence indicated that at the time he purchased the property Trooien did not know or have reason to know that Westinghouse had disposed of hazardous substances at the site.[212] In 1997, Kennedy entered into negotiations to sell the site back to Hillcrest.[213] Hillcrest retained an environmental consultant who discovered the PCB contamination.[214] Hillcrest withdrew its purchase offer, Kennedy reported the contamination to the MPCA, and then entered the MPCA's VIC program which required Kennedy to undertake field investigations of the contamination in order to avoid being referred to the state superfund program.[215] Kennedy's investigations of the property found significant levels of PCBs above state action levels in the soil and groundwater at the site as well as on surfaces in

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*; Kennedy Bldg. Assocs. v. Viacom, Inc., No. 99-CV-1833, slip op. at 3 (D. Minn. May 31, 2002).

210. Kennedy Bldg. Assocs. v. Viacom, Inc., 375 F.3d 731, 736–37 (8th Cir. 2004).

211. *Kennedy*, No. 99-CV-1833, slip op. at 4.

212. *Kennedy*, 375 F.3d at 737.

213. *Id.*

214. *Id.*

215. *Id.*

the building.[216]

In 1999 Kennedy filed suit against Westinghouse (now Viacom) seeking relief under CERCLA, MERLA, MERA, and under common law theories of nuisance, negligence and strict liability.[217] At the time of trial, Kennedy had incurred response costs of approximately $106,000 and the MPCA had required Kennedy to file a deed restriction against the property notifying potential purchasers of the contamination and prohibiting any subsurface activities on the property without MPCA approval.[218] The MPCA also issued Kennedy an assurance letter through the VIC program that Kennedy did not cause or contribute to any contamination at the site.[219] Just prior to the trial of the case, the MPCA and Viacom entered into a consent order in which Viacom agreed to conduct a remedial investigation and a feasibility study, as well as develop and implement a response action plan.[220]

2. Trial and Appeal

At trial, which began in January 2002, KBA sought to recover approximately $106,000 in response costs, damages for diminution in property value because of environmental stigma, punitive damages arising from Westinghouse's deliberate disregard for the rights and safety of others, and an injunction to compel Viacom to remediate the property.[221] Kennedy sought recovery of the response costs under CERCLA, MERLA, and state common law; stigma damages under MERLA and state common law; punitive damages under state common law; and the injunction under MERA. Thus, the various federal and state law claims provided multiple grounds for recovery of some, but not all of the relief sought. Although both parties had moved for summary judgment on several of the claims, the court denied the motions, leaving all issues for trial.[222]

During the trial, the jury heard testimony regarding the history of the site, the nature and scope of the contamination, expert witness testimony on diminution in value to the property as a result of environmental "stigma" caused by the contamination, Westinghouse's knowledge of the dangers of PCBs and the PCB contamination caused by transformer repair operations

216. *Kennedy*, No. 99-CV-1833, slip op. at 6-7.
217. Kennedy Bldg. Assocs. v. Viacom, Inc., 375 F.3d 731, 737 (8th Cir. 2004).
218. *Id.*
219. *Id.*
220. *Id.*
221. Kennedy Bldg. Assocs. v. Viacom, Inc., No. 99-CV-1833 (D. Minn. May 31, 2002).
222. *See id.*

in general, and evidence regarding Kennedy's own activities at the site during its ownership.[223] In its special verdict, the jury found in favor of Kennedy on both the CERCLA and MERLA claims and awarded it the full $106,000 in response costs. On the CERCLA claim, it found that Viacom was 95% percent responsible for the response costs and Kennedy was 5% responsible for the response costs. On the MERLA claim, the jury found Viacom 100% responsible for the response costs.[224] The jury also found in favor of Kennedy on the MERA claim but in favor of Viacom on all the common law claims except for strict liability, where the jury found in favor of Kennedy.[225] As in the *Union Pacific* case, the court determined prior to trial that Westinghouse's operations at the site were subject to strict liability under the *Rylands* rule, and thus so long as the jury determined Westinghouse caused the contamination and some damage resulted, Kennedy had proven its claim.[226] In addition to the $106,000 in response costs, the jury awarded $225,000 in damages associated with environmental stigma, and $5 million in punitive damages based on evidence that Westinghouse acted with "deliberate disregard" for the rights and safety of others, the standard in Minnesota for awarding punitive damages.[227]

The court issued findings of fact and conclusions of law on the CERCLA, MERLA, and MERA claims because those claims are equitable in nature and thus the jury was only advisory on those claims.[228] The court found that Westinghouse knew at the time it owned the Kennedy site that there were health risks associated with PCBs, that PCB contamination at the site was virtually certain, and that despite this knowledge Westinghouse sold the site without any investigation or cleanup of the PCBs or disclosure of their existence or the nature of Westinghouse's work at the time.[229] The court also found there was no credible evidence that Kennedy or its tenants brought PCBs on the site or contributed to the existing PCB contamination.[230] Based on these facts, the court found Kennedy was entitled to recover 100% percent of its response costs from Viacom under CERCLA and MERLA, as well as its costs, attorneys' fees, and expert

223. *Id.* at 1-7.

224. *Id.*

225. *Id.* at 9.

226. Jury Instructions, Number 19, Kennedy Bldg. Assocs v. Viacom, Inc., No. 99-CV-1833 (D. Minn. May 31, 2002) [hereinafter Kennedy Jury Instructions].

227. *Kennedy*, No. 99-CV-1833, slip op. at 10.

228. *See id.*

229. *Id.* at 2-5.

230. *Id.* at 4.

witness fees associated with bringing the action under MERLA, and prejudgment interest.[231] The court also held Viacom liable for all future response costs under CERCLA and MERLA.[232] With regard to MERA, the court found that Kennedy proved its claim, and granted injunctive relief directing Viacom to remediate the site's soil, groundwater, and building interior to a level that would allow the deed notice on the property to be removed.[233] The court did not disturb the jury's findings on the common law claims or the amount of actual and punitive damages.[234]

As in the *Union Pacific* case, the jury instructions help explain how the jury may have reached some of its conclusions. Unlike the *Union Pacific* case, the *Kennedy* case contained both a CERCLA and MERLA claim at trial. The jury found that that Kennedy was 5% responsible for the contamination under CERCLA but 0% responsible under MERLA.[235] While this may seem inconsistent, the CERCLA jury instructions made clear that liability would attach to Kennedy unless it could show it did not know or have reason to know of the existence of hazardous substances on the property and that it exercised due care with respect to hazardous substances on the site.[236] The instructions relating to MERLA, by contrast, stated that a current owner is not a responsible party unless it was actively engaged in activities involving hazardous substances or knowingly permitted others to engage in such activities.[237] While the district court found Kennedy 0% responsible under both statutes, there was some logic to the jury's conclusions. With regard the common law claims, like in the *Union Pacific* case, the district court in the *Kennedy* case determined in advance as a matter of law that Westinghouse's activities on the site were subject to strict liability under the *Rylands* rule. Thus, according to the instructions, the jury was directed to find Viacom strictly liable for the contamination upon a simple finding that Westinghouse caused some contamination on the property resulting in some damages.[238] Like in *Union Pacific*, the jury found the defendant subject to strict liability but not liable under any of the other common law theories.[239]

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231. *Id.* at 10.

232. *Id.*

233. *Id.* at 8-10.

234. *Id.* at 9-10.

235. Verdict at 1, Kennedy Bldg. Assocs. v. Viacom, Inc., No. 99-CV-1833 (D. Minn. May 31, 2002).

236. Kennedy Jury Instructions, *supra* note 226, at Number 10.

237. *Id.* at Number 14.

238. *Id.* at Number 19.

239. Verdict at 2-3, Kennedy Bldg. Assocs. v. Viacom, Inc., No. 99-CV-1833 (D. Minn. May

On appeal to the Eighth Circuit, the court of appeals did not disturb the CERCLA and MERLA substantive findings.[240] The real money, however, was in the $5 million punitive damages, which was based entirely on the finding that Viacom was strictly liable for the contamination, because that was the only state common law claim KBA prevailed on and thus the only claim that supported a punitive damages award.[241] With regard to that claim, the court held that in the absence of Minnesota authority directly on point, it predicted the Minnesota Supreme Court would find that the *Rylands* rule of strict liability was intended to protect owners of neighboring property from a defendant's abnormal or ultrahazardous activities and thus Kennedy, as a successor in interest to Westinghouse with regard to the property, could not bring such a claim.[242] Once the strict liability claim was dismissed there was no longer any claim to support the environmental stigma and punitive damage awards and thus KBA's monetary recovery was limited to the $106,000 in response costs under CERCLA and MERLA, as well as its attorney's fees, expert fees, and prejudgment interest under MERLA.[243]

With regard to the MERA claim, Viacom argued that the injunction the district court issued under Minnesota Statute section 116B.03 was preempted by the consent order Viacom entered into with the MPCA prior to trial to conduct an investigation, submit a feasibility study, develop a response action plan, and implement the cleanup plan for the site.[244] The court of appeals analyzed MERA and determined that the injunction was only preempted to the extent it conflicted directly with the MPCA consent order.[245] The court found that because the MPCA and Viacom had not yet agreed upon substantive terms of remediation, there was of yet no conflict between any MPCA order and the district court's order.[246] The court of appeals did find, however, that the scope of the district court's order was too broad. It held that MERA provides a cause of action for declaratory and injunctive relief to protect pollution, impairment, or destruction of natural resources and, based on precedent, an injunction under the statute can only require remediation of past pollution to the extent it poses a future threat to

31, 2002).

240. Kennedy Bldg. Assocs. v. Viacom, Inc., 375 F.3d 731, 735 (8th Cir. 2004).

241. *See id.* at 741–42; *see also* Kennedy Bldg. Assocs. v. Viacom, Inc., No. 99-CV-1833, slip op. at 9-10 (D. Minn. May 31, 2002).

242. *Kennedy*, 375 F.3d at 739-41.

243. *See id.* at 742, 748, 750.

244. *Id.* at 742.

245. *Id.* at 742-45.

246. *Id.* at 744-45.

natural resources, including soil and groundwater.[247] Because the district court's order required a complete cleanup of the site and was not focused solely on remediating pollution that was contaminating separate natural resources, the court of appeals remanded the case to the district court to limit the scope of its order to conform with the limitations of MERA.[248]

### C. *Observations*

These two lawsuits illustrate how there can be significant differences between federal and state law and between statutory law and common law with regard to claims to recover response costs, seek damages, and obtain injunctive relief with regard to contaminated property. One might conclude that this multitude of claims should be avoided. In other words, once Congress enacted CERCLA and created a private cost recovery vehicle, state statutes and state common law claims should logically take a back seat. As discussed earlier, of course, it is fairly clear that this was not Congress's intent and, instead, Congress intended to leave room for state law claims that did not conflict directly with CERCLA's provisions.[249] For their part, courts have followed suit and for the most part refused to preempt state law claims except for contribution, indemnity, unjust enrichment, and similar claims that may conflict with CERCLA's contribution provisions and settlement framework.

The *Union Pacific* and *Kennedy* cases show why the state law claims remain important. In *Union Pacific*, Union Pacific conducted a legitimate cleanup of the site and removed a significant amount of contamination, paving the way for further development of the property. If not for Union Pacific's delay in filing suit, it likely could have recovered at least some of those costs under MERLA or state common law. Thus, the procedural burdens of the NCP need not be a disincentive to potential plaintiffs who

247. *Id.* at 746-48.

248. On remand, the district court granted Kennedy's injunction and ordered Viacom to: (1) prevent the release of PCBs and chlorobenzenes into uncontaminated soil and groundwater, consistent with MERA; (2) provide Kennedy and the court with results of all tests for contamination performed, and if a test shows contamination a plan to remediate it; (3) provide a plan to prevent further contamination in the event that future development of the site should require excavation below 12 feet, and remediate any contamination presented by such development; and (4) advise Kennedy and the court of the identity of corporate successors and amend information on corporate successors when appropriate. Kennedy Bldg. Assocs. v. Viacom Inc., 2006 WL 305278 at *3–*4 (D. Minn. Feb 8, 2006), *aff'd in part, remanded in part*, 476 F.3d 530 (8th Cir. 2007), *appeal after remand*, 576 F.3d 872 (8th Cir. 2009), *remanded to* 2010 WL 3024714 (D. Minn. Aug 2, 2010).

249. *See* Aronovsky, *supra* note 2 at 280-82.

wish to work with state agencies in conducting a cleanup but not take on the additional delays, costs, and burdens of NCP compliance or attempt to do so unsuccessfully. With regard to further redevelopment, after paving the site for parking lots for several years, the University of Minnesota developed the site into a new, state-of-the art football stadium, saving the Minnesota Golden Gophers from further seasons in the beleaguered Metrodome and bringing football back on campus for the first time in decades. In 2011, the University filed a lawsuit in federal court against Union Pacific and Reilly's successor, Vertellus, to recover the millions of additional dollars it spent on further remediation as part of the stadium development.[250] The University presumably intended to argue that unlike in the *Union Pacific* case its response costs complied with the NCP and were "necessary" under CERCLA as well as "reasonable and necessary" under MERLA.

Moreover, since the initial *Union Pacific* lawsuit, the Minnesota legislature had amended the statute of limitations for MERLA so that, like CERCLA, the limitations period does not begin to run until the remedial action begins.[251] So while claims for nuisance, negligence, strict liability, and the like would be time-barred (and the University did not bring such claims), it could bring a MERLA action to recover response costs, damages, attorneys' fees, and witness fees. In September 2011, the case settled, leaving for another case the somewhat novel question of whether response costs incurred to transform a series of parking lots into a modern, Big 10 college football stadium are "necessary" under CERCLA and "reasonable and necessary" under MERLA. Likewise, in the *Kennedy* case, Kennedy was able to seek injunctive relief in an attempt to obtain future remediation by Viacom even though its CERCLA and MERLA claims limit it to recovering its own response costs and damages.

These cases show courts and legislatures working to balance the goals of remediating contaminated property and attempting to create a liability structure that holds those parties responsible for the contamination (or at least somewhat associated with the property and its activities) responsible for the costs themselves. Neither the *Union Pacific* site nor the *Kennedy* site required government cleanup. While the costs associated with the cleanup of both sites were significant, they were not in the hundreds of millions of dollars. Is it critical then that the detailed and sometimes cumbersome requirements of the NCP be followed to recover anything?

250. Complaint and Demand for Jury Trial, Regents of the Univ. of Minn. v. Union Pac. R.R. Co., et al., No. 11-CV-00056 (D. Minn. Jan. 7, 2011).

251. MINN. STAT. ANN. § 115B.11 (West 2005).

Certainly to recover costs under CERCLA it is required but for MERLA, the costs must simply be reasonable and necessary and to recover damages under common law, those damages must be only ascertainable and reasonable. There are state programs in place, like the VIC program in Minnesota, to ensure government oversight of remedy selection and implementation and if a property owner wishes to forego a CERCLA action and seek recovery under state law there are structures in place at the state level that should allow it.[252]

Autonomy in this area also allows state legislatures to respond to developing needs more quickly than can occur at the federal level. While CERCLA has been amended a few times, it has often taken many years to "fix" perceived problems that have arisen with the statute such as concerns regarding lender liability and the perceived unfairness of liability for current owners who did not contribute to the contamination but are held responsible for hundreds of millions of dollars in response costs.[253] By contrast, while state legislatures also move slowly, they can move more quickly than Congress in many cases. For instance, at the same time the *Union Pacific* case was working its way through the courts, the State of Minnesota had brought a CERCLA and MERLA case against a responsible party after that party refused to remediate a site and the state took over responsibility for the cleanup.[254] When the state brought its suit, the district court found that the state had failed to comply with the NCP and dismissed the CERCLA claim.[255] Because the state had known about the contamination for years prior to taking over the site and filing suit (because it was spending time attempting to get the responsible party to do the cleanup), its MERLA claim was time-barred.[256] Because this could be a frequent occurrence in cases where the state attempts to persuade a responsible party to remediate a site before the state takes over itself (as it should and in fact is required to do

252. MINN. STAT. ANN. § 115B.175 (West 2005).

253. *See* 42 U.S.C. § 9601(20)(F)(iv) (2006) (stating that a lender is not a responsible party under CERCLA so long as its actions are limited to performing actions typical of a lender); Todd S. Davis & Scott A. Sherman, *Brownfield Sites: Removing Lender Concerns as a Barrier to Redevelopment*, *in* BROWNFIELDS: A COMPREHENSIVE GUIDE TO REDEVELOPING CONTAMINATED PROPERTY 248 (Todd S. Davis & Scott A. Sherman eds., 3d ed. 2010) (discussing both state and federal reforms to limit lender liability); David B. Hird, *Federal Brownfield Legislation*, *in* BROWNFIELDS: A COMPREHENSIVE GUIDE TO REDEVELOPING CONTAMINATED PROPERTY 40 (Todd S. Davis & Scott A. Sherman eds., 3d ed. 2010) (discussing the 2002 Brownfield legislation, prospective purchaser and innocent landowner defenses, and the limits on CERCLA enforcement against persons using state cleanup programs).

254. Minnesota v. Kalman W. Abrams Metals, Inc., 155 F.3d 1019, 1022 (8th Cir. 1998).

255. *Id.* at 1023.

256. *Id.*

under MERLA), the Minnesota Attorney General's office lobbied the legislature for an amendment to the statute. Soon after, in 1998, the state legislature amended the MERLA limitations period for recovery of response costs (although not claims for damages) to follow CERCLA and tie the accrual of the limitations period to the start of cleanup rather than to knowledge of contamination.[257]

These are just a few examples in one jurisdiction that illustrate how federal law, state statutory law, and state common law can provide relief to plaintiffs in contaminated property cases as well as provide safeguards to defendants from unfairness through various liability standards, statutes of limitations, and relief that differs from federal law to state law and from statutory law to common law. While not all parties were pleased with the jury's or the court's results, nothing in the cases indicate that the jury's and the court's application of state law interfered with CERCLA's laudable goals, or that in order to implement CERCLA's goals it was necessary to displace state law. Part III goes back to the purposes of CERCLA to provide some concluding thoughts about CERCLA, federalism, and preemption.

## III. CERCLA AND FEDERALISM

While Congress did not include express purpose language in CERCLA, the circumstances surrounding its passage shed some light on Congress's intent. In a House Committee Report, the "Purpose and Summary" of CERCLA was stated as follows:

> "The reported bill would amend the solid waste disposal act to provide for a national inventory of inactive hazardous waste sites and to *establish a program for appropriate environmental response action to protect the public health and the environment from the dangers posed by such sites.* The bill would provide authorities to the administrator of the environmental protection agency to take emergency assistance and containment actions with respect to such sites and establish a $600 million, 4-year hazardous waste response fund to be drawn in equal amounts from industry-based fees and federal appropriations, to finance such actions undertaken by the administrator. *The legislation would also establish a federal cause of action in strict liability to enable the administrator to pursue rapid recovery of the costs incurred for the costs of such actions undertaken by him from persons liable therefor and to induce such persons voluntarily to pursue appropriate environmental*

257. MINN. STAT. ANN. § 115B.11 (amended by 1998 Minn. Laws Ch. 341 (H.F. 3297)) (West 2005).

*response actions with respect to inactive hazardous waste sites*."[258]

Beyond this legislative history, courts often set forth one or more purposes of CERCLA in reaching various decisions under the statute. In a 2009 CERCLA decision, the Supreme Court quoted a Second Circuit opinion which stated that "[t]he Act was designed to promote the 'timely cleanup of hazardous waste sites' and to ensure that the costs of such cleanup efforts were borne by those responsible for contamination."[259] This statement reflects the most common purposes courts have attributed to CERCLA, both when courts are addressing CERCLA preemption issues and otherwise.[260]

While some courts will choose a particular purpose to support their conclusions, others have found that both purposes of CERCLA support a particular ruling.[261] In *Boeing Co. v. Cascade Corp.*,[262] the Ninth Circuit issued a declaratory judgment for future contribution damages under CERCLA, stating:

> CERCLA was intended to encourage quick response and to place the costs on those responsible. Declaratory relief serves these purposes because all parties, like those in this case, will know their share of costs before they are incurred. The more liability can be limited and quantified,

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258. H.R. REP. NO. 96-1016(I), at 17, *reprinted in* 1980 U.S.C.C.A.N. 6119, 6119–6120 (emphasis added).

259. Burlington N. and Santa Fe Ry. Co. v. United States et al., 129 S. Ct. 1870, 1874 (2009) (quoting Consol. Edison Co. of N.Y. v. UGI Util. Inc., 423 F.3d 90, 94 (2d Cir. 2005)); *see also* Meghrig v. KFC Western Inc., 516 U.S. 479, 483 (1996) (distinguishing RCRA from CERCLA by indicating that RCRA was not designed to serve the purposes of CERCLA "to effectuate the cleanup of toxic waste sites or to compensate those who have attended to the remediation of environmental hazards."). *But see* Cooper Indus., Inc., v. Avail Services, Inc., 543 U.S. 157, 167 (2004) (refusing to take a position on the purpose of CERCLA and stating that "[e]ach side insists that the purpose of CERCLA bolsters its reading of § 113(f)(1). Given the clear meaning of the text, there is no need to resolve this dispute or to consult the purpose of CERCLA at all. As we have said: '[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.'" (internal citations omitted)).

260. City of Los Angeles v. San Pedro Boat Works, 635 F.3d 440, 447 (9th Cir. 2011) (stating that CERCLA has "two primary goals: '(1) to ensure the prompt and effective cleanup of waste disposal sites, and (2) to assure that parties responsible for hazardous substances [bear] the cost of remedying the conditions they created,'" while indicating that CERCLA is not meant to hold responsible every individual who ever held an interest in a property) (quoting Carson Harbor Vill., Ltd., v. Unocal Corp. 270 F.3d 863, 880 (9th Cir. 2001)).

261. W.R. Grace & Co.-Conn. v. Zotos Int'l, Inc., 559 F.3d 85, 88 (2d Cir. 2009) ("[I]t has now been over twenty-five years since CERCLA's enactment, and although many of the provisions remain perplexing, the statute's primary purposes are axiomatic: (1) to encourage the 'timely cleanup of hazardous waste sites'; and (2) to 'plac[e] the cost of that [cleanup] on those responsible for creating or maintaining the hazardous condition.'") (internal citations omitted).

262. 207 F.3d 1177 (9th Cir. 2000).

> the more practical it is for a party to budget and borrow to finance it. Environmental litigation is tremendously complex, lengthy, and expensive. The costs and time involved in relitigating issues as complex as these where new costs are incurred would be massive and wasteful. Declaratory relief allocating future costs is therefore consistent with the broader purposes of CERCLA.[263]

Some courts choose to focus solely on CERCLA's purpose of increasing the speed of recovery of cleanup costs.[264] In a case that did not involve preemption of state law claims, the Ninth Circuit stated that "the purpose of CERCLA is to encourage early settlement between potentially responsible parties and environmental regulators."[265] Using a slightly different formulation, another court allowed recovery of future damages under state law despite the lack of authority for such recovery under CERCLA, stating that "[t]he costs and time involved in relitigating issues as complex as these where new costs are incurred would be massive and wasteful" and "[d]eclaratory relief allocating future costs is therefore consistent with the broader purposes of CERCLA.[266]

Still other courts have focused on CERCLA's purpose of ensuring the financial burden of cleanups is placed on the responsible parties.[267] One case examining preemption of Delaware law determined that "CERCLA manifests Congress's intent that hazardous waste sites should be cleaned up and that those responsible for the contamination should bear the costs."[268] The court found that CERCLA did not preempt state law because to find preemption would put the burden for cleanup on the taxpayers of the state, rather than on the responsible party.[269]

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263. *Id.* at 1191 (internal citations omitted).

264. Cannon v. Gates, 538 F.3d 1328, 1332 (10th Cir. 2008) (finding that Congress intended to prevent litigation once a remediation strategy had been adopted under CERCLA in order to ensure prompt cleanup of contaminated property); United States v. City and Cnty. of Denver, 100 F.3d 1509, 1511 (10th Cir. 1995) ("Congress enacted CERCLA to provide a mechanism for the prompt and efficient cleanup of hazardous waste sites.").

265. Cal. Dept. of Toxic Substances Control v. Hearthside Residential Corp., 613 F.3d 910, 915 (9th Cir 2010) (arguing the quoted point as well as a general timeliness argument to support the fact that current ownership should be measured at the time of cleanup); *United States v. City and Cnty. of Denver*, 100 F.3d at 1512-3 (barring enforcement of Denver's zoning ordinance because it conflicts with remediation action under CERCLA).

266. Boeing Co. v. Cascade Corp., 207 F.3d 1177, 1191 (9th Cir. 2000) (finding declaratory relief for future damages consistent with CERCLA because it helps parties determine future costs without further litigation).

267. Walls v. Waste Res. Corp., 761 F.2d 311, 318 (6th Cir. 1985) (non-preemption case).

268. Marsh v. Rosenbloom, 499 F.3d 165, 178 (2d Cir. 2007) (citing Penn. v. Union Gas Co., 491 U.S. 1, 7 (1989)).

269. *Id.* at 178-79.

In cases specifically involving preemption of state law, courts have focused on the role of the states in forwarding the goals of CERCLA. For instance, in the *Bedford Affiliates* case, the Second Circuit stated that "it was not part of the legislative purpose that CERCLA be a comprehensive regulatory scheme occupying the entire field of hazardous wastes, nor does CERCLA prevent the states from enacting laws to supplement federal measures relating to the cleanup of such wastes."[270] In another case, the same court noted that states "play a critical role in effectuating the purposes of CERCLA."[271]

Based on this range of judicial declarations regarding the purposes of CERCLA, it seems fairly clear that there remains a central role for state law in achieving those purposes. Allowing plaintiffs to pursue state claims to recover costs associated with remediating contaminated property does not result in double recovery, can achieve expedited cleanups without compromising public health goals so long as state regulators are involved in the process, and places the burdens of those costs on the responsible parties.

As the *Kennedy* case shows, a plaintiff can bring multiple state law claims in addition to CERCLA claims in order to recover not only cleanup costs but also diminution in property value, lost profits, and punitive damages, at least where state law supports such damages. Nothing in that result interferes with CERCLA's purposes of promoting timely cleanup of contamination and placing the costs associated with that contamination on the responsible party or its successors. The ability of the plaintiff in *Kennedy* to bring both the state law and federal law claims placed additional pressure on the defendant to work with the MPCA and participate in the cleanup. Indeed, the threat of damages, particularly punitive damages associated with the state law claims, likely influenced the defendant's willingness to work with the state agency just prior to trial after years of refusing to do so. That Minnesota state law allows for the recovery of attorneys' fees to prevailing parties provides an additional incentive for plaintiffs to remediate property and seek recovery of costs, knowing there is a means of recovering not only those costs but the significant costs of litigation.

Moreover, as the *Union Pacific* case shows, a plaintiff can conduct a cleanup that is acceptable to state regulators but, based on failure to comply with the NCP, no CERCLA recovery results. One can argue that allowing state law to serve as a "back-up" to CERCLA can be helpful in cases where

270. Bedford Affiliates v. Sills, 156 F.3d 416, 426-27 (2d Cir. 1998), *overruled on other grounds*, Cooper Indus., Inc. v. Aviall Services, Inc., 543 U.S. 157 (2004).

271. Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc., 596 F.3d 112 (2d Cir. 2010).

it may not be cost-effective to conduct a cleanup of a moderately contaminated brownfields site that meets all the requirements of the NCP in terms of report preparation and other procedural requirements, but where there is sufficient state involvement. Although the plaintiff in the *Union Pacific* case was not able to recover under state law because of failure to comply with the statute of limitations for those claims, the state legislature was able to respond to that issue and bring the statute of limitations for MERLA in line with CERCLA. Thus, a future litigant in a similar situation may be able to recover under MERLA, even if not under CERCLA, despite a failure to comply with the NCP. This state legislative response shows how states can often be more nimble than the federal government in responding to perceived problems with a statutory framework.

Finally, both the *Kennedy* and *Union Pacific* cases illustrate that lawyers and judges can present the facts, law, jury instructions, and special verdict forms in a manner that allows the jury to address differences in state and federal laws governing recovery of costs for property contamination in a systematic way without interfering with federal or state goals. There were no problems with double recovery, confusion of federal and state law, or a usurping of federal authority or state authority. Because CERCLA, MERLA, and the state common law claims are simply providing for recovery for past harm, the concerns regarding conflicting standards for ongoing or future conduct are significantly lessened. While the *Kennedy* case involved concerns regarding whether the federal court could order relief under MERA that might conflict with state agency negotiations with the defendant regarding the level and extent of cleanup, that issue involved an application of state law only, and did not implicate federalism concerns.

In sum, concerns regarding conflicts between state law and CERCLA in the context of cost recovery appear overstated. The purposes of CERCLA leave ample room for state law claims. Moreover, most courts have been able to apply that principle to avoid preemption of state law claims with limited exceptions in cases involving contribution claims and settlement protection. Finally, the example cases show how courts and juries can implement the purposes of both federal and state law in this area without creating conflicts.

## CONCLUSION

There has been a significant amount of scholarship written about CERCLA in general, federalism in environmental law, and the importance of federalism in CERCLA. Now, just over thirty years after the enactment of CERCLA, there has developed a sufficiently significant body of law in

this area to reflect on the continuing importance of state law in contaminated property cases involving CERCLA claims. While most scholars as well as the majority of courts recognize a major role for state law in this area, it is often helpful to reflect on issues such as these by exploring the dynamics of federal and state law "on the ground" in actual jury trials. This makes it possible to consider whether juries, courts, and lawyers are able to fully use the unique and different features of federal and state law to reach a result consistent with CERCLA's goals. This essay's exploration of the *Union Pacific* and *Kennedy* trials shows that it is possible to fully implement state and federal law in this area without significant conflict, and that such implementation can promote CERCLA's goals of more rapid cleanups coupled with placing responsibility for the costs of such cleanups on responsible parties.