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A Comparative Analysis of the Federal and Pennsylvania Superfund Acts

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ON October 18, 1988, Pennsylvania jumped on the "superfund" bandwagon when Governor Casey signed the Hazardous Sites Cleanup Act (HSCA).[1] The states enacting "superfund" statutes have made a judgment that the promise of the federal superfund legislation (the Comprehensive Environmental Response, Compensation and Liability Act or "CERCLA")[2]—the promise of cleaning up sites contaminated by the

1. PA. CONS. STAT. §§ 6020.101-1305 (Supp. 1988)(hereinafter referred to as HSCA).

2. 42 U.S.C. §§ 9601-9675 (1982 & Supp. V 1987)(hereinafter referred to as CERCLA). CERCLA was amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified at 42 U.S.C. §§ 9601-9675 (Supp. V 1987)).

release of hazardous substances—is inadequate. At best, CERCLA aims at the cleanup of those sites that are determined to present such a significant hazard that they are placed on the United States Environmental Protection Agency's (EPA) "National Priorities List" (NPL).[3] There are, however, many other sites that, although contaminated with hazardous substances, may never be placed on the NPL and thus may never get cleaned up under CERCLA.[4] To address these sites, a growing number of states have enacted legislation that creates a new source of cleanup revenue—state "superfunds."[5]

But the state superfund acts are not simple clones of CERCLA that merely extend the provisions of CERCLA to sites that are not on the NPL. Though the state acts are clearly modelled upon the provisions of CERCLA, the state legislatures have not blindly accepted all the policy determinations that underlie the provisions of CERCLA. This is particularly true with respect to HSCA. In enacting HSCA, the Pennsylvania General Assembly consciously modified some of the basic provisions of CERCLA and unconsciously (apparently) modified others.[6]

In this Article, we will compare the major provisions of HSCA with the major provisions of CERCLA. In Part I, we will compare the "liability" provisions of the two statutes. We will compare how the two statutes define the acts which trigger cleanup liability, the parties who are liable, the standard of liability, the defenses to liability, and the scope (or extent) of liability. In Part II, we will examine the differences in how the statutes assign and define the enforcement authority of the government agencies that have primary enforcement responsibility—EPA

3. Sites are placed on the NPL by EPA as a result of EPA's use of the Hazard Ranking System established by CERCLA section 105(c). For a discussion of the NPL listing process and the state listing process under HSCA, see *infra* text accompanying notes 116-26.

4. As of November, 1989, there were 1010 sites included on the NPL, 87 of which were located in Pennsylvania. 54 Fed. Reg. 48,184 (1989) (to be codified at 40 C.F.R. Part 300, App. B). An official of the Pennsylvania Department of Environmental Resources (DER) has estimated that there are approximately 650 sites in Pennsylvania that will not be placed on the NPL but that may require some form of cleanup, or remedial, action under HSCA. David Myers, DER Legislative Liaison, Presentation at Seminar of Pennsylvania Chamber of Business and Industry, January 10, 1989.

5. Both the federal and the state statutes are referred to as "superfund" statutes because they create revenues—a "superfund"—that may be used to finance the cleanup of sites contaminated by hazardous substances.

6. HSCA is terribly drafted. It is rife with inconsistencies and redundancies. As a result, it is sometimes difficult to say whether certain language reflects a conscious policy determination or simply sloppy draftsmanship.

under CERCLA, and the Pennsylvania Department of Environmental Resources (DER) under HSCA. In addition, we will compare how the two statutes encourage settlements and private cleanups. In Part III, we will consider the extent to which HSCA grants to municipalities rights muncipalities do not have under CERCLA, including rights to recover municipal cleanup costs and natural resource damages. Finally, in Part IV, we will consider the extent to which the two statutes create, or preserve, private rights of action.

I. LIABILITY

In this Part, we will consider basic questions of liability. We will examine how HSCA defines the events that trigger liability, the parties who are liable, the standard of liability, and the scope (or extent) of liability. We will compare how HSCA and CERCLA treat these questions and, in doing so, we will demonstrate that, with respect to a number of these questions, HSCA differs significantly from CERCLA.

At the outset, it must be emphasized that, unlike CERCLA, HSCA does not have a single clear statement defining those who are liable and the extent of their liability. CERCLA section 107(a) sets forth a single, and relatively clear, statement of those who are liable and the extent of their liability. As we will see, chapter 7 of HSCA contains liability provisions that, although they may differ in certain significant respects, are fundamentally similar to the liability provisions of CERCLA. Specifically, both CERCLA section 107(a) and chapter 7 of HSCA identify certain entities (landowners, generators and transporters), and provide that such entities are strictly liable for the costs of responding to a release from a site. However, HSCA also contains a provision, section 507(a), that, unclearly and without an apparent legislative purpose, imposes cleanup liability that goes beyond the standards set forth in chapter 7. Section 507(a) provides, in relevant part, as follows:

> A responsible person under section 701 *or* a person who causes a release or threat of a release of a hazardous substance *or* causes a public nuisance under this act *or* causes a release or a substantial threat of release of contaminant which presents a substantial danger to the public health or safety or environment, *or* causes a release of a nonhazardous substance pursuant to section 501(g) shall be lia-

> ble for the response costs and for damages to natural resources. (Emphasis added.)

We have emphasized the disjunctives in order to point out that section 507(a) imposes cleanup liability not only upon a "responsible person under section 701" but also upon persons who "cause" different types of consequences.[7] Why the General Assembly chose to expand (beyond the "responsible persons" identified in section 701) the categories of persons who are liable for response costs is unclear. And, if the General Assembly wished to go beyond section 701 in defining the categories of persons who are liable for response costs, it is curious that it did not do so in chapter 7, the chapter captioned "*Liability* and Settlement Procedures," rather than in chapter 5, the chapter captioned "Response and Investigation." At the least, the use of section 507(a) to extend cleanup liability to persons other than those identified as "responsible persons" in section 701 is sloppy and disorganized draftsmanship.

In discussing "liability" in this paper, we will consider only the standards for liability set forth in chapter 7 of HSCA. We will not address the other bases for cleanup liability set forth in HSCA section 507(a).

Section 701(a) sets forth a "General Rule" of liability. Because of the importance of this provision (and because the language of this provision will be a major focus of the analysis in this Part), it is set forth in full:

> Except for releases of hazardous substances expressly and specifically approved under a valid Federal or State permit, a person shall be responsible for a release or threatened release of a hazardous substance from a site when any of the following apply:
>
> (1) The person owns or operates the site:
>
> (i) when a hazardous substance is placed or comes to be located in or on a site;
>
> (ii) when a hazardous substance is located in or on the site, but before it is released; or
>
> (iii) during the time of the release or threatened release.

7. In order for there to be liability under section 507(a), it must be demonstrated that a person has *caused* a release or threat of a release. As we will see, liability under section 701 is not dependent upon proof that a person (identified in section 701) caused a release or threat of a release of a hazardous substance.

(2) The person generates, owns or possesses a hazardous substance and arranges by contract, agreement or otherwise for the disposal, treatment or transport of the hazardous substance.
(3) The person accepts hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person from which there is a release or a threatened release of a hazardous substance which causes the incurrence of response costs.

A. EVENTS TRIGGERING LIABILITY

Liability under CERCLA section 107(a) arises when there is a "release" or "threatened release" of a "hazardous substance" from a "facility."[8] Similarly, liability under HSCA section 701(a) arises when there is a "release" or "threatened release" of a "hazardous substance" from a "site."

The term "release" is defined in both CERCLA[9] and HSCA.[10] There are no significant differences between the two statutory definitions.

The term "hazardous substance" is also defined in both CERCLA[11] and HSCA.[12] HSCA defines the term to *include* "any element, compound, or material which is . . . [d]efined or designated as a hazardous substance pursuant to the Federal Superfund Act [i.e., CERCLA]." Thus, the definition of "hazardous substance" in HSCA is broader than the definition of "hazardous substance" in CERCLA.[13]

---

8. There is also liability under CERCLA section 107(a) for a release from a "vessel."

9. CERCLA § 101(22).

10. HSCA § 103.

11. CERCLA § 101(14).

12. HSCA § 103.

13. The definition of "hazardous substance" in both HSCA section 103 and CERCLA section 101(14) expressly excludes "petroleum or petroleum products, including crude oil or any fraction thereof" and "natural gas." In addition, the definition of "hazardous substance" in HSCA section 103 expressly excludes byproducts that are particularly relevant to Pennsylvania industry: any substance from a coal mining operation regulated by DER, and wastes generated by fossil fuel combustion.

It must be remembered, however, that liability for the release of "hazardous substances" under chapter 7 is but one of two bases for liability under HSCA. The other basis for liability, set forth in section 507(a), imposes liability for releases of a "contaminant." The term "contaminant" is defined in HSCA section 103.

The term "threatened release" is not defined in either CERCLA or HSCA. The term has, however, been construed by the federal courts,[14] and there is no reason to believe that the Pennsylvania courts will adopt a different construction.

Finally, although the two acts use different terminology, the definition of "facility" in CERCLA[15] and the definition of "site" in HSCA[16] are almost identical.[17]

B. LIABLE PARTIES

HSCA section 701(a) imposes liability upon three types of persons. These types of persons will be referred to as "owners or operators" (those persons described in section 701(a)(1)), "generators" (those persons described in section 701(a)(2)), and "transporters" (those persons described in section 701(a)(3)). It is not enough, however, to look only to section 701(a) in order to understand what parties are liable under HSCA. We will also examine those provisions of HSCA which define key terms in section 701(a), set forth "exceptions" to those who would otherwise be liable under section 701(a), and provide "defenses" to liability under section 701(a). We will consider also the extent to which section 701(a), in imposing liability upon various "persons," imposes liability upon private individuals and parent corporations in apparent contravention of basic principles of corporate law; in addition, we will consider the extent to which section 701(a) imposes liability upon government entities, including the Commonwealth and political subdivisions.

1. "Owner or Operator" Liability

a. Basic provisions

"Owner or operator" liability under section 701(a)(1) differs significantly from "owner or operator" liability under CERCLA section 107(a).[18] Under both CERCLA and HSCA liability is im-

14. *See, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985); United States v. Wade, 653 F. Supp. 11 (E.D. Pa. 1984).

15. CERCLA § 101(9).

16. HSCA § 103.

17. There is one significant difference between CERCLA's definition of "facility" and HSCA's definition of "site." HSCA excludes from the definition of "site" a "location . . . where pesticides and fertilizers are in normal agricultural use." HSCA section 103. There is no similar exclusion in CERCLA's definition of "facility."

18. Our discussion at this point focuses upon the "basic provisions" of "owner or operator" liability as set forth in section 701(a)(1). In *supra* text ac-

posed upon the present owner or operator (that is, the owner or operator at the time of a release or threatened release, the event that triggers liability) and the owner or operator at the time of disposal. HSCA, however, also imposes liability upon a person whom we will call an "intervening landowner"—that is, a person who is an owner or operator of the property between the time of disposal and the time of release (or threatened release) of a hazardous substance. The intervening landowner is not, generally speaking, a liable party under CERCLA.[19]

HSCA imposes liability upon the intervening landowner by virtue of two provisions. First, section 701(a)(1)(ii) imposes liability upon a person who owns or operates the site "when a hazardous substance is located in or on the site, but before it is released." Presumably, the simple physical presence of the hazardous substance on the site is enough to support the conclusion that the hazardous substance "is located" on the site. If so, then section 701(a)(1)(ii) imposes liability upon all intervening owners of the site.

In addition, HSCA section 701(a)(1)(i) imposes liability upon "[t]he person [who] owns or operates the site . . . when a hazardous substance is placed *or comes to be located* in or on a site."[20]

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companying notes 52-56, we will examine various "exceptions" and "defenses" to "owner or operator" liability.

19. The statement in the text is qualified because, in the Superfund Amendment and Reauthorization Act of 1986, Congress made a somewhat surreptitious and convoluted addition to the CERCLA section 107(a) list of liable parties. In the course of adding a definition of "contractual relationship," Congress provided that:

> [I]f the defendant obtained actual knowledge of the release or threatened release of a hazardous substance at such facility when the defendant owned the real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge, such defendant shall be treated as liable under section 9607(a)(1) . . . ."

42 U.S.C. § 9601(35)(C) (Supp. V 1987).

Masquerading as a definition, this provision states that a previous owner [who obtains "actual knowledge" and does not disclose such knowledge to his purchaser] shall be "treated as liable under section 9607(a)(1)"—that is, shall be treated as a present owner. Though this is a curious way of adding a new class of liable persons under section 107(a), the liability imposed by section 101(35)(C) does not extend to *all* intervening landowners—just to the intervening landowner who obtained "actual knowledge" and did not disclose such actual knowledge to its purchaser. Thus, the liability imposed by CERCLA section 101(35)(C) is not as broad as the liability imposed upon *all* intervening landowners by HSCA section 701(a)(ii).

20. It is not clear whether there is an unintended inconsistency in the use of both definite and indefinite articles in section 701(a)(1)(i). The provision imposes liability upon "the person [who] owns or operates *the* site . . . when a hazardous substance is placed or comes to be located in or on *a* site." (Emphasis

This language imposes liability upon a person who owns or operates the site at a time when a hazardous substance is either *directly placed* on the site or when a hazardous substance "comes to be located" on the site. Thus, the intervening landowner—the person who owned the site between the time of disposal and the time of release—is covered under any scenario. From the preceding analysis, it can be seen that HSCA section 701(a)(1) is generally broader than CERCLA section 107(a) in identifying those owners or operators who are subject to liability.[21]

b. Definition of "owner of operator"—Special provisions for "financial institutions"

HSCA is more clear than CERCLA in imposing liability upon a person who is either an owner *or* an operator under one of the circumstances specified in section 701(a)(1).[22] Both HSCA and CERCLA define "owner or operator" and, although the definitional language is not identical, both statutes generally define an owner or operator as "a person who owns or operates or has owned or operated a site, or otherwise controlled activities at a site."[23] Under both acts, there can be a question of whether particular actions constitute "control" of activities at a site.

Both acts exclude from the definition of "owner or operator" a person "who, without participating in the management of a site (in CERCLA, 'vessel or facility'), holds indicia of ownership primarily to protect a security interest in the site."[24] This language in CERCLA has been of particular concern to financial institu-

added.) Perhaps the use of both definite and indefinite articles is simply careless draftsmanship and "a" should be read as "the."

21. Although HSCA is broader than CERCLA in identifying those owners or operators who are subject to liability, it should be noted that those owners or operators who fit within HSCA's expanded definition of liability (that is, intervening landowners and owners of sites to which hazardous substances have migrated) may nevertheless be able to escape liability if they can come within the "innocent landowner" exception, or one of the other statutory exceptions to liability. For a discussion of these exceptions, see *infra* notes 35-56 and accompanying text.

22. CERCLA section 107(a)(1) imposes liability upon "the owner *and* operator" of a facility from which there is a release (emphasis added). Federal courts, however, have interpreted "and" to mean "or." *See, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985); United States v. Wade, 653 F. Supp. 11 (E.D. Pa. 1984). HSCA section 701(a) is clear on its face in imposing liability upon a person who is either an owner or an operator.

23. HSCA § 103. The definition of "owner or operator" in CERCLA § 101(20)(A) is substantially the same.

24. CERCLA § 101(20)(A); HSCA § 103 (definition of "owner or operator").

tions. Such institutions may extend loans to "owners or operators" of a site and may, as part of the loan arrangement, obtain a security interest in the site. It is clear under both HSCA and CERCLA that simply having such a security interest does not constitute "ownership" or "operation" of the site. Indeed, the financial institution may hold "indicia of ownership primarily to protect a security interest" without being an "owner or operator" so long as the financial institution is not "participating in the management" of the site.[25] Federal courts have held that a financial institution that controls day-to-day activities at a site is "participating in the management of the site" and thus is an "operator" subject to "owner or operator" liability.[26] Presumably, since both CERCLA and HSCA impose liability upon financial institutions "participating in the management" of a site, state courts interpreting this language in HSCA will follow the federal decisions.

There is a second circumstance in which federal courts have imposed "owner or operator" liability upon a financial institution: when such an institution acquires title upon foreclosure and thereby becomes an "owner." In response to the concerns generated by these federal court decisions, the Pennsylvania General Assembly sought to protect foreclosing financial institutions from "owner or operator" liability by adding the following language (not included in CERCLA) to the statutory definition of that phrase:

> The term [owner or operator] shall not include a financial institution, an affiliate of a financial institution, a parent of a financial institution, nor a corporate instrumentality of the Federal Government, which acquired the site by foreclosure or by deed in lieu of foreclosure as a result of the enforcement of a mortgage or security interest held by such financial institution . . . before it had knowledge that the site was included on the National Priority List or corresponding State list and did not manage or control activities at the site which contributed to the release or threatened release of a hazardous substance. For the purposes of this subsection, the term "management" shall not include participation in or supervising the finances or fiscal operation of a responsible

25. CERCLA § 101(20)(A); HSCA § 103.

26. United States v. Fleet Factors Corp., 724 F. Supp. 955 (S.D. Ga. 1988); United States v. Mirabile, 15 Env't L. Rep. 20,994 (E.D. Pa. 1985).

> person or an owner or operator in connection with a loan to, services provided for or fiscal obligation of that responsible person or owner or operator or actions taken to protect or preserve the value of the site or operations conducted on the site.[27]

The preceding language is an obvious effort to preclude state courts from using the reasoning of *United States v. Maryland Bank & Trust Co.*[28] to impose "owner" liability upon foreclosing financial institutions.[29] The statutory language of HSCA can be broken down as follows:

> A financial institution is an "owner or operator" if it owns or operates, or has owned or operated, a site, or otherwise controlled activities at a site.
>
> HOWEVER, a financial institution is *not* an "owner or operator" if it acquired the site by foreclosure as a result of the enforcement of a mortgage or security interest held by such financial institution before it had knowledge that the site was included on the National Priority List or corresponding State list—
>
> UNLESS the foreclosing financial institution managed or controlled activities at the site which contributed to the release or threatened release of a hazardous substance.

Several aspects of the statutory language are worthy of note. First, in order to determine whether a foreclosing financial institution falls within the definitional exemption to "owner or operator" liability, it is not clear whether one is to look to the financial institution's state of knowledge: (1) at the time it obtained its mortgage or security interest; or, (2) at the time it acquired title through foreclosure. More specifically, it is not clear whether the phrase referring to the financial institution's knowledge modifies "acquired" or "held." One can make a policy argument in favor

27. HSCA § 103.

28. 632 F. Supp. 573 (D. Md. 1986).

29. The term "financial institutions" will be used as a shorthand reference to the statutory terms "financial institution," "parent of a financial institution," and "corporate instrumentality of the Federal Government." These terms are not defined in the Act. The last term, "corporate instrumentality of the Federal Government," is apparently intended to include entities such as the Federal Deposit Insurance Corporation (FDIC). CERCLA section 120(a)(4) subjects "a department, agency, or instrumentality of the United States" to liability under state superfund statutes.

of either interpretation. One can argue that, as a matter of policy, it makes sense to look to the financial institution's state of knowledge (whether a site is listed) at the time it extended a loan and obtained a security interest in the site. It is at this time that the financial institution obtained a financial interest relating to the site. If it later obtains knowledge that the site has been listed, it still should be able to foreclose upon the site without becoming subject to "owner" liability. However, one can also argue that, as a matter of policy, it makes sense to look to the financial institution's state of knowledge when it decided to acquire title to the site through foreclosure. It is at this time that the financial institution moves from the limited role of secured creditor to the more powerful role of "owner" with complete control over the site.

Whatever the relative merits of these two policy arguments, it is unfortunate that inartful drafting has obfuscated an issue that is of such practical importance and has presented financial institutions with a dilemma. To be prudent, a financial institution that is considering the acquisition of a security interest in a site (where there is, as always, the possibility of the need to foreclose in order to enforce the security interest) will have to conduct its environmental evaluation of the site at both thresholds: prior to mortgage application and prior to mortgage foreclosure. Only then can it be certain that its "state of knowledge" will be relevant to whether it fits within the financial institution exemption to "owner or operator" liability.

In addition to the preceding ambiguity regarding the relevant *time* of the financial institution's state of knowledge, there is a second ambiguity regarding the *nature* of the relevant state of knowledge. The Act focuses upon whether the financial institution "had knowledge that the site was included on the National Priority List or corresponding State list." Must the institution have "actual knowledge" that the site is included on the NPL or state list? Or is it enough that public notice of such inclusion has been given, through publication in either the *Federal Register* (for a site on the NPL) or the *Pennsylvania Bulletin* (for a site on the state list)? Most likely, the courts will not look to the "actual knowledge" of the financial institution but will impute knowledge based upon publication.

Since the relevant state of knowledge is knowledge that the site was "included" on either the NPL or the state list, it apparently is irrelevant whether the financial institution had knowledge

(at the time it obtained a security interest or foreclosed) whether there was a release of hazardous substances from the site or even whether the site was *proposed* for inclusion on the NPL or state list. In other words, it appears that a financial institution would enjoy protection from "owner or operator" liability even if (at the time it obtained a security interest or foreclosed) it knew that the site had been proposed for inclusion on the NPL or state list.[30]

Finally, even assuming that a foreclosing financial institution did not have knowledge (at the relevant time) that the site was included on the NPL or state list, it is clear that the foreclosing financial institution is protected from "owner or operator" liability only if it "did not manage or control activities at the site which contributed to the release or threatened release of a hazardous substance."[31] And the Act provides an explanation of activities that do not constitute "management"[32] though it provides no explanation (or definition) of what does (or does not) constitute "control."[33]

To summarize, CERCLA and HSCA differ significantly in the way that they deal, or fail to deal, with the circumstances under which foreclosing financial institutions are subject to "owner or operator" liability. CERCLA fails to deal specifically with the

30. It is not a sufficient answer to the analysis presented in the text to say that a financial institution would not, as a practical matter, obtain a security interest in, or foreclose upon, a site that has been proposed for inclusion on the NPL or the state list. Whether a financial institution would do so depends (at least in part) upon whether, in doing so, it runs the risk of becoming an "owner" and thereby subject to liability for cleanup costs. If it does not—by virtue of the protection accorded to financial institutions through the statutory language under examination—it might well decide to obtain a security interest, or foreclose, if there was a reasonable expectation that others would be required to clean up the site and thereby restore the value of the site.

31. HSCA § 103.

32. See cases cited *supra* note 26 and accompanying text. The statutory explanation of what " 'management' shall not include" seems to be consistent with the federal court decisions that explain when a financial institution may be deemed to be an "operator" under CERCLA.

33. The exemption from "owner or operator" liability for financial institutions simply describes some activities that do not constitute "management." A foreclosing financial institution, however, is subject to "owner or operator" liability if it has either *managed* or *controlled* activities that contributed to an actual or threatened release. In explaining that the described activities do not constitute "management," the legislature left open the question whether the described activities might constitute "control." We do not suggest that it would make sense for a court to conclude that the activities which were expressly excluded from "management" might properly be construed as constituting "control." Presumably, the legislative intention was that the specified activities were not to be considered as *either* management or control. Unfortunately, the language of section 103 does not reflect that intention.

question, and federal court decisions suggest that a foreclosing financial institution is, upon the acquisition of title, an "owner" subject to liability for cleanup costs. In HSCA, the General Assembly attempted to provide a statutory exemption from "owner or operator" liability for foreclosing financial institutions. However, the statutory exemption is replete with ambiguity and confusion and, as a result, will provide little certainty to financial institutions that are contemplating the acquisition of a mortgage or security interest in real property that may become the site of a release of hazardous substances.[34]

c. The "innocent landowner" exception

Both CERCLA and HSCA protect from "owner or operator" liability the owner who is popularly referred to as the "innocent landowner." The statutes differ, however, in the statutory method through which "innocent landowners" are protected from liability; the statutes differ also in their statements of the demonstration that is required in order for an owner to qualify as an "innocent landowner."

CERCLA provides protection to the "innocent landowner" through a complex and circuitous process. CERCLA section 107(b) sets forth various "defenses" including the following "third party defense":

> There shall be no liability under subsection (a) of this section for a person [including an "owner or operator"] otherwise liable who can establish by a preponderance of the evidence that the release or threatened release of a hazardous substance and the damages resulting therefrom were caused solely by . . . an act or omission of a third party other than an employee or agent of the defendant, or other than one whose act or omission occurs in connection with a contractual relationship, existing di-

34. As a practical matter, the General Assembly's effort to exempt foreclosing financial institutions from "owner or operator" liability under HSCA may be of little significance. When a financial institution is making a loan and securing the loan with an interest in real property, it is hard enough for the financial institution to predict whether there may be a future release from the site. It is all but impossible for the financial institution to predict whether, if there is such a release, the site will be placed on either the NPL or the state list. If the site is placed on the NPL, the liability of a foreclosing financial institution will be decided under CERCLA and the protections accorded to foreclosing financial institutions by HSCA will be of no significance.

> rectly or indirectly, with the defendant . . . .[35]

One must then turn to CERCLA section 101(35) for a definition of "contractual relationship." That definition states, in relevant part, as follows:

> The term 'contractual relationship', for the purpose of section [107(b)(3)], includes, but is not limited to, land contracts, deeds or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence:
>
> > (i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in or at the facility . . . .

Finally, one must turn to CERCLA section 101(35)(B) for an explanation of how it may be established that a defendant "had no reason to know, as provided in clause (i) of subparagraph (A) of this paragraph."[36]

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35. CERCLA § 107(b)(3). This provision goes on to condition the availability of the "third party" defense upon the following:

> [i]f the defendant [i.e., the owner] establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.

Id.

36. CERCLA section 101(35)(B) provides as follows:

> To establish that the defendant had no reason to know, as provided in clause (i) of subparagraph (A) of this paragraph, the defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. For purposes of the preceding sentence the court shall take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection.

CERCLA § 101(35)(B).

The preceding statutory complexity can be summarized as follows: (1) A present owner is liable for damages caused by a release unless the present owner can demonstrate that the damages were caused solely by a third party with whom the present owner did not have a contractual relationship; (2) A present owner has a contractual relationship (by deed) with a prior owner (who may have caused the release through disposal of hazardous substances) unless (a) the present owner acquired the property after the disposal of hazardous substances and, (b) at the time of acquisition the present owner did not know or have reason to know that hazardous substances had been disposed of on the property. If the present owner can make this demonstration, the present owner is an "innocent landowner."[37]

There is a more straightforward statutory method for protecting "innocent landowners" from "owner or operator" liability: the creation of an "exception" from liability for the "innocent landowner." This is the approach adopted in HSCA. HSCA section 701(b)(1) provides that "an owner of real property is not responsible for the release or threatened release of a hazardous substance from a site in or on the property when the owner demonstrates to the department that all of the following are true." There follows a list of seven demonstrations that the owner must make in order to enjoy the protection of the "innocent landowner" exception.[38]

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37. The owner must also demonstrate "due care" and "precautions." *See supra* note 35.

38. Section 701(b)(1) provides as follows:

(1) An owner of real property is not responsible for the release or threatened release of a hazardous substance from a site in or on the property when the owner demonstrates to the department that all of the following are true:

(i) The real property on which the site concerned is located was acquired by the owner after the disposal or placement of a hazardous substance on, in or at the site.

(ii) The owner has exercised due care with respect to the hazardous substances concerned, taking into consideration the characteristics of such hazardous substances, in light of all relevant facts and circumstances.

(iii) The owner took precautions against foreseeable acts or omissions of any third party and the consequences that could foreseeably result from such acts or omissions.

(iv) The owner obtained actual knowledge of the release or threatened release of a hazardous substance at the site when the owner owned the real property, and the owner did not subsequently transfer ownership of the property to another person without disclosing such knowledge.

(v) The owner has not, by act or omission, caused or contributed

Each of the seven demonstrations required by section 701(b)(1) has a counterpart in CERCLA. Some of the demonstrations are based upon language in CERCLA's "innocent landowner" provisions; some are based upon language in CERCLA's "defense" provisions. One seeking the protection of the "innocent landowner" exception must demonstrate that *all* of the circumstances listed in the seven subparagraphs of section 701(b)(1) "are true." Given the ambiguity of the language in many of these subparagraphs, it will be impossible to predict, with any degree of certainty, whether a particular landowner will be able to make the required demonstrations.[39]

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to the release or threatened release of a hazardous substance which is the subject of the response action relating to the site.

(vi) The owner meets one of the following requirements:

(A) At the time the owner acquired the site, the owner did not know, and had no reason to know, that a hazardous substance which is the subject of the release or threatened release was disposed of on, in or at the site. For purposes of this subparagraph, the owner must have undertaken, at the time of acquisition, all appropriate inquiries into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. The department shall take into account specialized knowledge or experience on the part of the owner, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property and the ability to detect the contamination by appropriate inspection.

(B) The owner is a government entity which acquired the site by escheat, through any other involuntary transfer or acquisition or through the exercise of eminent domain authority by purchase or condemnation.

(C) The owner acquired the site by inheritance or bequest.

(D) The owner is a financial institution or an affiliate of a financial institution or a corporate instrumentality of the Federal Government which acquired the site by foreclosure or by acceptance of a deed in lieu of foreclosure.

(vii) The only basis of liability for the landowner is ownership of the land.

HSCA § 701(b)(1).

39. The same uncertainty exists under the "innocent landowner" provisions of CERCLA. For a breakdown of these provisions, see *supra* notes 35-37 and accompanying text. Without more specific guidance than the statutory language, purchasers concerned about liability under CERCLA have been left to use their best judgment as to what level of investigation is necessary in order for them to be entitled to "innocent landowner" protection. In practice, attorneys and environmental consultants have developed fairly standardized procedures for a "Phase I Assessment." Adherence to these practices would probably be sufficient to bring the purchaser within the "innocent landowner" provisions. In an effort to provide more precise guidance, Representative Curt Weldon of

Furthermore, the owner seeking to come within the "innocent landowner" exception must make the required demonstrations "to the department" (i.e., DER). The significance of this requirement is unclear. There is no explanation of the procedure by which the owner, seeking to come within the "innocent landowner" exception, is to make the required demonstrations to DER; and there is no explanation of the procedure by which DER is to determine whether the owner has made the required demonstrations.[40] Since the required demonstrations are to be made "to the department," does this suggest that a court (or the Environmental Hearing Board), in determining whether an owner comes within the "innocent landowner" exception, is to review DER's determination of whether the required demonstrations have been made? How is DER to make this determination? Is the court (or the Board) to apply an "arbitrary and capricious" standard of review to DER's determination? Is the court (or the Board), in determining whether an owner comes within the "innocent landowner" exception, to limit itself to the "record" (such as it may be) developed by the applicant-owner before DER? None of these questions, of considerable practical importance, is answered by the provisions of the Act.

The following are a few brief comments about the specific demonstrations that must be made in order for an "owner or operator" to qualify for the "innocent landowner" exception:[41]

(1) *701(b)(1)(i)* The applicant must demonstrate that "the real property . . . was acquired by the owner after the disposal or

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Pennsylvania has introduced H.R. 2787, which attempts to spell out the specifics of an investigation that would entitle a purchaser to "innocent landowner" protection.

40. Under CERCLA, the "innocent landowner" question comes up in the context of an enforcement action when a defendant seeks to escape liability by claiming that it is an "innocent landowner." In this context, it is the court that determines whether the defendant is entitled to "innocent landowner" protection. *See, e.g.*, United States v. Pacific Hide & Fur Depot, 716 F. Supp. 1341 (D. Idaho 1989); United States v. Serafini, 711 F. Supp. 197 (M.D. Pa. 1988).

Because HSCA section 701(b)(1) provides that the "innocent landowner" demonstrations are to be made to DER, it is arguable that the General Assembly contemplated that DER would have the authority (and perhaps the responsibility) to advise a purchaser, at the time of purchase, whether the purchaser had done all those things that are necessary to fit within HSCA section 701(b)(1). But, unless DER is provided significant additional manpower, it is inconceivable that DER could render "innocent landowner" opinions on a prospective basis, nor is it likely that DER would wish to assume that burden. Therefore, under HSCA, it is likely that the "innocent landowner" question will be presented in the same context as it is presented under CERCLA (in the context of an enforcement action).

41. For the full text of section 701(b)(1), see *supra* note 38.

placement of a hazardous substance on, in or at the site."[42] To make this demonstration, the applicant would have to establish that, during the applicant's ownership, no hazardous substances were placed on the site.

(2) *701(b)(1)(ii)* The applicant must demonstrate that it has "exercised due care with respect to the hazardous substances."[43] To make this demonstration, the applicant would have to show that, once the hazardous substances were discovered at the site, the applicant acted responsibly and with due care. At a minimum, such behavior would include notifying EPA and DER (as required), posting appropriate warnings, and cooperating with authorities in any ensuing investigatory work.

(3) *701(b)(1)(iii)* The applicant must demonstrate that it "took precautions against foreseeable acts or omissions of any third party and the consequences that could foreseeably result from such acts or omissions."[44] Presumably, if the applicant is an "innocent landowner," it did not place hazardous substances on the site; rather, the presence of such substances is the result of action by a third party (e.g., a prior owner, a tenant, a licensee, a trespasser). Under section 701(b)(1)(iii), the applicant must show that it took appropriate precaution to prevent the placement of hazardous substances at the site by such third parties.

(4) *701(b)(1)(iv)* The applicant must demonstrate that it "obtained actual knowledge of the release or threatened release of a hazardous substance at the site when the owner owned the property, and the owner did not subsequently transfer ownership of the property to another person without disclosing such knowledge." On its face, this demonstration makes little sense. That is, it is difficult to imagine why, in order to come within the "innocent landowner" defense, the applicant must demonstrate that it "obtained actual knowledge of the release or threatened release of a hazardous substance" when the applicant owned the property. What the drafter clearly intended to require was that, *if* it is demonstrated that the applicant obtained actual knowledge of a release or threatened release while the applicant owned the site,

42. The language in this demonstration is similar to the language in CERCLA section 101(35)(A).

43. This "due care" component of the "innocent landowner" exception is almost identical in its language with a portion of the "third party" defense under CERCLA section 107(b)(3), which is set forth in *supra* note 35.

44. This "precaution" component of the "innocent landowner" exception is almost identical in its language with a portion of the "third party" defense under CERCLA section 107(b)(3). *See supra* note 35.

then the applicant must demonstrate that it did not subsequently transfer ownership of the site without disclosing this knowledge.[45]

Before the applicant for the "innocent landowner" exception must demonstrate disclosure, it must first be demonstrated that the applicant obtained "actual knowledge" of a release or a threatened release while the applicant owned the site.[46] Apparently, it is not enough (to trigger the applicant's obligation to disclose) that the applicant had grounds to suspect a release or threatened release during the time the applicant owned the site. If it is demonstrated that the applicant had such actual knowledge, then the applicant must demonstrate disclosure of this knowledge to the applicant's transferee.[47]

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45. The language of HSCA section 701(b)(1)(iv) is very similar to the language of CERCLA section 101(35)(C). However, the language of section 701(b)(1)(iv) does not correctly express the apparent legislative intent, because the legislative drafter apparently failed to recognize that the two sections perform different functions. Under CERCLA section 101(35)(C), "*if* [an owner] obtained actual knowledge of the release or threatened release of a hazardous substance . . . when the [owner] owned the real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge" (emphasis added), the owner is treated as liable under CERCLA section 107(a)(1). In short, CERCLA section 101(35)(C) *imposes liability* if an owner: (1) obtains actual knowledge of a release; and, (2) transfers ownership without disclosing its knowledge of the release. Section 701(b)(1), in contrast, sets forth demonstrations that must be made *in order to come within an exception to liability*. In taking language used for one purpose and trying to make it perform another purpose, the legislative drafter was not careful in making the necessary changes to the statutory language. The intent of the drafter seems clear, even if the language is not. The drafter intended to set forth a demonstration that had to be made, in order to qualify for the "innocent landowner" exception, by an owner *if* (and only if) the owner had obtained actual knowledge of a release or threatened release while it owned the property. Such an owner has to demonstrate that it "did not subsequently transfer ownership of the property to another person without disclosing such knowledge." Eliminating the double negative, the owner must demonstrate that, if the owner transferred ownership after obtaining actual knowledge, it *did* disclose such knowledge to the person to whom it transferred ownership.

46. Presumably, this demonstration would be made not by the applicant for the "innocent landowner" exception but by the entity seeking to impose liability upon the applicant—for example, DER in a cost recovery action.

47. This disclosure requirement is similar to the disclosure requirement under section 405 of the Pennsylvania Solid Waste Management Act. 35 PA. CONS. STAT. § 6018.405 (Supp. 1989). Section 405 provides that "the grantor in every deed for the conveyance of property on which hazardous waste is presently being disposed, or has ever been disposed by the grantor or to the grantor's actual knowledge shall include in the property description section of such deed an acknowledgement of such hazardous waste disposal . . . ." This disclosure requirement applies only when the grantor has actual knowledge of the disposal of hazardous *wastes*; the disclosure demonstration of HSCA section 701(b)(1)(iv) requires disclosure whenever the applicant has actual knowledge of the release or threatened release of a hazardous *substance*. In addition, though

(5) *701(b)(1)(v)* The owner must demonstrate that it "has not, by act or omission, caused or contributed to the release of a hazardous substance which is the subject of the action relating to the site."[48] In order to be able to make this demonstration, it would behoove an owner to not contaminate the site during the period of ownership. Nevertheless, an applicant who did dispose of a hazardous substance on the site during the period of ownership could still make the demonstration required by this provision if the hazardous substance disposed by the applicant was different from the hazardous substance that was the subject of a release.

(6) *701(b)(1)(vi)* This provision requires an owner to make a demonstration that meets any one of four "requirements." Three of the "requirements" are of limited applicability.[49] The first is of more general applicability, however. Under section 701(b)(1)(vi)(A), the owner must demonstrate that "at the time the owner acquired the site, the owner did not know, and had no reason to know, that a hazardous substance which is the subject of the release or threatened release was disposed of on, in or at the site." The language of this provision is very similar to the "innocent landowner" language in CERCLA sections 101(35)(A)(i) and 101(35)(B). It contains all the ambiguities and uncertainties of

HSCA section 701(b)(1)(iv) requires disclosure, it does not require that such disclosure be set forth in the deed.

48. The language of this provision is very similar to the language of CERCLA § 101(35)(D).

49. Under section 701(b)(1)(vi)(B) the owner may demonstrate that it is a "government entity" that has acquired the property through some form of involuntary transfer. The language of this provision is very similar to CERCLA section 101(35)(A)(ii). To some extent, section 701(b)(1)(vi)(B) is redundant in that "owner or operator" is defined in section 103 to "not include . . . a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign."

Under section 701(b)(1)(vi)(C) the owner may demonstrate that it has "acquired the site by inheritance or bequest." The language of this provision is very similar to CERCLA section 101(35)(A)(iii).

Under section 701(b)(1)(vi)(D) the owner may demonstrate that it is a "financial institution . . . which acquired the site by foreclosure or by acceptance of a deed in lieu of foreclosure." This provision is, in large measure, redundant in that "owner or operator" is defined in section 103 to exclude a financial institution that acquired the site by foreclosure or by deed in lieu of foreclosure (so long as the financial institution does not "manage" or "control" the property).

Any owner that fits within one of these provisions falls within the "innocent landowner" exception of section 701(b)(1) only if the owner can also make all of the other demonstrations called for by section 701(b)(1).

the CERCLA language.[50]

(7) *701(b)(1)(vii)* This provision requires the owner to demonstrate that "[t]he only basis of liability for the landowner is ownership of the land." The apparent intent of this provision is to preclude an owner from qualifying for an "innocent landowner" exception to "owner or operator" liability where the owner was also the "operator" of the site, or would be otherwise liable under the Act.[51]

In summary, although the "innocent landowner" provisions of HSCA are much lengthier than the "innocent landowner" provisions of CERCLA, it appears that the seven demonstrations required by section 701(b)(1) do not differ significantly from the demonstrations required by CERCLA section 101(35). Indeed, as has been noted, most of the language in section 701(b)(1) is taken from CERCLA section 101(35) or CERCLA section 107(b). Though that language may, at times, be ineptly rearranged, it seems that, generally speaking, a landowner who would qualify for "innocent landowner" status under CERCLA would also be able to make the demonstrations called for by the "innocent landowner" exception in section 701(b)(1) of HSCA.

d. Specific "exceptions" and "defenses" to "owner and operator" liability

HSCA contains a number of specific "exceptions" and "defenses" to "owner or operator" liability that are not found in CERCLA.[52] The most significant of the specific exceptions is set forth in section 701(b)(2):

> Liability under subsection (a) shall not apply to an owner

50. See *supra* text accompanying note 36 for a discussion of these ambiguities.

51. This provision is similar to the first sentence of CERCLA section 101(35)(C) (in the "innocent landowner" provisions of CERCLA) which provides that "[n]othing in this paragraph . . . shall diminish the liability of any previous owner or operator of such facility who would otherwise be liable under this chapter."

52. HSCA section 701(b) lists various "exceptions"; HSCA section 703 lists "defenses to liability." The particularized "defenses" listed in section 703 are functionally the same as "exceptions"—that is, the particularized "defenses" set forth circumstances in which persons, who would otherwise be "responsible persons" under section 701, are exempt from liability. Because the particularized, or specific, "exceptions" and "defenses" have the same function, we discuss them together.

HSCA section 703(a) sets forth a "general" defense that can be invoked by all section 701 "responsible parties." This "general" defense provision is discussed *infra* at note 78 and accompanying text.

> of real property if the real property is exclusively used as single or multi-family housing of four units or less or for private noncommercial recreational purposes, *and* the owner did not place the hazardous substance on the property, *or* the owner did not know and had no reason to know that a hazardous substance which is the subject of the release or threatened release was disposed on, in or at the site. (Emphasis supplied).

If one were to take seriously the emphasized conjunctions in the preceding quotation, section 701(b)(2) should be broken down as follows:

> An owner of real property is not subject to "owner or operator" liability under section 701(a) if:
>
> (1) the real property is exclusively used as
>
> (a) single or multi-family housing of four units or less or
>
> (b) for private noncommercial recreational purposes *and*
>
> (2) (a) the owner did not place the hazardous substance on the property *or*
>
> (b) the owner did not know and had no reason to know that a hazardous substance which is the subject of the release or threatened release was disposed on, in or at the site.

It is not clear that the legislature intended the consequences of the emphasized disjunctive "or." In particular, it is not clear that the legislature intended to except from liability an owner of real property if: (1) the real property is exclusively used for one of the specified purposes; and, (2) the owner did not place the hazardous substance on the property *even though the owner knew that a hazardous substance, which is the subject of a release, was disposed on the site.* Yet, under the language of section 701(b)(2) such an owner comes within the exception because there are alternative ways (the disjunctive "or") of satisfying the second requirement for the section 701(b)(2) exception.[53]

53. Perhaps the General Assembly intended to provide an "exception" to an owner of property which is used for the specified purposes so long as the owner did not place the hazardous substances on the property *and also* did not know and had no reason to know, etc. If this was the legislature's intention, it was frustrated by careless drafting. As drafted, the owner of real property who fits within the language of section 701(b)(1) is excepted from liability even if the

Though CERCLA does not contain an express exception to "owner or operator" liability similar to section 701(b)(2), it is unlikely that a landowner covered by section 701(b)(2) would, as a practical matter, be subject to significant cleanup liability under CERCLA. It is unlikely that, in the exercise of its prosecutorial discretion, the federal government would seek to impose cleanup liability upon such an owner (even though such an owner would not come within a statutory exception to "owner or operator" liability); alternatively, such an owner would most likely be able to obtain a "de minimis" settlement with the government.[54]

The most significant of the particularized "defenses" is the "residential housing" defense set forth in section 703(d). This section provides that "[t]here shall be no liability under section 701 for the owner of real property which is exclusively used or under construction as residential housing" so long as the owner can establish that: (1) any release or threatened release was "caused solely by an act or omission of a third party;" (2) at the time of acquisition, the owner did not know and had no reason to know that a hazardous substance was disposed of on the property; and, (3) after obtaining actual knowledge of the presence of a hazardous substance on the site, exercised due care with respect to the hazardous substance. This "residential housing" defense contains elements of, and to some extent duplicates, other provisions of the Act: the exception provided in section 701(b)(2) for the owner of single or multi-family housing (discussed in the preceding paragraphs); the "innocent landowner" exception in section 701(b)(1);[55] and, the third-party "defense" in section 703(a).[56] The redundancies and inconsistencies in these various

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owner is not "innocent"—that is, the owner is excepted from liability even if the owner knew that a hazardous substance was disposed of on the site.

Furthermore, section 701(b)(2) is ambiguous in a number of respects. First, it is unclear *when* the owner's lack of knowledge is to be considered. Presumably, it is the owner's knowledge at time of purchase that is significant, but the Act does not say so. Second, there is no explanation in section 701(b)(2) of when it can be said that an owner "had reason to know" that a hazardous substance had been disposed on, in or at the site. There is an explanation of a similar phrase in the "innocent landowner" exception—see section 701(b)(1)(vi)(A)—but such explanation is expressly provided "for the purposes of this subparagraph" and thus cannot be used in interpreting section 701(b)(2).

54. For a discussion of "de minimis" settlements, see *infra* text accompanying notes 226-29.

55. The "innocent landowner" exception is discussed *supra* in the text accompanying notes 38-51.

56. The "third party" defense is discussed *infra* at text accompanying notes 78-82.

provisions (yet another manifestation of careless draftsmanship) will present needless problems of interpretation for the courts.

2. "Generator" Liability

a. Basic provisions

Section 701(a)(2) imposes liability upon "generators" of hazardous substances. It provides, in relevant part, as follows:

> (a) . . . [A] person shall be responsible for a release or threatened release of a hazardous substance from a site when any one of the following apply:
>
> * * *
>
> (2) The person generates, owns or possesses a hazardous substance and arranges by contract, agreement or otherwise for the disposal, treatment or transport for disposal or treatment of the hazardous substance.

There is one stunning oversight in the preceding language. On its face, the quoted language imposes liability upon a person who generates, owns, or possesses a hazardous substance and arranges for its disposal (etc.) *without regard to whether the person's hazardous substance ever came to be placed at the site from which there is a release.* Certainly, the intention of the legislature was to impose liability only upon generators of the hazardous substances *that were disposed of on the site from which there is a release.* The failure to include this limitation is another example of careless draftsmanship.[57]

Though the language of section 701(a)(2) is not identical to the analogous provision of CERCLA that imposes liability upon generators (section 107(a)(2)) the differences in language are not significant.

b. Specific "exceptions" to generator liability

Section 701(b) sets forth certain limited exceptions to the liability imposed upon generators by section 701(a)(2). Section 701(b)(3) provides an exception for generators of "household hazardous waste"; section 701(b)(5) provides an exception, subject to specified limitations, for "a person who generates scrap

57. It is probably unlikely that an action would be brought against a generator of hazardous substances who had no connection with the site from which there is a release. If such an action were brought, it is highly likely that a court would read into section 701(a)(2) the limitation referred to in the text.

materials that are transferred to a facility . . . for the purpose of reclamation or reuse. . . ." There are no analogous exceptions in CERCLA.[58]

3. "Transporter" Liability

a. Basic provisions

Section 701(a)(3) imposes liability upon "transporters" of hazardous substances. It provides, in relevant part, as follows:

> (a) . . . [A] person shall be responsible for a release or threatened release of a hazardous substance from a site when any one of the following apply:
>
> * * *
>
> (3) The person accepts hazardous substances for transport or treatment facilities, incineration vessels or sites selected by such person from which there is a release or a threatened release of a hazardous substance which causes the incurrence of response costs.

Once again (as in the "generator" liability provisions), the legislative drafter has not clearly tied the activities imposing liability to the release from a particular site. On its face, the language imposing liability upon "transporters" imposes liability upon a person who transports hazardous substances to "sites" from which there is a release which causes the incurrence of response costs. There is no requirement that a transporter, in order to be subject to liability, has to have transported to *any particular site*. In other words, on its face, section 701(a)(3) provides that a person who transports hazardous substances to "sites" from which there is a release is subject to liability for a release from other sites. Again, this could not have been the intention of the legislature and is simply the result of careless draftsmanship.

Otherwise, the language of section 701(a)(3) does not differ significantly from CERCLA section 107(a)(4), the provision of CERCLA that imposes liability upon transporters.

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58. Generators of scrap metal have not fared well under CERCLA. An egregious example is United States v. Bourdeauhui, No. H-88-354 (D. Conn. filed June 3, 1988), in which the United States sought recovery of response costs from, *inter alia*, sixty-one dentists who sold scrap dental amalgam to a recycler.

b. Specific "exceptions" to "transporter" liability

There are no "exceptions" to liability that are limited in their applicability to transporters. However, section 703(e) limits the liability of "municipal waste transporters."[59]

4. "Persons" Subject to Liability

HSCA, like CERCLA, does not expressly resolve a number of specific questions regarding those "persons" who are subject to liability as owners or operators, generators, or transporters. Specifically, HSCA, like CERCLA, does not describe: (1) when an individual within a corporation is subject to liability; (2) when a parent corporation is liable for the actions of its subsidiary; and, (3) when a successor corporation is liable for the actions of its predecessor. HSCA does, however, provide clearly that "the Federal Government," "state governments," and "political subdivisions" may be subject to liability.

a. Liability of individuals

HSCA section 701 imposes liability upon a "person" who is either an owner or operator, a generator, or a transporter. And "person" is defined to include "an individual."[60] Though this definition makes it clear that an individual *may* be liable under HSCA, it is not clear *when* an officer or employee of a corporation is subject to individual liability.

The question of when an officer or employee of a corporation is subject to individual liability has been addressed in a number of

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59. Section 703(e) provides as follows:

> Limited liability.—Liability under the provisions of section 701 shall not apply to municipal waste transporters for that portion of municipal waste which is defined as household hazardous waste under section 1512 of the act of July 28, 1988 (P.L.556, No.101), known as the Municipal Waste Planning, Recycling and Waste Reduction Act and which is collected from generators and transported to permitted muncipal waste disposal facilities.

HSCA § 703(e).

There is no analogous defense in CERCLA.

60. "Person" is defined in HSCA section 103 as follows:

> "Person." An individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, authority, interstate body or other legal entity which is recognized by law as the subject of rights and duties. The term includes the Federal Government, state governments and political subdivisions.

HSCA § 103.

This definition is almost identical to the definition of "person" in CERCLA section 101(21).

decisions under CERCLA.[61] CERCLA, like HSCA, imposes liability upon a "person" and defines "person" to include "an individual." In *United States v. Northeastern Pharmaceutical and Chemical Co.*,[62] the court explained individual liability under CERCLA as follows:

> The government argues Lee [a corporate officer] can be held individually liable without, "piercing the corporate veil," because Lee personally arranged for the disposal of hazardous substances in violation of CERCLA § 107(a)(3). . . . We agree . . . Lee can be held individually liable because he personally participated in conduct that violated CERCLA; this personal liability is distinct from the derivative liability that results from "piercing the corporate veil." "The effect of piercing a corporate veil is to hold the owner [of the corporation] liable. The rationale for piercing the corporate veil is that the corporation is something less than a bona fide independent entity" [citation omitted]. Here, Lee is liable because he personally participated in the wrongful conduct and not because he is one of the owners of what may have been a less than bona fide corporation.[63]

The question of individual liability under a Pennsylvania environmental statute has been addressed recently by the Commonwealth Court. In *Kaites v. Department of Environmental Resources*,[64] the court considered whether an individual who was president and chief executive officer of a corporation could be held individually responsible for complying with the terms of an abatement order issued under either the Clean Streams Law or the Coal Refuse Disposal Act. Both acts authorized the issuance of orders to "persons," and both acts defined persons to include "any natural person." But, although both acts stated that a "natural person" may be a "person" subject to liability, both acts were silent regarding the circumstances in which a natural person, acting as an officer of a corporation, could be held subject to individual liability.

In this context, the court in *Kaites* considered two issues: (1)

61. *See, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985); United States v. Northeastern Pharmaceutical and Chem. Co., 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 434 U.S. 848 (1987).

62. 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 434 U.S. 848 (1987).

63. *Id.* at 744.

64. 108 Pa. Commw. 267, 529 A.2d 1148 (1987).

"whether the record supports 'piercing the corporate veil' so as to render Petitioner [the president and chief executive officer] directly liable for abating the existing nuisance;" and, (2) "whether Petitioner may be found liable under the 'participation' theory of joint tortfeasor liability."[65] The court concluded that there was insufficient evidence in the record to justify "piercing the corporate veil," and it declined to impose liability under the "participation" theory in the absence of evidence "demonstrating that Petitioner has contributed, by personal actions of neglect or misconduct, to the existing nuisance."[66]

The question of individual liability under HSCA is complicated by the provisions of section 701(c). That section, for which there is no analogue in CERCLA, provides as follows:

> (c) Employees—When a person who is responsible for a release or threatened release under subsection (a) is an employee who is acting in the scope of employment:
>
> (1) The employee is subject to liability under this section only when the employee's conduct with respect to the hazardous substance was negligent under circumstances in which the employee knew that the substance was hazardous and that the employee's conduct could result in serious harm.
>
> (2) The employer shall be considered a person responsible for the release or threatened release and is subject to liability under this section regardless of the degree of care exercised by the employee.

There can, of course, be an employer-employee relationship outside of the corporate context. There can, in other words, be a situation in which both the employer and the employee are individuals, or natural persons. Assume, for example, a situation in which a private individual, acting as a sole proprietor, undertakes activities (carried out through employees) that involve the disposal of hazardous substances. The respective liability of employer and employee in such a situation is explained fairly clearly by section 701(c).

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65. *Id.* at 270, 529 A.2d at 1149.

66. *Id.* at 275-76, 529 A.2d at 1152. Although the court in *Kaites* declined, on the facts, to impose individual liability under the "participation" theory of joint tortfeasor liability, the court's analysis—and, in particular, its distinguishing of "piercing the corporate veil" from the imposition of individual liability—mirrors the analysis of those federal courts that have considered the test for individual liability under CERCLA.

More difficult, however, is the situation of an employer-employee relationship in the corporate context. Consider, for example, the situation in which a corporation undertakes activities (carried out, of necessity, by individuals) that involve the disposal of hazardous substances. In the absence of section 701(c), the liability of individuals would be determined under case law, such as *Kaites*. It is unclear, however, whether section 701(c) overrides, codifies, or modifies such case law.

To begin with, there is the problem of delineating those individuals whose liability is defined by section 701(c). This section speaks to the liability of "employees" but there is no applicable definition of "employee" or "employer."[67] May an officer of a corporation be an "employee" as that term is used in section 701(c)?

If an officer of a corporation may be an "employee" as that term is used in section 701(c), then it is unclear how section 701(c) relates to the case law (e.g., *Kaites*) that defines individual liability in the corporate context. Section 701(c)(1) can be viewed as defining the *only* circumstances in which an officer-employee is "subject to liability." These circumstances are more limited than the circumstances which trigger individual liability under the "participation" theory of joint tortfeasor liability explained and applied in *Kaites*. Under the "participation" theory, "in order for liability to attach the officer must actually participate in wrongful acts."[68] Under section 701(c)(1), however, the officer-employee is "subject to liability . . . only when the employee's conduct with respect to the hazardous substance was negligent under circumstances in which the employee knew that the substance was hazardous and that the employee's conduct could result in serious harm." Whatever the difficulties in interpreting this language (and there are many),[69] section 701(c)(1) limits individual liability more narrowly than does the "participation" theory.

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67. There is a definition of "employee" and "employer" in the "Whistleblower" provisions of the Act, section 1112. Section 1112(c) expressly states, however, that it sets forth "meanings" for terms "as used in this section." "Employee" is defined as "[a] person who performs a service for wages or other remuneration . . . for an employer." The term "employer" is defined as "[a] person supervising one or more employees" or "a superior of that supervisor."

68. 108 Pa. Commw. at 274, 529 A.2d at 1151.

69. For example, under section 701(c)(1), an employee is subject to liability only if the "employee's conduct was negligent under circumstances in which the employee knew that the substance was hazardous and the employee's conduct could result in serious harm." Is actual knowledge required? What if the employee should have known? What is meant by "serious harm"?

On the other hand, again assuming that an officer may be an "employee" as that term is used in section 701(c)(1), it should be noted that the introductory language to section 701(c) limits the applicability of the subsection to "when a person *who is responsible for a release or threatened release under subsection (a)* is an employee who is acting in the scope of employment." (Emphasis added.) Does the emphasized language require that, before one begins to interpret and apply the limiting circumstances of section 701(c)(1), one must first determine whether the officer-employee is "responsible" under section 701(a), and that this determination requires the application of the "participation" theory for individual liability? Under this interpretation, one first applies case law tests for "responsibility" in order to determine the applicability of the statutory standard for "liability" set forth in section 701(c)(1). This is admittedly a bizarre way to go about defining the circumstances that trigger officer-employee liability, and it is hard to believe that such a two-step process was intended.

It is likely that the courts will turn to case law (e.g., *Kaites*) to define the circumstances in which corporate officers are subject to individual liability under HSCA. One way or another, the courts will probably conclude that officers (and other corporate higher-ups) are not "employees" and thus do not fall within the protection accorded by section 701(c). If this happens, it is likely that the case law defining the individual liability of corporate officers under HSCA will follow the case law defining individual liability under CERCLA.

b. Liability of parent and successor corporations

As previously stated, HSCA like CERCLA does not address the questions: (1) when a parent corporation is liable for the actions of its subsidiary; and, (2) when a successor corporation is liable for the actions of its predecessor. In addressing these questions under CERCLA, federal courts have had to consider a threshold issue of whether a federal court should apply state law or create a "federal common law" of parent and successor liability under CERCLA. In two recent decisions, federal courts have concluded that federal law should be applied in determining parent and successor liability under CERCLA.[70]

70. In United States v. Nicolet, Inc., 712 F. Supp. 1193 (E.D. Pa. 1989), the court fashioned the following "federal rule of decision" for determining parent liability under CERCLA:

> Where a subsidiary is or was at the relevant time a member of one of the classes of persons potentially liable under CERCLA; and the parent

In determining the extent of parent and successor liability under HSCA, Pennsylvania state courts will not be faced with the threshold question of what law to apply; Pennsylvania courts will obviously apply Pennsylvania law. Under Pennsylvania law, a court will "pierce the corporate veil" and hold a parent corporation liable for the acts of its subsidiary if the parent corporation dominates and controls the subsidiary to the extent that the subsidiary is a "mere instrumentality" or "alter ego" of the parent.[71] The general rule for successor liability in Pennsylvania is that when one company sells or transfers all of its assets to a successor company, the successor does not acquire the liabilities of the transferor corporation merely because of its succession to the transferor's assets.[72] Since HSCA is silent on the issues of parent and successor liability, it can be expected that Pennsylvania courts will apply this case law in determining whether to impose parent or successor liability under HSCA.

c. Liability of government entities

HSCA section 701(a) imposes liability upon various "persons" and HSCA section 103 defines "person" to include "the Federal Government, state governments, and political subdivisions." CERCLA section 101(21) is similar.[73]

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had a substantial financial or ownership interest in the subsidiary; and the parent corporation controls or at the relevant time controlled the management and operations of the subsidiary, the parent's separate corporate existence may be disregarded.

712 F. Supp. at 1202.

In Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 837 (1989), the court concluded that a federal rule of decision should be applied in determining successor liability under CERCLA and left it to the district court to fashion such a rule of decision.

71. See Botwinick v. Credit Exchange, Inc., 419 Pa. 65, 213 A.2d 349 (1965) for a statement of the Pennsylvania common law on the tort liability of a parent corporation for the actions of a subsidiary.

72. Burnside v. Abbott Laboratories, 351 Pa. Super. 264, 505 A.2d 973 (1986); Dawejko v. Jorgenson Steel Co., 290 Pa. Super. 15, 434 A.2d 106 (1981). The general rule is not applicable and the transferee is held liable when one of the following occurs: (1) the transferee expressly or impliedly agrees to assume the obligation; (2) the transaction amounts to a consolidation or merger; (3) the purchasing corporation is merely a continuation of the selling corporation; or, (4) the transaction is fraudulently entered into to escape liability. Commonwealth v. LaVelle, Inc., 382 Pa. Super. 356, 555 A.2d 218 (1989). An additional situation which Pennsylvania courts sometimes consider as an exception to the general rule occurs when the transfer is without adequate consideration and no provisions were made for the creditors of the transferor. *Id.*

73. CERCLA section 101(21) defines "person" to include "United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." CERCLA § 101(21).

It is clear that the General Assembly could not, on its own, impose liability under HSCA upon the federal government and thereby override federal sovereign immunity. The federal government, however, may waive its immunity to liability under state "superfund" acts and, in CERCLA section 120(a)(4), it has done so.[74] Thus, by virtue of the combined language of CERCLA section 120(a)(4) and HSCA section 103, it is clear that the federal government is subject to liability under HSCA section 701(a).

It would also seem that, in defining "person" to include "state governments," the General Assembly has waived the Commonwealth's immunity to liability under HSCA section 701(a).[75] However, HSCA section 511 sets forth a limitation upon the waiver of the state's sovereign immunity. Section 511(a) authorizes DER to acquire such interests in real property as "the department, in its discretion, determines is needed to conduct a response action under this act."[76] And section 511(b) provides as follows:

> (b) Sovereign immunity. — The Commonwealth shall not be liable under this act as a result of acquiring an interest in real estate under this section, nor shall anything in this act be construed as a waiver of sovereign immunity or a waiver under 42 Pa.C.S. § 8522 (relating to exceptions to sovereign immunity).

The first part of section 511(b) is clear and unremarkable.[77] It provides that the Commonwealth is not liable under HSCA if it acquires an interest in real estate *under this section* — that is, if the Commonwealth acquires an interest in real estate as a result of DER's determination that such acquisition is needed to conduct a response action. However, the second part of section 511(b) is

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74. CERCLA section 120(a)(4) provides:

> "State laws governing removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States when such facilities are not included on the National Priorities List."

CERCLA § 120(a)(4).

If a federal facility is on the NPL, the federal government is subject to liability under CERCLA. CERCLA § 120(a)(1).

75. In a recent decision, Pennsylvania v. Union Gas Co., 106 S. Ct. 2273 (1989), the Supreme Court of the United States has held that states are subject to liability under CERCLA.

76. HSCA section 511(a) is all but identical to CERCLA section 104(j)(1).

77. The first part of HSCA section 511(b) is taken from CERCLA section 104(j)(3).

more broad and undercuts any contention that the inclusion of "state governments" in the section 103 definition of person constitutes a waiver of the Commonwealth's immunity to liability under HSCA.

In defining "person" to include "political subdivisions," the General Assembly has made it clear that "political subdivisions" are subject to liability under section 701(a). However, the term "political subdivisions" is not defined in HSCA.

In summary, section 511(b) supports the conclusion that the Commonwealth is not subject to liability under HSCA in spite of the fact that section 701 imposes liability upon "persons" and "persons" is defined to include "state governments." However, "political subdivisions" are clearly subject to liability under HSCA.

5. General "Defenses"[78] to Liability

Both HSCA section 703(a) and CERCLA section 107(b) provide that there shall be no liability where a person who is otherwise liable can establish that a release or threatened release was caused solely by "an act of God" or "an act of war." Both sections also provide an otherwise liable person with a "third party" defense.[79]

Under CERCLA, the "third party" defense is raised most

78. For a discussion of specific, or particularized, defenses to liability, see *supra* text accompanying notes 52-56.

79. Section 703(a) provides as follows:

There shall be no liability under section 701 of this act for a person otherwise liable who can establish that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by any of the following:

(1) An act of God.

(2) An act of war.

(3) An act or omission of a third party other than an employee, agent or contractor of the responsible person or one whose act or omission occurs in connection with an agreement or contractual relationship (except where the sole contractual arrangements arise either from a published tariff and acceptance for carriage by a common carrier by rail, or an exempt circular or transportation contract in lieu of a published tariff for carriage by a common carrier by rail), if the responsible person:

(i) exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances; and

(ii) took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from those acts or omissions.

HSCA § 703(a).

often in the circumstance where a present landowner is claiming to be an "innocent landowner" and thus not subject to "owner or operator" liability; more specifically, the present landowner is claiming to be "innocent" because the release of hazardous substances was (according to the present landowner) caused solely by the activities of a third party—a prior landowner. As we have seen, HSCA deals with the "innocent landowner" situation through the "exception" created by section 701(b)(1).[80]

The "third party" defense may be raised in circumstances other than the "innocent landowner" situation. For example, a generator defendant may contend that the release of its hazardous substance was caused solely by the action of a transporter or a disposer.[81] However, under both HSCA section 703(a) and CERCLA section 107(b), the person asserting the "third party" defense is not entitled to the defense if the third party is "an employee, agent or contractor of the responsible person or one whose act or omission occurs in connection with an agreement or contractual relationship." In addition, the party asserting the third-party defense must establish that it exercised "due care" and "took precautions against foreseeable acts or omissions" of the third party.[82]

C. STANDARDS OF LIABILITY

In this part, we will discuss standards of liability—that is, the standards under which "responsible persons" (those designated in section 701) are liable for the items of liability identified in section 702.[83] In discussing standards of liability, we will distinguish between "original liability" and "contribution liability"—that is, we will distinguish between the standards by which a responsible person is liable in an original action brought by the government enforcement agency ("original liability") and the standards by

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The provisions of HSCA section 703(a) and CERCLA section 107(b) are substantially the same.

80. For a comparison of the treatment of "innocent landowners" under CERCLA and HSCA, see *supra* notes 34-51 and accompanying text.

81. *See, e.g.*, Violet v. Picillo, 648 F. Supp. 1283 (D.R.I. 1986) (generator contends that transporter diverted generator's waste from disposal site designated by generator).

82. *See supra* note 79. The "due care" provision is set forth in section 703(a)(3)(i), and the "precaution" prong is section 703(a)(3)(ii).

83. The standards of liability considered here are the standards of liability for the items of liability set forth in section 702 (essentially, cleanup costs, and natural resource damages). The standards of liability for civil penalties and punitive damages are considered *infra* at text accompanying notes 184-92.

which a responsible person is liable to another responsible person in an action for contribution ("contribution liability").

1. Standards of Original Liability

Following the enactment of CERCLA in 1980, it took years for the federal courts to resolve basic questions relating to the standards by which responsible parties were to be held liable in an enforcement action by EPA. CERCLA section 107(a) was clear in imposing responsibility (for a release or threatened release) upon owners, generators, and transporters, but CERCLA was not clear in defining the standards under which these entities were to be held liable. Specifically, CERCLA was not clear in stating whether liability under section 107(a) was predicated upon fault (e.g. negligence) or was strict (i.e., imposed regardless of fault). In addition, CERCLA was not clear in stating whether the entities subject to liability under section 107(a) were jointly and severally liable for the costs and damages attributable to the release.[84] Ultimately these questions were resolved by judicial decisions.[85] It is now clear that the liability imposed upon responsible parties by CERCLA section 107(a) is strict, and (in the absence of proof of divisible harm by a responsible party) joint and several.

HSCA section 702(a) provides clearly that section 701 responsible persons are "strictly liable" for specified items of costs and damages.[86] HSCA is less clear, however, in dealing with the question whether liability under sections 701 and 702 is joint and several.

HSCA, like CERCLA, contains no express provision for joint and several liability. However, there is legislative history to support the conclusion that the General Assembly intended that the liability of each responsible person is joint and several.[87] Furthermore, HSCA section 705(a) provides for contribution and, since a right of contribution would be significant only if original liability is joint and several, the existence of such a statutory right

84. Tied to the issue of joint and several liability is the question of whether one responsible person can seek contribution from another. This question is addressed in the next subpart *infra*.

85. *See, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985) (strict liability); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 808 (S.D. Ohio 1983) (joint and several liability).

86. These specified items of costs and damages are described *infra* at text accompanying notes 100-11.

87. Most supportive of joint and several liability are the remarks of Representative Camille George on final passage of the Conference Committee's report. 61 HOUSE LEGIS. J. 1717-18 (Oct. 13, 1988).

suggests quite strongly that the original liability of responsible persons was intended to be joint and several.

Federal courts have recently begun to address important questions regarding joint and several liability under CERCLA.[88] They have rejected arguments that, in order for a responsible person to be jointly and severally liable, the plaintiff (usually the government) has an initial burden of demonstrating that the responsible person was a "substantial" cause of the harm caused by the release.[89] Rather, the only way that a responsible person can escape joint and several liability is by proving that the harm caused by the release is divisible. Where the harm has been caused by a release from a site where numerous generators have disposed of hazardous substances, it is usually impossible for a single generator defendant to meet this burden of proof.[90]

In interpreting and applying joint and several liability under HSCA, it is likely that the Pennsylvania courts will follow the lead of the federal courts and conclude that, when an action is brought against a responsible person, that person is jointly and severally liable even in the absence of proof that the person was a "substantial" cause of the harm caused by the release.[91] In addition, it is likely that a responsible person will be able to escape joint and several liability under HSCA only if the responsible person can meet the heavy (and, in most cases, impossible) burden of proving that the harm caused by a release is divisible.

88. *See* O'Neil v. Picillo, 883 F.2d 176 (1st Cir. 1989); United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 3156 (1989).

89. O'Neil v. Picillo, 883 F.2d 176, 179 n.4 (1st Cir. 1989). The court in *Picillo* pointed out that the responsible person who is not a "substantial" cause of the harm is protected against disproportionate liability by the statutory provisions providing for contribution (see discussion of contribution in the next subpart) and for *de minimis* settlements (see discussion of *de minimis* settlements *infra* at text accompanying notes 226-29).

90. In *Picillo*, the court stated:

> The practical effect of placing the burden [of proving divisibility of harm] on defendants has been that responsible parties rarely escape joint and several liability, courts regularly finding that where wastes of varying (and unknown) degrees of toxicity and migratory potential commingle, it simply is impossible to determine the amount of environmental harm caused by each party.

883 F.2d at 178-79.

91. The statement in the text refers to the liability of responsible persons under Chapter 7. It is not clear that liability under section 507(a) is joint and several. For a general discussion of section 507(a), see *supra* note 7 and accompanying text. Indeed, under section 705(a), the statutory entitlement to seek contribution is limited to contribution from "a responsible person under section 701." There is no statutory entitlement to seek contribution from a person who is liable under section 507(a); this suggests that liability under section 507(a) is not joint and several.

2. Standards of Contribution Liability

HSCA section 705(a), like CERCLA section 113(f)(1), provides a right of contribution. Specifically, section 705(a) sets forth the "general rule" that "a person may seek contribution from a responsible person under section 701, during or following a civil action under sections 507 or 1101."[92] Thus, a responsible person who has been sued in an original action can seek to mitigate the effects of joint and several liability by seeking contribution from other responsible persons.[93] In addition, section 705(a) provides that "[n]othing in this section shall diminish the right of a person to bring an action for contribution in the absence of a civil action under sections 507 or 1101." Thus, a responsible person who wishes to seek contribution from other responsible persons need not wait to be sued by DER in a cost recovery action under sections 507 or 1101; the responsible person may undertake a voluntary cleanup of a release and then bring an action for contribution against other responsible persons.[94]

HSCA is more specific than CERCLA in stating how a court (or the Environmental Hearing Board[95]) is to go about allocating liability for harm when a responsible person has brought a claim for contribution against another responsible person (or persons). CERCLA section 113(f)(1) simply states that "[i]n resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." HSCA section 705(b) also authorizes "the court or the board" to "use such equitable factors as it deems appropriate" but it also goes on to list six factors that "[t]he trier

92. Sections 507 and 1101 provide forums for the recovery of response costs and damages. (See *infra* note 95 and accompanying text for a discussion of sections 507 and 1101.) The language of section 705(a) is similar to the language of CERCLA section 113(f)(1). As previously noted, however (*supra* note 91), the statutory entitlement to contribution is limited to contribution from "a responsible person under section 701." There is no statutory entitlement to seek contribution from a person who is liable under section 507(a).

93. Section 705(a) provides that such "[c]laims for contribution shall be brought in accordance with this section and the Pennsylvania Rules of Civil Procedure."

94. Such an action is similar to a private cost recovery action. However, private cost recovery actions may be brought by persons who are not responsible persons. See *infra* text accompanying notes 259-65 for a discussion of private cost recovery actions.

95. Actions for response costs and claims for contribution may be brought before EHB. HSCA §§ 507(a), 1101.

of fact shall consider."[96] These factors are similar to the "Gore Amendment" factors to which federal courts have looked in considering "equitable factors" for the purpose of allocating liability under CERCLA section 113(f)(1).[97] Thus, although the text of HSCA section 705(b) is more specific than the text of CERCLA section 113(f)(1), it appears that, in allocating liability in contribution claims, state courts (or EHB) will apply the same factors that federal courts have applied in allocating liability in contribution claims under CERCLA.[98] The federal courts have found these allocation determinations to be difficult, and there is no reason to believe that the Pennsylvania courts (or EHB) will find them any easier.[99]

D. SCOPE OF LIABILITY

HSCA section 702(a) provides that a responsible person (as

96. The six factors listed in section 705(b) are the following:

(1) The extent to which each party's contribution to the release of a hazardous substance can be distinguished.

(2) The amount of hazardous substance involved.

(3) The degree of toxicity of the hazardous substance involved.

(4) The degree of involvement of and care exercised by each party in manufacturing, treating, transporting and disposing of the hazardous substance.

(5) The degree of cooperation by each party with Federal, State or local officials to prevent harm to the public health or the environment.

(6) Knowledge by each party of the hazardous nature of the substance.

HSCA § 705(b).

97. For a description and discussion of the "Gore Amendment," see United States v. A & F Materials Co., 578 F. Supp. 1249, 1254 (S.D. Ill. 1984).

98. HSCA section 705(b) contains two provisions that cannot be found in CERCLA section 113(f)(1). First, section 705(b) provides that "[a]llocation shall not affect the parties' liability to the department." In other words, though responsible persons may, in a contribution action, arrive at an allocation of liability as between (or among) themselves, this allocation does not preclude DER from asserting that each responsible person is jointly and severally liable for all the items of liability specified in section 702. Though CERCLA does not contain a similar provision, it seems implicit in CERCLA that any allocation among the responsible persons (as a result of private agreement or resolution in a contribution claim) does not affect the joint and several liability of such persons.

Second, section 705(b) provides "[t]he burden is on each party to show how liability should be allocated." This provision is mysterious and incomprehensible. Where one responsible person is seeking contribution from another responsible person, it is difficult to see how the burden of showing how liability should be allocated could be "on each party." *Id.* Only one of two adverse parties can have the burden of proof.

99. Of course, the Pennsylvania courts (or EHB) will be required to make these allocation determinations only when the responsible persons have been unable to agree upon appropriate allocations. Given the complexity and uncertainty involved in seeking allocation determinations in a contribution claim, one can expect that the great majority of allocation disputes will be settled.

designated in section 701) is strictly liable for five items of "response costs and damages which result from the release or threatened release or to which the release or threatened release significantly contributes." These five items under section 702(a) are described as follows:

> (1) Costs of interim response which are reasonable in light of the information available to the department at the time the interim response action was taken.
>
> (2) Reasonable and necessary or appropriate costs of remedial response incurred by the United States, the Commonwealth or a political subdivision.
>
> (3) Other reasonable and necessary or appropriate costs of response incurred by any other person.
>
> (4) Damages for injury to, destruction of, or loss of natural resources within this Commonwealth or belonging to, managed by, controlled by or appertaining to the United States, the Commonwealth or a political subdivision. This paragraph includes the reasonable costs of assessing injury, destruction or loss resulting from such a release.
>
> (5) The cost of a health assessment or health effects study.

For the sake of brevity, section 702(a)(1) costs will be referred to as "interim response costs"; section 702(a)(2) costs will be referred to as "remedial response costs" (interim and remedial response costs will be referred to collectively as "response costs"); section 702(a)(3) costs will be referred to as "third party response costs"; section 702(a)(4) damages will be referred to as "natural resource damages"; and, the section 702(a)(5) cost will be referred to as "health study cost."

We will examine each of these items of liability and compare them with their counterparts in CERCLA. First, we will address some more basic questions.

1. The Uncertain Relationship Between Section 702 and Sections 507(a) and 1101

Section 702(a) lists five items for which responsible persons are liable, and section 702(b) states that "[t]he amounts *recoverable in an action under sections 507 and 1101* include interest on the amounts recoverable under subsection (a)." (Emphasis added.) The emphasized language would lead one to believe that the five

items listed in section 702(a), together with interest on these five items, are recoverable in an action under section 507 and section 1101. But reference to the language of section 507 and section 1101 leaves one uncertain.

Section 507(a) provides that certain persons[100] "shall be liable for the response costs and for damages to natural resources" that are attributable to a release. Section 507(a) goes on to say that "[t]he department, a Commonwealth agency, or a municipality which undertakes to abate a public nuisance under this act or take a response action may recover *those response costs and natural resource damages* in an action in equity brought before a court of competent jurisdiction." (Emphasis added.) Finally, section 507(a) provides that "the board [i.e., EHB] is given jurisdiction over actions by the department to recover *response costs and damages to natural resources*." (Emphasis added.)

Section 1101 is simpler. It provides that "[a]ny person allowing such a release [i.e., a release of a hazardous substance] or committing such a violation [i.e., a violation of any provision, regulation, order or response approved by DER] shall be liable *for the response costs* caused by the release or the violation." Section 1101 goes on to provide "[t]he board and any court of competent jurisdiction is hereby given jurisdiction over actions *to recover the response costs.*" (Emphasis added.)

Although the language of section 702(a) suggests that all five items listed in that section are recoverable in an action under sections 507 and 1101, it appears that only response costs and natural resource damages (and not health study cost) are recoverable in an action under section 507, and that only response costs (and not natural resource damages or health study cost) are recoverable in an action under section 1101. Thus, although section 702(a) lists health study cost as an item of liability, HSCA contains no provision which provides a forum for recovery of such cost. This is another example of careless draftsmanship. It will take awhile for the Pennsylvania courts to work out the inconsistencies in the language of sections 702, 507, and 1101.

2. *The Required Causal Relationship Between a Release and Liability for Response Costs and Damages*

Under both CERCLA and HSCA, responsible persons are liable only for those costs and damages which are caused by a re-

100. See *supra* text accompanying note 7 for a discussion of the various entities who are liable under section 507(a).

lease. However, CERCLA and HSCA differ regarding the precise language of the required causal relationship between the release and the costs and damages sought to be recovered.

CERCLA section 107(a) imposes liability for response costs and natural resource damages that are "caused" or "result from" a release. HSCA section 702(a), on the other hand, imposes liability for response costs and damages which "result from" a release or to which a release "significantly contributes." The language of the required relationship between a release and "response costs and damages" (for which a responsible person is liable) is obviously somewhat different; whether that difference in language will have a practical impact depends upon the extent to which the Pennsylvania courts give a broad interpretation to the phrase "significantly contributes."

3. Response Costs

HSCA section 702(a) imposes upon responsible parties liability for both "interim" and "remedial" response costs. Before discussing the differences between these two different types of response costs, we will first consider the more general question of what types of costs are "response" costs.

The term "response costs" or "costs of response" is not defined in HSCA; the term "response" is. HSCA section 103 generally defines "response" as "[a]ction taken in the event of a release or threatened release of a hazardous substance or a contaminant into the environment to study, assess, prevent, minimize or eliminate the release in order to protect the present or future public health, safety or welfare or the environment." The definition of "response" then lists various actions which the term "includes, but is not limited to."[101] The list is expansive, including all the

101. The listing is as follows:

(1) Emergency response to the release of hazardous substances or contaminants.

(2) Actions at or near the location of the release, such as studies; health assessments; storage; confinement; perimeter protection using dikes, trenches, or ditches; clay cover; neutralization; cleanup or removal of released hazardous substances, contaminants or contaminated materials; recycling or reuse, diversion, destruction, segregation of reactive wastes; dredging or excavation; repair or replacement of leaking containers; collection of leachate and runoff; onsite treatment or incineration; offsite transport and offsite storage; treatment, destruction, or secure disposition of hazardous substances and contaminants; treatment of groundwater, provision of alternative water supplies, fencing or other security measures; and monitoring and maintenance reasonably required to assure that these actions protect the public health, safety, and welfare and the environment.

items that are listed in CERCLA's definitions of "removal" and "remedial action."[102] Indeed, the list goes beyond the items listed in the CERCLA definitions; most significantly, HSCA lists investigative and enforcement costs as recoverable response costs.[103]

a. Interim response costs

HSCA section 702(a)(1) imposes liability for "costs of interim response", and section 103 defines "interim response" as a "[r]esponse which does not exceed 12 months in duration or $2,000,000 in cost." The definition then lists the exclusive circumstances in which an interim response may exceed these limitations.[104]

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(3) Costs of relocation of residents and businesses and community facilities when the department determines that, alone or in combination with other measures, relocation is more cost effective than and environmentally preferable to the transportation, storage, treatment, destruction or secure disposition offsite of hazardous substances or contaminants or may otherwise be necessary to protect the public health or welfare.

(4) Actions taken under section 104(b) of the Federal Superfund Act, (42 U.S.C. § 9604(b)) and any emergency assistance which may be provided under the Disaster Relief Act of 1974 (Public Law 93-288, 83 Stat. 43).

(5) Other actions necessary to assess, prevent, minimize, or mitigate damage to the public health, safety or welfare or the environment which may otherwise result from a release or threatened release of hazardous substances or contaminants.

(6) Investigation, enforcement, abatement of nuisances, and oversight and administrative activities related to interim or remedial response enforcement, abatement of nuisances, and oversight and administrative activities related to interim or remedial response.

HSCA § 103.

102. The structure of definitions in HSCA differs from the structure of definitions in CERCLA. HSCA section 103 contains a lengthy definition of "response" and then contains separate definitions of "interim response" and "remedial response or remedy." CERCLA, on the other hand, defines "respond" or "response" rather generally as including "removal" and "remedial action" (CERCLA § 101(25)) and then provides more lengthy definitions of these two terms. "Removal" is defined in CERCLA section 101(23) and "remedial action" is defined in CERCLA section 101(24). Differences in definitional structure aside, the HSCA definition of "response" includes all of the actions descibed in the CERCLA definitions of "removal" and "remedial action."

103. *See* paragraph (6) of the HSCA section 103 definition of "response," *supra* note 101. A federal court has recently held that the federal government may recover "indirect costs" under CERCLA. United States v. R. W. Meyer, Inc., 889 F.2d 1497 (6th Cir. 1989).

104. The section 103 definition of "interim response" provides, in relevant part, as follows:

An interim response may exceed these limitations [12 months or $2,000,000] only where one of the following applies:

HSCA section 702(a)(1) imposes liability for interim response costs "which are reasonable in light of the information available to the department at the time the interim response action was taken." This is an obviously broad standard and, given that interim response actions are undertaken in order to deal with conditions that require expeditious action, it will probably be the rare case in which a court or EHB questions DER's assessment of what costs are "reasonable."

b. Remedial response costs

HSCA section 702(a)(2) imposes liability for "costs of remedial response" (defined in section 103 as "[a]ny response which is not an interim response"). However, liability for "costs of remedial response" extends only to such costs as are "reasonable and necessary or appropriate."

CERCLA section 107(a)(4)(A) also imposes liability for remedial response costs but limits liability to such costs as are "not inconsistent with the national contingency plan [NCP]." The NCP provides a fairly objective standard by which to assess the extent to which remedial response costs are recoverable.[105] HSCA contains no analogue to the NCP and, until such time as DER puts forth regulations that seek to define the remedial response costs that are recoverable, Pennsylvania courts and EHB will have to apply the broad, almost open-ended, test of whether the costs sought are "reasonable and necessary or appropriate."[106]

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(1) Continued response actions are immediately required to prevent, limit or mitigate an emergency.
(2) There is an immediate risk to public health, safety or welfare or the environment.
(3) Assistance will not otherwise be provided on a timely basis.
(4) Continued response action is otherwise appropriate and consistent with future remedial response to be taken.

This definition of "interim response" is important because, as we will see, DER may undertake an "interim response" and seek recovery of its interim response costs without first going through the administrative record process of section 506. HSCA section 505(b). For a discussion of the § 506 administrative record process, see *infra* text accompanying notes 142-63.

105. The nature and function of the NCP is described in CERCLA section 105. In accordance with the 1986 SARA amendments, the NCP has been recently revised. *See* 53 Fed. Reg. 51,394 (1988) (to be codified at 40 C.F.R. Part 300, App. A)(proposed Dec. 21, 1988).

106. HSCA section 702(a)(2) imposes liability for remedial response costs "incurred by the United States, the Commonwealth or a political subdivision." The imposition of liability under HSCA for response costs incurred by the United States is curious. CERCLA section 107(a) imposes liability for response costs incurred by the United States. There is no apparent reason why the Gen-

4. Third Party Response Costs

HSCA section 702(a)(3) imposes liability for "[o]ther reasonable and necessary or appropriate costs of response incurred by any other person." This provision is similar to CERCLA section 107(a)(4)(B).[107]

Although section 702(a)(3) clearly imposes liability for third party response costs, HSCA does not, as we will demonstrate later in this article, provide a forum for recovery by a third party of its response costs.[108]

5. Natural Resource Damages

HSCA section 702(a)(4) imposes liability for "[d]amages for injury to, destruction of, or loss of natural resources within this Commonwealth or belonging to, managed by, controlled by or appertaining to the United States, the Commonwealth or a political subdivision." This provision is similar to CERCLA section 107(a)(4)(C).[109]

Both HSCA section 103 and CERCLA section 101(16) define the term "natural resources." The definitions are similar.[110]

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eral Assembly would wish to impose additional liability, under state law, for response costs incurred by the United States.

107. CERCLA section 107(a)(4)(B) imposes liability for "any other necessary costs of response incurred by any other person consistent with the national contingency plan [NCP]."

There are a couple of obvious differences between the HSCA section 702(a)(3) and CERCLA section 107(a)(4)(B). First, under CERCLA, liability for third party response costs extends only to those costs which are "necessary"; under HSCA liability extends to those costs which are "reasonable and necessary or appropriate." Second, under CERCLA, liability extends only to those third party response costs that are consistent with the NCP; under HSCA there is no analogous limitation.

108. Third party cost recovery will be discussed in the context of a more general discussion of "private rights of action." See *infra* text accompanying notes 259-70.

109. CERCLA section 107(a)(4)(C) imposes liability 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 such a release." The one most obvious difference between HSCA section 702(a)(3) and CERCLA section 107(a)(4)(C) is that the latter makes no mention of liability for natural resources controlled by a "political subdivision." See *infra* text accompanying notes 254-58 for a discussion of the extent to which political subdivisions may recover natural resource damages.

110. HSCA section 103 defines "natural resources" as follows:

> Land, fish, wildlife, biota, air, water, groundwater, drinking water supplies and other resources belonging to, managed by, held in trust by, appertaining to or otherwise controlled by the United States, the Commonwealth or a political subdivision. The term includes resources protected by section 27 of Article I of the Constitution of Pennsylvania.

HSCA § 103.

Although both CERCLA and HSCA impose liability for natural resource damages, we will see that the two statutes set forth very different processes for assessing and recovering such damages.

6. Health Study Cost

HSCA section 702(a)(5) imposes liability for "[t]he cost of a health assessment or health effects study." This provision is derived from CERCLA section 107(a)(4)(D) which imposes liability for "the costs of any health assessment or health effects study carried out under section 9604(i) of this title [CERCLA section 104(i) as codified]."

CERCLA section 104(i) sets forth a lengthy and detailed process for carrying out a "health assessment or health effects study." The detailed requirements of section 104(i) provide an objective standard against which to measure the extent to which the cost of a health study is recoverable. There is, however, no similar objective standard in HSCA. HSCA contains no provisions describing how a health study is to be carried out, and there is no statutory definition of "health assessment or health effects study." Thus, HSCA provides no guidance regarding the extent to which the cost of such a study is a recoverable cost.[111]

II. ENFORCEMENT BY THE DEPARTMENT OF ENVIRONMENTAL RESOURCES

The Department of Environmental Resources (DER) has primary enforcement responsibility and authority under HSCA,[112] In this part, we will examine DER's enforcement role under HSCA and compare that role with the enforcement role of EPA under CERCLA. Generally speaking, HSCA provides DER with the same three options that EPA has under CERCLA—that is, when faced with a contaminated site, DER may: (1) undertake its own cleanup of the site and then seek recovery of its cleanup costs from the responsible parties; (2) order one or more responsible

The definition of "natural resources" in CERCLA section 107(a)(4)(C) contains the same list as in the first sentence of the HSCA definition. The CERCLA definition refers to natural resources controlled by "the United States . . ., any State or local government, any foreign government, [and] any Indian tribe."

111. Moreover, as previously discussed, HSCA contains no provision that provides a forum for recovery of health study costs.

112. HSCA also provides for enforcement actions by municipalities (discussed in Part III, *infra*) and enforcement by way of citizen suits (discussed in Part IV, *infra*).

parties to undertake cleanup; or, (3) enter into an agreement with one or more responsible parties under which the responsible parties agree to undertake cleanup under government supervision.

In this part, we will consider first those provisions of HSCA that authorize DER to clean up a contaminated site and then seek response costs against responsible parties. Second, we will consider other enforcement options that are available to DER, including the issuance of cleanup orders and actions for natural resource damages. Third, we will examine DER's authority to enter into settlements with responsible parties. Finally, we will discuss the extent to which DER's enforcement options under HSCA are limited by section 1301 of the Act.

A. DER CLEANUP AND COST RECOVERY ACTIONS

Like CERCLA, HSCA authorizes a government agency—DER—to undertake a cleanup of a contaminated site and then bring an action to recover the cost of the cleanup from responsible parties. A DER-directed cleanup, followed by a cost recovery action (in which each responsible person is jointly and severally liable), is DER's ultimate weapon. The experience under CERCLA has been that the threat of government-directed cleanup followed by a cost recovery action has been enough to induce a high number of "voluntary" cleanups by potentially responsible parties (PRPs). It will be interesting to see whether there will be a similar experience under HSCA.

1. Investigation and Notice

HSCA section 501 sets forth DER's "response authorities." The major provisions of this section are taken from CERCLA section 104; there are, however, a number of differences between HSCA section 501 and CERCLA section 104.

HSCA section 501(a) states that DER "shall investigate" whenever there is a release or a substantial threat of a release of a hazardous substance into the environment; in contrast, CERCLA section 104(a) states that the President "is authorized" to undertake various actions in response to a release or the threat of a release. The mandatory language of section 501(a) suggests that a citizen, concerned about DER inaction in response to a release or threatened release, may be able to bring a mandamus action in order to compel DER to at least "investigate."[113]

113. HSCA section 502(f) provides that "[n]othing in this act shall be interpreted to deprive any interested or aggrieved person of his inherent right to

If, after investigation, "further response action is deemed appropriate," then section 501(a) provides that "the department shall notify the owner, operator or any other responsible person of such release or threat of release if such persons are known." Though not expressly required under CERCLA, PRP notices have been the almost invariable first step in an effort by EPA to get responsible persons to undertake a response action.

HSCA section 501(d) provides that DER "shall undertake or cause to be undertaken" by a responsible person investigations and "other similar activities" that are necessary to identify the source and nature of the release. This language suggests that DER may order responsible persons to undertake investigations. EPA has similar power under the broad language of CERCLA section 106 which authorizes "such orders as may be necessary to protect public health and the environment."[114]

HSCA section 501(e), unlike CERCLA, requires DER to give "prompt written notice" to the owner and operator of a site "and to the first mortgagee holding a mortgage on the premises on which the site is located" whenever DER undertakes any investigation, interim response, or remedial response. No similar notice is required under CERCLA, although, as a practical matter, it is usually provided to the site owner or operator, although rarely if ever to the mortgagee. Since the mortgagee would not be adversely affected by any investigation or response by DER, the purpose of notice to the mortgagee is not clear.[115]

2. *The State Priority List*

Congress, in enacting CERCLA, and the Pennsylvania General Assembly, in enacting HSCA, have recognized that there may be a very large number of sites on which there is a release, or threatened release. Both Congress and the General Assembly have also recognized that such sites present different degrees of risk to public health and the environment. Accordingly, both CERCLA and HSCA require the development of "priority lists"

bring an action in mandamus to correct department actions under the standards currently recognized in Pennsylvania equity practice."

114. CERCLA § 104(a).

115. Under HSCA section 509(a), DER may obtain a lien upon the site in the amount of the response costs. Such a lien does not, however, have priority over preexisting security interests. HSCA § 509(b). Earlier drafts of H.B. 1852 provided for a "superlien" that would have priority over preexisting security interests, and it may be that the notice requirement of section 501(d) was drafted with such a superlien provision in mind. For further discussion of the lien provisions of HSCA, see *infra* text accompanying notes 201-06.

under which various sites are ranked according to the significance of the risks that they present.

Under CERCLA section 105(a)(8)(B), EPA is to establish, and annually revise, a "National Priority List" (NPL). Before it initially promulgated the NPL, EPA first had to establish criteria for listing sites on the NPL.[116] These criteria are embodied in EPA's "Hazard Ranking System" (HRS).[117]

HSCA, like CERCLA, provides for a "priority list" of sites with releases or threatened releases. HSCA section 502(a)(1) states that DER, in compiling the priority list, is to utilize the "Uncontrolled Hazardous Waste Site Ranking System" (i.e., the HRS) established under CERCLA. Generally speaking, no site included on the NPL is to be included on the state priority list (SPL).[118] Rather, the SPL is to include those sites that are the "next in line" after the sites that have been placed on the NPL.[119]

There are some significant differences between the listing provisions of HSCA and the listing provisions of CERCLA. First, DER may, by regulation, make modifications to CERCLA's hazardous ranking system for the purpose of listing sites on the SPL.[120] Given the number of other tasks that HSCA imposes upon DER, it is probably doubtful that DER will, in the near future, make such modifications.

Second, although the EPA decision to include a site on the NPL is reviewable,[121] the DER decision to include a site on the SPL is not.[122] However, HSCA section 502(c) contains a requirement, not present in CERCLA, that, 120 days prior to the placing of a site on the SPL, DER shall notify the known responsible persons of the proposed listing. Then, if a responsible person enters

116. The requirement of establishing such criteria is imposed by CERCLA section 105(a)(8)(A).

117. In Eagle-Picher Industries v. EPA, 759 F.2d 905 (D.C. Cir. 1985), the court rejected a challenge to the validity of the HRS. See 759 F.2d at 909-11 for a general discussion of the NPL and the HRS.

118. *See* HSCA § 502(e).

119. The NPL is to include any site that has a total score (under the HRS) of 28.5 or more. The SPL will include those sites that have a total score of less than 28.5. It is not clear, however, how far down DER will go (in terms of HRS score) in listing sites on the SPL.

120. HSCA § 502(a)(2).

121. The United States Court of Appeals for the District of Columbia Circuit has concluded that the promulgation of the NPL, and subsequent revisions, constitute informal rulemaking that is subject to review (in the Court of Appeals for the District of Columbia Circuit) under CERCLA section 113(a). *See* Eagle-Picher Industries v. EPA, 759 F.2d 905 (D.C. Cir. 1985).

122. HSCA § 502(b).

into a settlement with DER "which provides for the abatement of the release or threatened release," the site may not be placed on the SPL.[123]

Under both CERCLA and HSCA, it is clear that the purpose of the priority list (NPL or SPL) is to establish priorities for government-financed "remedial action."[124] In other words, just as EPA may not use federal superfund monies to undertake remedial action at a site that is not on the NPL,[125] so also it appears that DER may not use state superfund monies to undertake remedial action at a site that is not on the SPL.[126] Listing on the SPL is not, however, a prerequisite for government-financed interim response actions or for private (or third party) cost recovery actions.

3. Cleanup Standards

Since responsible parties are liable for, among other things, the "reasonable and necessary or appropriate costs of remedial response"[127] incurred by DER, the criteria for determining what costs of response are "reasonable and necessary or appropriate" are of great practical significance. Of particular importance is the question which plagued federal cleanups under CERCLA prior to the Superfund Amendments and Reauthorization Act of 1986 (SARA): How clean is clean? In other words, responsible parties are liable for the costs of cleaning up (or remediating) a site—but what are the criteria for measuring whether the cleanup is adequate?

Insofar as federally funded cleanups are concerned, this question was addressed by the 1986 amendments to CERCLA.

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123. HSCA § 502(c).

124. Section 502(a)(1) of HSCA provides that "[t]he department shall publish in the Pennsylvania Bulletin a priority list of sites with releases or threatened releases *for the purpose of taking remedial response*" (emphasis supplied). *Compare* CERCLA § 105(a)(8).

125. CERCLA itself does not expressly prohibit the use of federal superfund monies to undertake remedial action at a site that is not on the NPL. Rather, in the National Contingency Plan, EPA has provided that a site is eligible for superfund-financed remedial action only if it is listed on the NPL. 40 C.F.R. § 300.68(a) (1984).

126. HSCA, like CERCLA, is not explicit in providing that a site is eligible for a fund-financed remedial action only if it is listed. HSCA section 502(a)(1) does provide, however, that the SPL is to be established "for the purpose of taking remedial response." It is likely that DER will in practice (if not by express regulation) seek state superfund financing only with respect to remedial actions for sites that are on the SPL.

127. HSCA § 702(a)(2).

These amendments provided a methodology for determining which cleanup standards are applicable, relevant, or appropriate to each remedial action undertaken under CERCLA.[128] (These standards are commonly referred to as "ARARs.") To a significant extent, HSCA provides that the federal ARARs are applicable to cleanups undertaken under HSCA. However, HSCA section 504 (captioned "cleanup standards") contains a number of provisions that confer upon DER considerable discretion in modifying the general cleanup standards required by HSCA.

HSCA section 504(a) sets forth as a "general rule" the requirement that "[f]inal remedial responses under this act shall meet all standards, requirements, criteria or limitations which are legally applicable or relevant and appropriate under the circumstances presented by the release or threatened release of the hazardous substance or contaminant and shall be cost effective." This general rule is consistent with the basic cleanup principles contained in CERCLA section 121. HSCA section 504(c) goes on to provide that "the standards, requirements, criteria or limitations that are *generally* applicable to remedial responses to releases" are to be proposed by DER, and promulgated by the Environmental Quality Board (EQB), "by regulation." Until such final cleanup standards are promulgated under section 504(c), section 504(b) provides that "State cleanup standards shall be those cleanup standards applicable under section 121 of the Federal Superfund Act [i.e., CERCLA]."

HSCA section 504(d) provides DER with the discretion to impose "special standards" that are "more stringent than the general cleanup standards." In addition, DER has the discretion under section 504(e) to "waive or modify otherwise applicable requirements." DER action in imposing a more stringent standard under section 504(d), or in waiving or modifying an otherwise applicable requirement under section 504(e), is subject to review based upon the record developed before DER.[129]

a. General cleanup standards

DER and EQB have rather wide-ranging authority to propose and promulgate, by regulation, "standards, requirements, criteria or limitations that are generally applicable to remedial responses

128. The various provisions of CERCLA section 121 set forth these "cleanup standards."

129. HSCA § 504(h). For a discussion of HSCA's administrative record process, see *infra* text accompanying notes 142-63.

to releases."[130] The only substantive limitation upon such authority is that set forth in section 504(a), that "cleanup standards" must be "consistent with State standards permitted under section 121(d) of the Federal Superfund Act."

It is noteworthy that section 504(b) provides that the "interim cleanup standards"—that is, the general standards governing cleanups under HSCA in the interim prior to the promulgation of standards under section 504(c)—are to be those "cleanup standards applicable *under section 121*" of CERCLA (emphasis added); however, the regulations promulgated under section 504(c) need only comply with *"[s]tate standards permitted under section 121(d)"* of CERCLA (emphasis added). In other words, the interim cleanup standards under HSCA must comply with *all* of the cleanup standards of section 121 of CERCLA, including, for example, the "general rules" of section 121(b) which, among other things, express a preference for permanent treatment. However, the final cleanup regulations, to be promulgated under section 504(c), need comply only with the *"[s]tate standards permitted under section 121(d)"* of CERCLA (emphasis added).

CERCLA section 121(d) provides, among other things, that any remedial action under CERCLA shall require "a level or standard of control" which attains any "legally applicable or relevant and appropriate" requirement of a state environmental law that is *more stringent* than any federal requirement. Thus, any regulations promulgated under section 504(c) need only, under section 504(a), "be consistent with" such state environmental requirements. There is no requirement that the general cleanup regulations promulgated under section 504(c) be consistent with the other requirements of CERCLA section 121. Indeed, there is no requirement that the general cleanup regulations promulgated under section 504(c) be consistent with the requirements of section 121(d) other than the "State standards permitted under" section 121(d)(2)(A)(ii). Thus, in proposing and promulgating "standards, requirements, criteria or limitations" under section 504(c), DER and EQB are free to follow or ignore most of the requirements of CERCLA section 121.

HSCA makes no provision for review of regulations promulgated under section 504(c), but neither expressly precludes such review. Under Pennsylvania case law, it is likely that any attempt to review regulations promulgated under section 504(c), prior to

130. HSCA § 504(c).

their application to a particular cleanup, would be dismissed for lack of ripeness.[131]

b. Special standards

DER has wide-ranging authority under HSCA section 504(d) to "add, without rulemaking under subsection (c), special standards, more stringent than the general cleanup standards, on a case-by-case basis."[132] DER may impose these more stringent special standards:

> . . . if the department can show that any of the following apply based on the administrative record:
>
> (1) The circumstances at the site are such that the applicable general standards, as applied, would not provide the degree of protection to public health or the environment intended by the general standards.
>
> (2) The degree of additional environmental protection provided by the special standard is significant in relation to the cost of implementing it.[133]

The administrative record provisions of HSCA will be examined later in this article. However, for present purposes, it should be pointed out that the broad nature of the criteria for imposing "special standards" under section 504(d) will invite the development of an extensive administrative record in order to support the imposition of more stringent "special standards." Although the development of this record may impose an administrative burden upon DER, it is unlikely, given the complexity and expert nature of the criteria for imposing "special standards," that a court or the Environmental Hearing Board will conclude that DER's determination in imposing more stringent special standards was "arbitrary and capricious."[134]

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131. *See* Arsenal Coal Co. v. DER, 505 Pa. 198, 477 A.2d 1333 (1984); Chambers Development Co. v. DER, 110 Pa. Commw. 432, 532 A.2d 928 (1987).

132. Presumably, this authority to impose more stringent special standards on a case-by-case basis may be exercised prior to the promulgation of regulations under section 504(c), while the interim cleanup standards of CERCLA section 121 are, by virtue of section 504(b), in effect.

133. HSCA § 504(d).

134. HSCA section 508(c) makes it clear that a court, or EHB, in reviewing a DER determination based upon an administrative record, is to set aside the determination only if the party challenging the determination proves that the determination "was arbitrary and capricious."

c. Waivers or modifications

DER has wide-ranging authority under HSCA section 504(e) to "waive or modify otherwise applicable requirements," including the requirements contained in regulations promulgated under section 504(c).[135] DER may waive or modify any such requirements—

> . . . if any of the following apply:
> (1) Compliance with a requirement at a site will result in greater risk to the public health and safety of the environment than alternative options.
> (2) Compliance with a requirement at a site is technically infeasible from an engineering perspective.
> (3) The remedial actions selected will attain a standard of performance that is equivalent to that required under the otherwise applicable requirement through use of another method or approach.
> (4) The remedial action selected will not provide for cost-effective response.[136]

It will be the rare case in which responsible parties do not request a modification or waiver under section 504(e). Yet there is no clear indication in HSCA of either the procedure that a responsible party is to follow in requesting a modification or the procedure that DER is to follow in granting or denying such a request. Presumably, such requests, and DER action on such requests, must take place during the development of the administrative record (required by section 506)[137] developed for each response action.

Like the criteria for imposing "special standards," the criteria for a modification or waiver under section 504(e) require DER to undertake a number of complex and technical inquiries. Review of DER's action in granting or denying a request for modification or waiver must be based on the administrative record developed by DER,[138] and a party challenging such action has the burden of proving (to a reviewing court or EHB) that DER's action "was

135. Although not as broadly stated as the language of HSCA section 504(e), CERCLA also grants EPA authority to waive or modify otherwise applicable ARARs. *See, e.g.*, CERCLA §§ 121(d)(2)(B)(ii), 121(d)(4).

136. HSCA § 504(e).

137. The administrative record requirements of section 506 are discussed *infra* at text accompanying notes 142-63.

138. HSCA § 504(h).

arbitrary and capricious."[139] Given the complex and technical nature of the determinations required by section 504(e), it will be the rare case in which a reviewing court (or EHB) will set aside DER's determination.[140]

4. Development of an Administrative Record

HSCA section 505(a) sets forth the basic requirement that "[t]he selection of a remedial response shall be based upon the administrative record developed under section 506." Furthermore, section 508(c) states clearly that "[a] challenge to the selection and adequacy of a remedial action shall be limited to the administrative record developed under section 506." These provisions (requiring development of an administrative record and limiting a challenge to administrative action to a review of the administrative record) are standard fare in federal environmental law. Indeed, the "record review" provisions of HSCA are modelled upon similar provisions in CERCLA.[141] They are, however, novel in Pennsylvania environmental law, where the norm has been that a person challenging administrative action by DER is entitled to review by the Environmental Hearing Board based upon a *de novo* record developed before EHB. "Record review" will require some adjustment, by both DER and those affected by DER-mandated remedial actions.

It should be emphasized at the outset that the record development and record review provisions of HSCA are limited to "remedial responses." "Interim responses" may be undertaken before the development of an administrative record "when, upon the basis of the information available to the department at the time of the interim response, there is a reasonable basis to believe that prompt action is required to protect the public health or the environment."[142] In exempting interim responses from the administrative record requirement, HSCA follows CERCLA.[143] However, if DER takes an interim response before the develop-

139. HSCA § 508(c).

140. HSCA section 504(f) confers upon DER even more wide-ranging authority to waive or modify general requirements for a response action that "is to be done using only fund money." In such situations, DER may waive or modify otherwise applicable requirements "if the department determines the waiver or modification to be in the public interest." Apparently, the General Assembly has given to DER the almost unreviewable authority to determine when such waivers or modifications would be "in the public interest."

141. CERCLA § 113(j), (k).

142. HSCA § 505(b).

143. CERCLA § 113(k)(2)(A).

ment of an administrative record, it must initiate the administrative record development process within thirty days of initiating the interim response.[144]

The administrative record requirements are set forth in HSCA section 506. These requirements are more detailed than the administrative record requirements set forth in CERCLA section 113(k). HSCA section 506 prescribes the "contents" of the required administrative record, the nature of the required "notice,"[145] the extent to which there must be a "public comment period" during which the public may comment upon the contemplated "remedial response,"[146] the nature of the required "public hearing,"[147] the required content of the DER "decision,"[148] the nature of the "docket" that DER must maintain in developing the administrative record,[149] the circumstances under which the administrative record is closed and the circumstances under which the administrative record may be reopened,[150] and the procedures to be followed by DER when it reopens the administrative record.[151]

Because any challenge to the remedial response selected by DER is limited to the administrative record developed under section 506, it is essential for those who may wish to challenge the selected response to insert their challenges into the administrative record. The most likely challengers are, of course, potentially responsible parties from whom DER may seek its response costs.

DER is required to begin the administrative record process with a notice. This notice is to be "mailed to responsible persons whose identities and addresses are known to the department."[152] The notice is also to be published in "a newspaper of general circulation in the area in which the release has occurred and also in the Pennsylvania Bulletin."[153] In a situation involving a site where numerous generators have disposed of waste (and where the records of past disposal are meager or nonexistent), it is likely

144. HSCA § 505(b).
145. HSCA § 506(b).
146. HSCA § 506(c).
147. HSCA § 506(d).
148. HSCA § 506(e).
149. HSCA § 506(f).
150. HSCA § 506(g).
151. HSCA § 506(h).
152. HSCA § 506(b)(2).
153. *Id.*

that, at the time DER commences the administrative record development process, it will not know the "identities and addresses" of all potentially responsible parties. DER may come to learn of additional PRPs only after it is far into the administrative record process. At that point, PRPs may receive notice, but they may have lost the opportunity to participate (through the administrative process) in the selection of a remedial response. In such a situation, it is at least questionable whether, if such late-notified PRPs challenge the DER-selected remedial response, their challenge may constitutionally be limited to the record of an administrative process in which they had little or no opportunity to participate.[154] Therefore, it is in DER's interest to identify, as quickly as possible, all the PRPs from whom it may wish to seek response costs, and provide actual notice to such PRPs so that they may have an opportunity to participate through the administrative process in the selection of a remedial response.

Those who receive the notice required by HSCA section 506(b), and who wish to affect the selection of a remedial response, should participate in the administrative process because, as previously stated, any challenge to the selection or adequacy of the remedial response chosen by DER is limited to the record developed in the administrative process. During the ninety day public comment period that follows the provision of notice, interested persons may participate in the section 506 administrative process in two ways: through the submission of written comments and, through participation in a "public hearing." There must be at least one public hearing "to allow interested persons to give oral or written comments."[155] It is during this public comment period that PRPs have the opportunity to comment upon the remedial response proposed by DER and to seek, in ac-

154. HSCA section 506(b)(2) provides that "[t]he failure to provide this notice [i.e., the notice required by § 506(b)(1)] does not affect a responsible person's liability under this act." This provision does not affect the analysis in the text. All that section 506(b)(2) states is that the failure to give notice does not affect *liability*. The analysis in the text suggests that the failure to give a PRP timely notice—so that the PRP may participate in the administrative process for selecting a remedial response—may mean that, if such PRP challenges the remedial response selected through the administrative process, the PRP's challenge may not constitutionally be limited to the record of a process in which the PRP was not able to effectively participate. *See* United States v. Ottatti & Goss, Inc., 694 F. Supp. 977 (D.N.H. 1988) and United States v. Hardage, 663 F. Supp. 1280 (W.D. Okla. 1987) (trial courts in CERCLA actions refusing to limit review of remedial response to administrative record because of inability of challenging PRPs to participate in recordmaking process).

155. HSCA § 506(d).

cordance with section 504(e), a waiver or modification of "otherwise applicable requirements."

At the close of the public comment period, DER must file "a statement of the basis and purpose for its decision."[156] This statement is to include, among other things, "the reasons for selecting the proposed response action."[157] DER is also to file "a response to each of the significant comments, criticisms and new data submitted in oral or written presentations during the public comment period."[158]

Once DER files the statement and response required by section 506(e) "the administrative record shall be closed."[159] The administrative record may be reopened only for certain limited and specified reasons.[160] One of the most common situations in which DER will reopen the administrative record is when DER "wishes to document its response costs."[161] In other words, DER will first use the section 506 administrative process to select a remedial response, and then, after it has implemented that remedial response, it will reopen the administrative record "to document its response costs."[162] If DER reopens the administrative record it must, among other things, provide a new notice and a new public comment period.[163]

The administrative record provisions of section 506 are

156. HSCA § 506(e).

157. *Id.*

158. HSCA § 506(e). This last requirement presents problems of interpretation. DER is required to respond to "significant" comments—it is not required to respond to insignificant comments. DER's failure to respond to "significant" comments would be a failure to comply with one of the procedural requirements of the section 506 process for the development of an administrative record and might justify setting aside DER's selection of an administrative remedy (or at least a remand). But it is unclear how DER is to determine which comments are "significant" and the extent to which DER's determination of which comments are "significant" are subject to review. See *infra* text accompanying note 173 for a further discussion of this question. It might be argued that the safer course for DER is to err on the side of responding to all comments that are arguably "significant." However, if DER fails to respond to a comment that is (upon review) determined to be significant, the only consequence will probably be that the reviewing tribunal (a court or EHB) will remand the matter to DER to have it respond to the significant comment.

159. HSCA § 506(g).

160. *Id.*

161. HSCA § 506(g)(3).

162. DER's determination of response costs, like its selection of remedial response, may be challenged only on the administrative record developed under section 506. HSCA § 508(c). A responsible party challenging DER's determination of response costs has the burden of proving that the determination "was arbitrary and capricious." *Id.*

163. HSCA § 506(h).

highly significant. These provisions call upon DER to perform new, difficult, and burdensome duties in developing complex administrative records. The effectiveness of HSCA is dependent upon DER's ability to effectively carry out this task.

5. DER Cost Recovery Actions

Once DER selects a remedial response in accordance with the administrative record process of section 506, it may implement the selected response[164] and then bring an action against one or more responsible parties in order to recover its response costs. In such an action, the responsible persons may raise questions of liability (i.e., they may contend that they are not "responsible"); they may challenge DER's compliance with the procedural requirements of the section 506 administrative record process; they may challenge DER's selection of a remedial response; and, they may challenge DER's determination of response costs. In this part, we will examine various issues relating to DER cost recovery actions.

a. Forum for DER cost recovery actions

HSCA section 507(a) provides DER with a choice of two forums for a cost recovery action: "an action in equity brought before a court of competent jurisdiction,"[165] or an action before EHB.[166] The legislative characterization of the court action as an "action in equity" would seem to eliminate the argument, raised unsuccessfully in a number of CERCLA cost recovery actions,[167] that there is a right to trial by jury in such actions.

The allocation to EHB of jurisdiction to entertain DER cost

164. DER may also order a responsible person to implement the selected remedial response. HSCA § 505(c). At the present point, we consider the issues presented in a DER cost recovery action. We will consider the issues presented if DER orders a responsible person to undertake a remedial response that has been selected through the section 506 administrative record process *infra* at text accompanying notes 180-88.

165. Presumably, this is an indirect reference to courts of common pleas. Interestingly, there is no venue provision in HSCA. *Compare* CERCLA § 113(b).

166. A municipality seeking to recover response costs is limited to one forum—"an action in equity before a court of competent jurisdiction." HSCA § 507(a). See *infra* text accompanying notes 248-49 for a discussion of cost recovery actions by municipalities. There is no express provision of a forum for a private cost recovery action, assuming such a cause of action exists under HSCA. See *infra* text accompanying notes 259-65 for a discussion of the availability of private cost recovery actions.

167. *See, e.g.*, United States v. Northeastern Pharmaceutical and Chem. Co., 810 F.2d 726, 749 (8th Cir. 1986); Wehner v. Syntex Corp., 682 F. Supp. 39, 40 (N.D. Cal. 1987).

recovery actions has the potential to add greatly to the workload of a tribunal that is already overburdened. It is likely that EHB will be the preferred forum for DER cost recovery actions since DER has become familiar with the personnel on the Board and will probably be unwilling to take its chances by bringing highly complex cost recovery actions before inexpert, and relatively unpredictable, common pleas courts throughout the Commonwealth.

b. Challenges to liability

Wherever a DER cost recovery action is brought, it can be expected that defendants will seek to challenge liability. Specifically, defendants will contend that they do not come within the section 701(a) description of "responsible persons,"[168] that they fit within one of the statutory "exceptions," or that they are entitled to a statutory "defense."[169]

One would expect that it would be for the court or EHB to determine *de novo* these various challenges to liability. But this expectation is called into question by the following provision in section 508(c):

> In a challenge to liability for . . . the recovery of response costs, . . . the record shall be limited to the administrative record developed under section 506, except that it may be supplemented with additional evidence supporting or refuting the department's determination that a person is a responsible person under section 701 . . . .

This provision is curious and confusing for a number of reasons. First, the function of the administrative record process of section 506 is *not* to determine liability; rather, its function is to select a remedial response.[170] Thus, it would seem inappropriate for DER to use the administrative record process of section 506 to determine liability.[171] Second, the administrative record "*may*

168. See *supra* notes 18-20 and accompanying text for a discussion of "responsible persons" under section 701(a).

169. See text accompanying notes 52-56 and 79-82 *supra* for a discussion of the various statutory "exceptions" and "defenses."

170. Section 505(a) provides that "[t]he *selection of a remedial response* shall be based upon the administrative record developed under section 506." (Emphasis supplied.) Furthermore, even a cursory review of section 506 reveals that the purpose of the administrative record process is to give the public notice of, and obtain public comments regarding, possible responses. *See, e.g.*, §§ 505(a)(2), 505(b)(1)(i), 505(c)(1)(ii).

171. After the administrative record process of section 505 is used to select

be supplemented" (emphasis added) with additional evidence regarding the question whether a person is a responsible person under section 701, but there are no criteria to guide the decision (presumably by the court or EHB) whether to permit such supplementation.

The extent to which the tribunal in a cost recovery action determines questions of liability *de novo* is further confused by the language of the "innocent landowner" exception, section 701(b). This provision excepts from liability an owner, otherwise liable under section 701(a), "when the owner *demonstrates to the department*" (emphasis added) that certain circumstances "are true."[172] This language suggests that an owner seeking the protection of the section 701(b) exception must, at least initially, assert its right to such protection to DER. But there is no provision in HSCA that describes the procedure which an owner is to use in seeking to make the various demonstrations described in section 701(b). And there is definitely no suggestion anywhere in HSCA that such demonstrations are to be made as part of the section 506 administrative record process.

Under CERCLA, it seems clear that questions of liability in cost recovery actions are to be determined *de novo* by the court. Indeed, it appears that no one has ever contended otherwise. It is possible that the confusion presented by the language of sections 508(c) and 701(b) will never have to be addressed by a court or EHB. The problems identified in the preceding analysis will present themselves only if DER, relying upon the confusing language of these provisions, seeks to determine questions of liability as part of the section 506 administrative record process and then contends that questions of liability in a DER cost recovery action

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a remedial response, DER has the option under section 505(c) to implement the remedial response either through an order to a responsible person or by undertaking the remedial response itself. If the former option is chosen (the issuance of an order), it is clear that the order may not be reviewed until DER files an action to enforce the order. HSCA § 508(b). Such an action to enforce an order would be brought in court, and it could be expected that the defendant in such an action might wish to raise issues of liability. There is no suggestion in section 508(c) that a challenge to liability in such an action is to be limited to the section 506 administrative record and thus one would assume that issues of liability in such an action would be determined *de novo* by the court.

It is hard to think of any logical reason why the legislature might have wished to limit review of liability issues in a cost recovery action to the administrative record while at the same time providing for *de novo* review of liability issues in an action to enforce a section 505(c) order.

172. HSCA § 701(b).

are not to be determined *de novo* by the court or EHB, but rather are to be based upon the administrative record.

c. Challenge to compliance with section 506 administrative process

A defendant in a DER cost recovery action may wish to contend that, in selecting a remedial response, DER did not comply with all the procedural requirements of the administrative record process of section 506.

Initially, it seems clear that, as a general matter, a person may not challenge DER's compliance with the requirements of section 506 until such time as DER brings a cost recovery action. That seems to be the intent, if not the clear expression, of section 508(b).[173]

If a defendant in a DER cost recovery action contends that DER has failed to comply with some requirement of section 506, it should be relatively easy, in most cases, for the court or EHB to determine whether there has been compliance. However, it is not clear how a court or EHB is to determine whether DER has complied with the requirement, set forth in section 506(e), that the DER decision include "a response to each of the *significant* comments, criticisms and new data submitted in oral or written presentations during the public comment period." (Emphasis added.) Presumably, if DER has not responded to a comment it is because DER has concluded (implicitly at least) that a comment is not "significant." If, by way of challenge in a DER cost recovery action, a defendant contends that a comment (to which DER did not respond) *was* significant, should the court or EHB make its own determination of the significance of the comment? The

173. Section 508(b) provides, in relevant part, as follows:

(b) Timing of review.—Neither the board nor a court shall have jurisdiction to review a response action taken by the department or ordered by the department under section 505 until the department files an action to enforce the order to collect a penalty for violation of such order or to recover its response costs or in an action for contribution under section 705.

HSCA § 508(b).

Contrary to the statement in the text, it might be argued that the limitation imposed by section 508(b) applies only to challenges to the *substance* of the response action selected through the section 506 process and does not apply to challenges to *procedure* (that is, contentions that DER is not complying with the procedural requirements of section 506). The latter challenges, it might be argued, may be raised through a petition for mandamus. Section 502(f) preserves the "inherent right to bring an action in mandamus to correct department actions under the standards currently recognized in Pennsylvania equity practice."

court or EHB cannot defer totally to DER's determination of the significance of comments or else the response requirement of section 506(e) becomes a nullity.

Even assuming that DER committed a procedural error in not complying with some requirement of section 506, the legislature has made it clear that not all errors provide "a basis for challenging a response action." HSCA section 508(d) provides as follows:

> Procedural errors in the development of the administrative record shall not be a basis for challenging a response action unless the errors were so serious and related to matters of such central relevance to the response action that the action would have been significantly changed had the errors not been made. The person asserting the significance of the procedural errors shall have the burden of proving the action would have been significantly changed.[174]

It will be hard for a court, or EHB, to apply the preceding language. How is the court, or EHB, to determine whether "the errors were so serious and related to matters of such central relevance to the response action that the action would have been significantly changed had the errors not been made"?[175] Presumably, the court, or EHB, will err on the side of concluding that any procedural errors were serious since, if such a determination is made, the matter can simply be remanded to DER so that DER can then correct its procedural error.[176]

d. Challenge to DER's selection of remedial response

Several provisions of HSCA dictate the manner in which there may be a challenge to DER's selection of a remedial response. First, section 505(a) provides that "[t]he selection of a remedial response shall be based upon the administrative record developed under section 506." Second, section 508(b) makes it clear that there may be no challenge to DER's response action until DER takes some enforcement action—for example, an action to recover response costs. Third, section 508(c) states that

174. The quoted language is substantially identical to CERCLA section 113(j)(4).

175. There is, of course, a similar problem in applying the substantially identical language of CERCLA section 113(j)(4).

176. HSCA section 508(e) requires a remand where there have been "significant" procedural errors.

"[a] challenge to the selection and adequacy of a remedial action shall be limited to the administrative record developed under section 506."[177] Finally, section 508(c) also provides that "[t]he party challenging the department's determination [of an appropriate remedial response] . . . shall retain the burden of proving the department's determination . . . was arbitrary and capricious."

These provisions are substantially identical to the provisions of CERCLA that relate to a challenge to the selection of a remedial response.[178]

B. ADDITIONAL DER ENFORCEMENT OPTIONS

Thus far, we have focused upon only one option that is available to DER when it is faced with a release of hazardous substances—the initiation by DER of a remedial response and the subsequent filing of a cost recovery action. DER has a number of other enforcement options. In lieu of undertaking remedial action itself, DER may order one or more responsible persons to undertake the remedial response that DER has selected. In addition, DER may seek to recover natural resource damages. Each of these options will be considered in this part.[179]

1. Order to Undertake Remedial Response

HSCA section 505(c) provides DER with two basic options once it has selected a remedial response in accordance with the section 506 administrative record process:

> After the selection of an interim response or a remedial response, the department may implement all or any part of the selected action by doing any of the following:
>
> (1) In the case of a release or threatened release of a hazardous substance, the department may:
>
> (i) Issue an order to a responsible person. This subparagraph does not prohibit action under subparagraph (ii).
>
> (ii) Take the action itself. This subparagraph

177. Section 508(c) provides that the administrative record "may be supplemented with additional evidence supporting or refuting the department's determination that a person is a responsible person under section 701 or the department's assessment of civil penalties." Presumably, the administrative record may not be supplemented with evidence relating to the selection and adequacy of a remedial response.

178. *See* CERCLA § 113(h), (j).

179. DER may also seek civil penalties under HSCA section 1104 and criminal penalties under section 1105.

> does not prohibit action under subparagraph (i).[180]

This language makes it clear that DER, when faced with the release of a hazardous substance, need not undertake its own remedial response and then initiate a cost recovery action against the responsible persons. DER may instead order the responsible persons to undertake a remedial response.[181] This latter option is particularly attractive where the responsible persons are "deep pockets" who have the resources to undertake a remedial response. An order issued to such persons will spare DER from dipping into the limited resources of the state superfund in order to finance a remedial action.

If DER invokes its authority under HSCA section 505(c) and orders a responsible person to undertake a remedial response, there are a number of reasons why the responsible person will be under heavy pressure to comply. The issuance of an order under section 505(c) follows the selection of a remedial response based upon an administrative record developed in accordance with section 506. It is clear that the recipient of a section 505(c) order may not challenge the order until such time as DER brings an action to enforce the order.[182] Moreover, if DER does bring an action to enforce the order, any challenge to the order is limited to the section 506 administrative record, and the challenger has the burden of proving that DER's order was arbitrary and capricious.[183] Furthermore, if DER brings an action to enforce a section 505(c) order, it "may include in the same action a civil penalty assessment . . ." and "its civil penalty assessment *shall* be upheld unless the person subject to the order or the civil penalty can demonstrate that the department acted arbitrarily and capriciously on the basis of the administrative record developed under section 506 . . ." (emphasis added).[184] Finally, section 507(c) provides that "a person who willfully fails to comply with an order of the department requiring a response action under section

180. The quoted language lists the options available to DER "[i]n the case of a release or threatened release of a hazardous substance." HSCA section 505(c)(2) lists the same options "in the case of a release of a contaminant, which presents a substantial danger to the public health or safety or the environment."

181. HSCA section 505(d)(1) makes it clear that "[o]rders issued under this section include, but are not limited to: (1) Orders requiring a responsible person to undertake a response action."

182. HSCA § 508(b).

183. HSCA §§ 505(e), 508(c).

184. HSCA § 505(e).

505(c)(1) shall be liable for punitive damages in an amount which is at least equal to but not more than three times the costs recoverable under this section."[185]

In summary, a person faced with a cleanup order under section 505(c)(1) runs the risk that if it does not comply with the order it will be subject to substantial civil penalties and, if its failure to comply is determined to be "willful," to "punitive damages" in the amount of three times the response costs. Further, the person faced with such an order may not challenge it until such time as DER brings an action to enforce the order, and, even then, the person bears a heavy burden in challenging it.

The person faced with a section 505(c)(1) order has a limited "out" if it wishes to protect itself against the risk of civil penalties and punitive damages. It may, under section 505(f), complete the response action mandated by the order and then seek to recover all or part of its response costs from the state superfund. To recover all its response costs (incurred in attempting to comply with a section 505(c)(1) order), the person must demonstrate "by a preponderance of the evidence" both that the person is not a responsible person and that "the costs sought to be recovered are reasonable in light of the action required by the order."[186] Even if the person concedes that it is a responsible person and thus unable to recover all its response costs, the person may nonetheless "recover reasonable costs for that portion of the response action ordered [under section 505(c)(1)] which the person can demonstrate to be arbitrary and capricious on the basis of the administrative record developed under section 506."[187]

The limited "out" provided by section 505(f) will not be terribly attractive to most recipients of section 505(c)(1) cleanup orders because it requires the recipient to first expend what will usually be considerable sums in complying with the order and then seek recovery of these sums in an action in which the person seeking recovery carries a heavy burden of proof. In short, as stated at the outset of the present discussion, the recipient of a section 505(c)(1) cleanup order is under considerable pressure to comply with the order.[188]

185. HSCA section 507(c) goes on to provide that "[a] party shall not be liable for punitive damages when a court reviewing the order under section 508 finds that the department's order was invalid as to that party." What does "invalid" mean? How does it relate to "arbitrary and capricious"?

186. HSCA § 505(f).

187. *Id.*

188. The recipient of the order will be under pressure to comply with the

The above-described provisions of HSCA differ from analogous provisions in CERCLA. Under CERCLA section 106(a), EPA may issue "such orders as may be necessary to protect public welfare and the environment"—for example, a cleanup order directed to a responsible person. Under CERCLA section 113(h), it is clear that the recipient of a section 106(a) order may not challenge the order until such time as EPA brings an action to enforce the order. Under CERCLA section 106(b), "[a]ny person who, *without sufficient cause, willfully* violates, or fails or refuses to comply with" a section 106(a) order, "*may*, in an action brought in the United States district court to enforce such order, be fined not more than $25,000 for each day in which such violation occurs or such failure to comply continues." (Emphasis added.) Under CERCLA section 107(c)(3), a responsible person who "*fails without sufficient cause* to properly provide removal or remedial action" (emphasis added) in response to a section 106(a) order "may be liable to the United States in an amount at least equal to, and not more than three times, the amount" of any cleanup costs incurred by the federal superfund. Finally, the recipient of a section 106(a) order has the option of compliance with the order followed by an action to recover from the federal superfund the cleanup costs incurred by the recipient.[189]

The following are the significant differences between the HSCA and CERCLA provisions:

(1) Under HSCA section 1104(a), DER is authorized to assess a civil penalty upon a person who violates a section 505(c)(1) order, and "[a] penalty may be assessed whether or not the violation was willful or negligent." In contrast, CERCLA authorizes a federal court to impose civil penalties only upon a person who, "without sufficient cause, willfully" violates a section 106(a) order.

(2) Under HSCA section 507(c), a person who "willfully" fails to comply with a section 505(c)(1) order "shall" be liable for punitive damages in an amount up to three times the response costs. Under CERCLA section 107(c)(3), a person who "fails without sufficient cause" to comply with a section 106(a) order "may" be liable for punitive damages in an amount up to three times the response costs. It may be that, as a practical matter,

order or to work out a settlement which may be slightly more favorable than the terms of the order.

189. CERCLA § 106(b)(2). The criteria for recovery are substantially the same as the criteria for recovery under HSCA section 505(f).

these provisions do not differ because, although HSCA section 507(c) mandates the imposition of punitive damages, the mandate is limited to situations in which there has been a "willful" violation. Perhaps a "willful" violation is simply a violation "without sufficient cause."

There is at least a question whether the HSCA provisions outlined above may be constitutionally implemented. In a number of decisions, federal courts have considered whether the issuance of CERCLA section 106(a) orders, combined with the prohibition of pre-enforcement review, and the financial risk of civil penalties and treble punitive damages, places such a burden upon the recipient of the order as to constitute a deprivation of property without due process of law.[190] The courts have upheld the constitutionality of the CERCLA provisions because a person who fails to comply with a section 106(a) order is not liable under CERCLA (for either civil penalties or treble punitive damages) unless the failure to comply is "without sufficient cause."[191] As we have seen, there is no such limitation upon the imposition of civil penalties or treble punitive damages under HSCA. Therefore, there is at the very least a question whether the HSCA provisions outlined in this part may be constitutionally implemented.[192]

2. Action for Natural Resource Damages

In addition to seeking its response costs (by way of a cost recovery action), a government agency may also wish to seek damages for those natural resources that have been irreparably lost or harmed—that is, those natural resources which cannot be restored to their original state by way of a response action.

Like CERCLA, HSCA provides for the recovery of natural resource damages by a government agency.[193] HSCA section 507(a) provides that DER may recover such natural resource damages in either an action in equity or in an action before

190. *See, e.g.*, Bethlehem Steel Corp. v. EPA, 669 F.2d 903 (3d Cir. 1982); E.I. Dupont de Nemours & Co. v. Daggett, 610 F. Supp. 260 (D.C.N.Y. 1985).

191. *See, e.g.*, Solid State Circuits, Inc. v. EPA, 812 F.2d 383 (8th Cir. 1987).

192. *See* In re Kimber Petroleum Corp., 110 N.J. 69, 539 A.2d 1181 (1981), *appeal dismissed sub nom.* Kimber Petroleum Corp. v. Daggett, 109 S. Ct. 358 (1988).

193. In discussing "scope of liability," we pointed out that HSCA section 702(a)(4) lists natural resource damages as one of the items for which responsible parties are liable. At *infra* text accompanying notes 254-258, we discuss whether HSCA authorizes the recovery of natural resource damages by municipalities.

EHB.[194]

The HSCA provisions relating to recovery of natural resource damages are much less sophisticated and clear, in several significant respects, than the corresponding provisions of CERCLA. First, CERCLA section 107(a)(4)(C), like HSCA section 702(a)(4), imposes liability upon responsible parties for natural resource damages. However, CERCLA contains a provision, section 107(f)(1), that sets forth a "measure of damages," prescribes how any recovered damages are to be used, and prohibits "double recovery" of natural resource damages. There are no similar provisions in HSCA.

Second, CERCLA contains provisions that require the designation of the "officials" who "shall act on behalf of the public as trustees."[195] Under CERCLA section 107(f)(2)(A), the President is to designate the officials who shall assess damages "for those resources under their trusteeship." Similarly, the Governor of each State is to designate the "State officials" who are to assess damages "for those natural resources under their trusteeship."[196] There are no similar designation requirements in HSCA.

Third, CERCLA section 301(c) requires the President to "promulgate regulations for the assessment of damages for injury to, destruction of, or loss of natural resources resulting from a release . . . for the purposes of this chapter." In addition, CERCLA section 301(c) states that the promulgated regulations are to specify procedures for conducting such assessments.[197] There are no similar provisions in HSCA.

Unlike these CERCLA provisions, HSCA section 507(d) simply states that "trustees" are to make "a determination or assessment of damages to natural resources." Unlike CERCLA, HSCA makes no provision for the designation of trustees,[198] contains no

194. In Part III, we point out that, to the extent a municipality may recover natural resource damages, section 507(a) provides that such recovery may be sought only in a "court of competent jurisdiction," not in an action before EHB. See *infra* text accompanying note 248.

195. CERCLA § 107(f)(4).

196. CERCLA § 107(f)(5).

197. The President delegated to the Department of Interior the task of promulgating regulations under CERCLA section 301(c). After considerable delay, these regulations were finally promulgated on August 1, 1986. 51 Fed. Reg. 27,674 (1986) (codified at 43 C.F.R. §§ 11.10-11.93) (1987). Certain aspects of the regulations were held invalid by the United States Court of Appeals for the District of Columbia Circuit. Ohio v. Department of the Interior, 880 F.2d 432 (D.C. Cir. 1989).

198. It may be less than clear in a particular situation which state official or

provision defining a "measure of damages," does not deal with the problem of "double recovery," and does not require the promulgation of regulations to define the substantive standards or the processes under which a trustee is to make an assessment of damages. HSCA simply allows an undesignated "trustee" to decide on its own the substantive criteria for assessing natural resource damages and the procedures by which such an assessment will be made.[199] According to HSCA section 507(d), an assessment by a trustee "shall have the force and effect of a rebuttable presumption on behalf of the department or other trustee in an administrative or judicial proceeding under this act."

Under CERCLA, an assessment of natural resource damages also has "the force and effect of a rebuttable presumption" in a subsequent action under section 107 to collect such damages. But giving a trustee's assessment such an effect makes sense when (as it is under CERCLA) the trustee's determination is subject to specific substantive criteria for assessing damages and the trustee has followed a specified procedure for making the assessment. Giving a trustee's assessment the effect of a rebuttable presumption makes no sense when (as it is under HSCA) the trustee is free to decide on its own the substantive criteria for assessing damages and the procedures by which such an assessment will be made.[200]

agency is the "trustee" of particular natural resources. HSCA section 507(d) provides that not only "the department" (DER) but also a "Commonwealth agency" may recover natural resource damages. If the Governor designates the "trustee" of particular natural resources, will the courts or EHB accept such designation as definitive?

199. There is a hint that DER is to use the section 506 administrative record process in assessing natural resource damages. *See infra* note 200 and accompanying text.

200. Section 508(c) contains a cryptic suggestion that the section 506 administrative record process is to be used to assess natural resource damages. "*In a challenge to liability for natural resource damages*, civil penalties or the recovery of response costs, or where the assessment of civil penalties is challenged, the record shall be limited to the administrative record developed under section 506. . . ." HSCA § 508(c). (emphasis supplied).

There are a couple of reasons to conclude that the section 506 administrative record process is *not* to be used to assess natural resource damages and that, in an action to recover such damages, a court or EHB is *not* limited to the record developed by DER. First, as previously stated, the purpose of section 506 on its face is to provide notice of, and obtain public comments regarding, possible response actions. Second, the conclusion that, in an action to recover natural resource damages, a court or EHB is limited to the record developed by DER would be inconsistent with the provision in section 507(d) that DER's assessment of natural resource damages "shall have the force and effect of a rebuttable presumption." This latter provision makes it clear that DER's assessment of natural resource damages is to have considerable evidentiary effect—a rebuttable presumption—but evidence may be produced (before the court or EHB) to rebut the presumption.

Indeed, under such circumstances, for a court to give the trustee's assessment the effect of a rebuttable presumption raises significant questions of due process.

The HSCA provisions relating to natural resource damages are crudely and insensitively borrowed from CERCLA. Because HSCA, unlike CERCLA, provides no substantive criteria for measuring damages to natural resources (and does not contemplate the promulgation of regulations that would set forth such criteria), it will presumably be up to the courts and EHB to fashion such criteria. Though HSCA, unlike CERCLA, does not require the promulgation of regulations that define the procedures by which a trustee is to assess damages, such regulations will have to be promulgated if the assessment process is to have any effect whatsoever.

C. JUDGMENT LIEN

If DER is successful in a cost recovery action, it will receive (from EHB or the court) "an award of response costs" against those persons determined to be "responsible persons."[201] One of the more controversial questions in state superfund statutes is the extent to which such an award to a state agency will result in the agency having rights that are superior to the claims of prior creditors of the responsible persons.

HSCA section 509 responds to this question. First, section 509(a) provides that "[a]n award of response costs . . . shall constitute a judgment against the responsible person," and that the judgment "may be collected in any manner provided by law." Second, section 509(a) further provides that "[t]he department shall send a notice of lien to the prothonotary or equivalent official of a county in which the responsible person has real or personal property, setting forth the amount of the award of costs." Third, upon receipt of the notice of lien, "[t]he prothonotary or equivalent official shall promptly enter upon the civil judgment or order docket the name and address of the responsible person and the amount of the lien as set forth in the notice of lien."[202] Fourth, the department is also to file a notice of lien with the Secretary of the Commonwealth who is to maintain "a central registry of all liens filed under this act."[203] Fifth, section 509(a) provides that, "[u]pon entry by the prothonotary, the lien shall

201. HSCA § 509(a).
202. *Id.*
203. HSCA § 509(b).

attach to the revenue and all real and personal property of the responsible person." Finally, section 509(c) sets forth the following "priority":

> The notice of lien filed under this section affecting property of a responsible person, including property subject to response action, shall create a lien which shall have priority from the day of the filing of the notice of the lien over all subsequent claims and liens against the property, but it shall not affect any valid lien, right or interest in the property filed in accordance with established procedure prior to the filing of a notice of lien under this subsection.[204]

There are a couple of significant differences between these provisions and the lien provisions in section 107(l) of CERCLA. First, the lien created by HSCA section 509 attaches to *all* real property of a responsible person; the lien created by CERCLA section 107(l) attaches only to that real property of a responsible person which is "subject to or affected by a removal or remedial action."[205] Second, the lien created by HSCA section 509 attaches not only to the real property of a responsible person but also to "the revenue" and "personal property" of the responsible person; the lien created by CERCLA section 107(l) is limited to the real property of the responsible person that is "subject to or affected by a removal or remedial action." These differences provide DER with a wide range of resources against which to execute a judgment for response costs.

With the exception of these differences, the lien provisions in HSCA section 509 and CERCLA section 107(l) are essentially the same. In both acts, the lien for response costs is subordinate to prior liens that have been properly recorded.[206]

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204. It should be noted that these lien provisions operate only in favor of DER—that is, these lien provisions do not operate in favor of a private individual who has received an award in a private cost recovery action.

205. CERCLA § 107(l)(1)(B).

206. Earlier versions of HSCA contained a "superlien" provision that gave the lien for response costs priority over previously recorded liens. Such "superlien" provisions can be found in other state superfund statutes. *See, e.g.*, ARK. STAT. ANN. § 82-4708, 82-4720 (1985); CONN. GEN. STAT. ANN. § 22a-452a (Supp. 1989); MASS. GEN. LAWS ANN. ch. 21E, § 13 (Supp. 1989); N.H. REV. STAT. ANN. § 147-B:10-b (Supp. 1988); N.J. STAT. ANN. § 58:10-23.11f (West 1982); TENN. CODE ANN. § 68-46-209 (Supp. 1989).

D. SETTLEMENT

Both CERCLA and HSCA contain a number of provisions that deal with settlement of claims against responsible parties and the effect of such settlements upon possible future government enforcement and upon contribution claims by or against the settling parties. These settlement provisions of CERCLA and HSCA are among the most important provisions in the acts. Litigation under either act is such a costly and time-consuming venture that settlement is an attractive option to both the government and the responsible parties.[207]

We have deferred consideration of the settlement provisions until this point because we believe that the attractiveness of the settlement alternative cannot be comprehended unless one is aware of: (1) the nature and scope of a responsible party's liability; and, (2) the nature of the enforcement options that are available to the government. It is against this backdrop that the government and the responsible parties consider the settlement option.

We have divided our discussion of settlement into two parts. First, we discuss what we call the "cleanup settlement" in which one or (as is usual) a group of responsible parties agree to undertake all (or a major part) of a cleanup. Before agreeing to undertake the cleanup, the responsible parties will have to determine: (1) the extent to which the settlement will protect them against future enforcement action by the government; (2) the extent to which the settlement affects their rights to seek contribution from non-settling responsible parties and the rights of non-settling parties to seek contribution from them; and perhaps most importantly, (3) the possible adverse effects of failing to participate in a cleanup settlement.

Second, we discuss the "cash-out settlement" in which one or more responsible parties seek to settle with the government by making a cash payment to be used by the government in undertaking a cleanup. Before agreeing to such a payment, the responsible parties will have to make the same determinations that must be made by parties considering a cleanup settlement.[208] In addition, parties contemplating a cash-out settlement will have to de-

207. Settlement is also attractive to responsible parties because of the widely held belief that responsible parties can undertake a more cost-effective cleanup than if the government agency (EPA or DER) cleaned up the site and then sought to recover its cleanup costs from the responsible parties.

208. These determinations are listed in the preceding paragraph.

termine how much they are willing to pay (including a possible settlement premium) in order to obtain the benefits of settlement. We will address each of these determinations in the following discussion.

1. The Cleanup Settlement

The first determination—whether the assumption of cleanup responsibility by a responsible party will protect that party against future enforcement action—turns upon whether the responsible party can obtain a "covenant not to sue" from the government enforcement agency and, if it can, the terms of the covenant. The "covenants not to sue" provision of HSCA (section 706) is similar to the "covenants not to sue" provisions of CERCLA (section 122(f)). There are, however, a few differences that deserve mention.

a. Covenants not to sue—The general rule

HSCA section 706(a) sets forth the following "General Rule" regarding covenants not to sue:

> To encourage the voluntary and timely cooperation of responsible parties in the cleanup of certain hazardous waste sites, the department may provide a responsible person with a covenant not to sue concerning liability to the Commonwealth under this act, including future liability, resulting from a release or threatened release of a hazardous substance addressed by a remedial action where:
>
> (1) The covenant not to sue is in the public interest.
>
> (2) The covenant not to sue would expedite response action.
>
> (3) The responsible person is in full compliance with any consent decree under the Solid Waste Management Act or this act for response to the release or threatened release concerned.
>
> (4) The response action has been approved by the department.

This general rule is substantially the same as the general rule set forth in CERCLA section 122(f)(1).[209]

209. There are, of course, some differences between HSCA section 706(a) and CERCLA section 122(f)(1). For example, CERCLA section 122(f)(1)(B) provides, as a condition for a covenant not to sue, that any response action is to

Naturally, the responsible person wishes to obtain from the government the broadest possible covenant not to sue in exchange for its "voluntary" cleanup. Ideally (from the responsible person's perspective) the covenant not to sue should provide that the responsible person will not be subject to *any* further liability to the government agency. However, neither HSCA nor CERCLA provide such assurance.

b. Special covenants not to sue—Protection against future liability

Covenants not to sue that extend to all future liability are referred to as "special covenants" under both HSCA section 706(b) and CERCLA section 122(f)(2). Both of these provisions contemplate covenants not to sue with respect to future liability to the extent that the remedial action (being undertaken by a responsible person) involves "permanent treatment."[210] In addition, both CERCLA section 122(f)(3) and HSCA section 706(c) provide that a covenant not to sue "shall not take effect" until the government agency (EPA or DER) certifies that the remedial action has been completed in accordance with statutory requirements. There are, however, some significant differences between the "special covenant" provisions of CERCLA and HSCA.

CERCLA section 122(f)(2) provides that EPA *shall* enter a covenant not to sue with respect to future liability to the extent that a remedial action provides for permanent treatment; however, HSCA section 706(b) provides that DER *may* enter a covenant not to sue under the same circumstances. On its face, this

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be "consistent with the National Contingency Plan." Furthermore section 122(f)(1)(C) requires that the person who is the beneficiary of the covenant not to sue must be in compliance with a consent decree "under section 9606 of this title," rather than a consent decree under state law.

Both HSCA section 706(a) and CERCLA section 122(f)(1) list four conditions for covenants not to sue. CERCLA section 122(f)(1) is explicit in providing that "each of the following conditions" must be met. HSCA section 706(a) simply provides that DER may enter into covenants not to sue "where" and then lists four conditions. It is not clear whether all four listed conditions must be satisfied. Since the four conditions in HSCA section 706(a) are clearly taken from the four conditions in CERCLA section 122(f)(1), however, it is reasonable to assume that the General Assembly intended to require that all four conditions must be satisfied before DER may enter into a covenant not to sue.

210. More specifically, HSCA section 706(b) provides that DER may provide a responsible person with a special covenant—i.e., a covenant not to sue with respect to future liability—"for the portion of remedial action which involves the treatment of hazardous substances so as to destroy, eliminate or permanently immobilize the hazardous constituents of such substances." This language is identical to that of CERCLA section 122(f)(2)(B).

difference in language suggests that DER has the discretion to withhold a "special covenant"—a covenant not to sue with respect to future liability—even where the responsible person is committed to remedial action that involves permanent treatment. It is unlikely that any responsible person will undertake the expense of remedial action involving permanent treatment unless DER enters into a special covenant.

CERCLA and HSCA also differ with respect to the extent to which the government agency may include an "unknown conditions" reopener[211] in a special covenant not to sue. HSCA section 706(f)(1) provides:

> A covenant not to sue concerning future liability to the Commonwealth may include an exception to the covenant that allows the department to sue such concerning future liability resulting from the release or threatened release that is the subject of the covenant where such liability arises out of conditions which are unknown at the time the department certifies under subsection (c) that remedial action has been completed at the site concerned.[212]

This broad authorization to include an "unknown conditions" reopener in a special covenant not to sue cannot be found in CERCLA. CERCLA section 122(f)(6)(A) authorizes generally an "unknown conditions" reopener in covenants not to sue but expressly excepts from such authorization "the portion of the remedial action" which is subject to a special covenant not to sue under section 122(f)(2). In other words, EPA is not authorized to include an "unknown conditions" reopener in a special covenant not to sue under CERCLA section 122(f)(2); in contrast, DER *is* authorized to include an "unknown conditions" reopener in a special covenant not to sue under HSCA section 706(b). The inclusion of such a reopener will, of course, make the assumption of

211. The limitations upon special covenants not to sue are referred to as "exceptions" in both HSCA and CERCLA, but are commonly referred to as "reopeners."

212. As previously noted, both CERCLA section 122(f)(3) and HSCA section 706(c) provide that a covenant not to sue with respect to future liability "shall not take effect" until the government agency (EPA or DER) certifies that the remedial action has been completed in accordance with statutory requirements. It is at this point that the government agency "signs off" on the agreed upon cleanup and the covenant not to sue with respect to future liability "takes effect."

cleanup responsibility under HSCA less attractive to responsible persons.

Both CERCLA section 122(f)(4) and HSCA section 706(d) list various "public interest" factors that the government agency is to consider "in assessing the appropriateness of a covenant not to sue" and "any condition to be included in a covenant not to sue." The factors listed in both provisions are generally the same.[213]

c. The right of settlors to seek contribution from non-settlors

Responsible persons contemplating the assumption of cleanup responsibility and settlement with the government (settlors) are greatly interested in the effect of settlement upon their rights to seek compensation from non-settling responsible persons (non-settlors) for some of the cost incurred in performing the cleanup. HSCA section 705(c)(2) addresses this concern by providing that "[t]he settling party may seek contribution from a nonsettling party to recover the consideration paid in excess of its allocated share of liability as determined by the court or the board." This provision is similar to CERCLA section 113(f)(3)(B). Thus, it is clear that settlors may seek contribution from non-settling responsible persons. In an action for contribution, settlors may seek to recover from non-settlors the amount by which the cost of cleanup (assumed by the settlors) exceeds the settlors' allocated share of liability.[214]

d. The right of non-settlors to seek contribution from settlors

Responsible persons contemplating the assumption of

213. HSCA section 706(d) lists six "public interest" factors that DER is to consider "[i]n assessing the appropriateness of a covenant not to sue under subsection (a) [the "General Rule"] and any condition to be included in a covenant not to sue under subsection (a) or (b)." The six factors are identical to six of the seven factors listed in CERCLA section 122(f)(4). Omitted from HSCA section 706(d) as a "public interest" factor is "[t]he extent to which the response action provides a complete remedy for the facility, including a reduction in the hazardous nature of the substances at the facility." CERCLA § 122(f)(4)(D). The reason for the omission of this factor is unclear.

214. The situation discussed in this part—settlement followed by an action for contribution against non-settling responsible persons by the settlors—should be distinguished from a private cost recovery action. A responsible person—for example, the present owner of a contaminated site—may elect to clean up the contaminated site in order to avoid, or minimize, liability to third parties (e.g., neighboring landowners). The responsible person may then seek to recover some of its cleanup costs in a private cost recovery action against other responsible persons. See *infra* text accompanying notes 259-65 for a discussion of private cost recovery actions.

cleanup responsibility and settlement with the government agency are also concerned about the effect of settlement upon the rights of non-settlors to seek contribution from settlors. This concern may be quite significant because it is possible that any cleanup that is assumed, and any settlement with the government based upon that cleanup, will be of limited scope and effect. In other words, a group of responsible persons may assume the responsibility for part, but not all, of the total necessary cleanup for a site. If the government then seeks to hold other responsible persons (non-settlors) liable for the remaining cost of cleanup, it is likely that the non-settlors will seek contribution (for part of this remaining cost of cleanup) from the settlors.

HSCA section 705(c)(2) provides settlors with some protection against such contribution claims by non-settlors. "[A] person who has resolved its liability to the department in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement unless the terms of the settlement provide otherwise." This provision is similar to CERCLA section 113(f)(2).[215] Under both HSCA and CERCLA, the scope of the matters addressed in the settlement will determine the extent of the protection accorded to settlors against contribution claims by non-settlors. The responsible person negotiating a settlement should therefore seek to define the scope of the settlement (the "covered matters" or, to use the statutory language, the "matters addressed in the settlement") as broadly as possible. However, settlors who perform a partial remedy will not be protected against contribution claims by non-settlors against whom the government seeks the remaining cost of a complete remedy.[216]

2. The "Cash-Out Settlement"

Both CERCLA and HSCA contain provisions that are aimed

215. CERCLA section 113(f)(2) does not contain the "unless" clause in HSCA section 705(c)(2). Certainly, settlors would not seek to include terms in the settlement that would "provide otherwise"—that is, that would provide that settlors remained liable for contribution claims by non-settlors. It is also unclear when DER would seek to include in a settlement terms that provided that settlors remained liable for contribution claims by non-settlors.

216. Experience under CERCLA has been varied. Most typically, settlors can obtain a release only for the portion of the remedy that they perform. In the early days of CERCLA, *full* releases (and resulting full protection against contribution claims by non-settlors) were available if settlors performed a partial remedy. *See, e.g.*, United States v. Seymour Recycling, 554 F. Supp. 1334 (D.C. Ind. 1982). In practice today, EPA usually grants contribution protection for those aspects of the remedy performed by the settlors.

at determining the proportional liability of various responsible persons. Such determinations can then become the basis for "cash-out settlements"—that is, settlements under which a responsible person resolves its liability to the government agency through a cash payment.

a. Nonbinding preliminary allocation of proportionate responsibility

HSCA section 708 establishes a process for the development of a "nonbinding preliminary allocation of proportionate responsibility [NPAPR] among all known responsible persons." The process established by section 708 is similar (but with some significant differences) to the process in CERCLA section 122(e) for "nonbinding preliminary allocations of responsibility (NPAR)."

The NPAPR process of section 708 is mandatory "[w]henever the department believes that more than one person may be responsible under section 701 for a release or threatened release."[217] Many, if not most, contaminated sites will present situations where DER will believe that more than one person may be liable under section 701. Under section 708(a), DER is to provide written notice of its preliminary allocation to all known responsible persons and invite such persons to "participate in a dispute resolution procedure"[218] for the purpose of determining "each person's proportionate share of the response costs and the appropriate response action to be taken." Within 120 days of the notice, DER and the participating persons "shall reach an agreement,"[219] which is to include "a schedule of payment for the proportionate share contained in the agreement." If no agreement is reached within the 120 day period, the dispute resolution process is to terminate unless DER and the participating parties agree to an extension.

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217. HSCA § 708(a). CERCLA § 122(e)(3)(A) provides that EPA *may* provide a "nonbinding preliminary allocation of responsibility [NPAR]." Thus, the NPAPR process of HSCA is mandatory whenever there are multiple responsible persons, whereas the use of the NPAR process of CERCLA is discretionary.

218. The dispute resolution procedure is to be "selected by the department" and may include "mediation, arbitration, or similar procedures." HSCA § 708(a).

219. Although section 708(a) provides that DER and the parties "*shall* reach an agreement" (emphasis added) within 120 days after the notice, there apparently was no intention on the part of the General Assembly to suggest that an agreement could be compelled by a mandamus action. The lack of such an intention is evident from the provisions of section 708(a) which address the consequences of a failure to reach an agreement within the 120 day period.

During the course of the section 708(a) dispute resolution process, DER may not commence an enforcement action against any person participating in the process.[220] Finally, section 708(c) provides that "[a]ny agreement reached under the dispute resolution procedures . . . shall become a legally binding agreement upon all parties thereto"; section 708(d) states that a person who has reached a settlement under the section 708 dispute resolution process "shall not be subject to claims for contribution regarding matters addressed in the settlement."[221]

HSCA section 708 provides a process whereby a group of responsible persons may reach a cash-out settlement with DER. DER is not obligated to accept any settlement offered by a group of responsible persons in the course of the section 708 dispute resolution process. Thus, DER may develop guidelines under which it will not agree to a cash-out settlement under section 708 unless the total cash amount of the settlement proposed by the responsible persons is a significant percentage of the projected total response cost.[222]

If no agreement is reached under the section 708 process, section 708(c) makes it clear that DER's nonbinding allocations are not admissible in any future administrative or judicial actions.[223] Thus, in a contribution action, no party may seek to use DER's nonbinding allocation as evidence of an appropriate allocation of liability.

b. Voluntary acceptance of responsibility

DER is not obligated to accept any settlement proposed under the section 708 process. Thus, the section 708 process provides no assurance to a responsible person that it will have an opportunity to agree to a cash-out settlement with DER. Section 709 does provide such an opportunity, however.

220. This "moratorium" on enforcement is established by HSCA section 708(b). There is a similar moratorium provision in CERCLA section 113(e)(2)(A).

221. Is this provision redundant in light of section 705(c)(2) which provides that "[a] person who has resolved its liability to the department in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement unless the terms of the settlement provide otherwise"? Or is an agreement reached under the process of section 708 effective without administrative or judicial approval so that section 705(c)(2) is not applicable to such an agreement? See *infra* text accompanying notes 230-32 for a discussion of section 705(c)(2).

222. This has been the practice of EPA under CERCLA section 122(e).

223. This provision of HSCA section 708(c) is similar to CERCLA section 122(e)(3)(C).

HSCA section 709, captioned "voluntary acceptance of responsibility," has no analogue in CERCLA. CERCLA, in other words, provides no opportunity for a particular responsible person to enter into a "cash-out settlement."[224] HSCA section 709 provides as follows:

> Any person who voluntarily accepts responsibility under section 701 and agrees to pay his or her proportionate share, as determined under section 708, of the response costs and damages listed in section 702, as ultimately determined, plus an appropriate premium in an amount up to 50% of that person's proportionate share, but not to exceed 15% of the total costs of response and damages, shall not be subject to claims by the department, or by any other responsible person, in excess of that amount.

This provision seems to provide absolute protection against any future liability (to DER or to any other responsible person) to any individual responsible person who is willing to take the steps that are necessary to come within its terms. The price of such protection, however, may be prohibitive. In order to come within the protection of section 709, a responsible person must be willing to commit itself to paying its proportionate share of an as yet undetermined amount of costs and damages.[225] This in itself is not an attractive option. Moreover, in order to come within the protection of section 709, a responsible person must also be willing to pay an "appropriate premium." Even if a responsible person is willing to commit itself to pay its proportionate share of an as yet undetermined amount of total liability, it is unlikely that the responsible person would be willing to commit itself further to any significant additional percentage of the undetermined total liability.

Thus, though section 709 seems to offer responsible persons a simple (and therefore attractive) cash-out settlement option, the

224. CERCLA does provide a limited opportunity for a cash-out settlement for those responsible persons who qualify for treatment under the "de minimis" settlement provisions. See *infra* text acompanying note 229 for a discussion of these provisions.

225. Before a responsible person can seek to come within section 709, there must first be a determination of proportionate liability under section 708. But, though the section 708 process determines the proportionate liability of the various responsible persons, it does not determine the dollar amount of the total liability of all responsible persons. Thus, the responsible person who, through the section 708 process, is determined to have a proportionate liability of 10% does not know whether its liability is 10% of a $500,000 or $500,000,000 total liability.

terms for invoking the option require a commitment that few responsible persons may be willing to assume.

c. De minimus settlements

HSCA section 707, like CERCLA section 122(g), provides for "de minimis settlements." The two provisions are very similar. HSCA section 707(a) and CERCLA section 122(g)(1) set forth the conditions that must be met in order for there to be a de minimis settlement. The language of the two sections is substantially identical. HSCA section 707(a) provides:

> Whenever practicable and in the public interest, the department may as promptly as possible reach a final settlement with a responsible person in an administrative or civil action if such settlement involves only a minor portion of the response costs at the site concerned and if either of the following conditions are met:
>
> (1) Both of the following are minimal in comparison to other hazardous substances contributed at the site by all known and financially viable responsible persons:
>
> (i) The amount of the hazardous substances contributed by that person to the site.
>
> (ii) The toxic or other hazardous effects of the substances contributed by that person to the site.
>
> (2) The responsible person:
>
> (i) is the owner of the real property on or in which the site is located;
>
> (ii) did not conduct or permit the generation, transportation, storage, treatment or disposal of any hazardous substance at the site; and
>
> (iii) did not contribute to the release or threatened release of a hazardous substance at the site through any act or omission.

This language sets forth two circumstances in which a de minimis settlement is available. The first, described in section 707(a)(1), involves the person who (as a generator, transporter, or past operator of the site) has contributed hazardous substances which are minimal in both amount and toxicity. The second circumstance involves the "almost innocent" present landowner. We have previously explained how an "innocent

landowner"—that is, a landowner who can make the demonstrations set forth in section 701(b)—is not subject to liability.[226] The circumstances described in section 707(a)(2) describe the "almost innocent" landowner in the sense that section 707(a)(2) applies to the present landowner who is unable to come within the "innocent landowner" exception of section 701(b) but who is still "innocent" in the sense that he did not contribute hazardous substances to the site. Section 707(a)(3) does make it clear, however, that a de minimis settlement is not available to a present landowner who acquired the site with knowledge that the property contained hazardous substances.

HSCA section 707(b), like CERCLA section 122(g)(2), provides that the government may provide a "covenant not to sue" to any person who has entered into a de minimis settlement. There is, however, a significant difference between a HSCA de minimis covenant not to sue and a CERCLA de minimis covenant not to sue. HSCA section 707(b) states that a de minimis covenant not to sue may be provided "pursuant to the provisions of section 706." Thus, arguably, a HSCA de minimis covenant not to sue is subject to the unknown conditions reopener provision of section 706(f).[227] In contrast, CERCLA section 122(g) does not include this restriction. Rather, section 122(g) merely requires that a de minimis covenant not to sue be consistent with the public interest requirements of section 122(f).[228]

HSCA section 707(c) appears to protect the de minimis settlor regarding claims against the settlor by parties other than DER (e.g., contribution claims by other responsible persons). The nature of the protection, however, is unclear. Section 707(c) states that "[a]ny person who reaches an agreement under this section shall be responsible only for that person's proportional share of response costs and damages assessed under section

226. See *supra* notes 34-51 and accompanying text for a discussion of the "innocent landowner" exception to liability.

227. See *supra* text accompanying notes 211-12 for a discussion of the section 706(f) reopener provision.

228. See *supra* text accompanying note 213 for a discussion of these public interest requirements.

In practice, EPA typically provides a de minimis covenant not to sue that is limited only by a reopener if it is determined that the de minimis settlor did not provide accurate information regarding the nature and volume of the waste that the settlor disposed of at the site. In contrast, in the early proposed settlements under HSCA, DER has taken the position that it is entitled to include an unknown conditions reopener as well an inaccurate information reopener. Under this practice, the major incentive for entering into a de minimis settlement—finality of settlement—will be eliminated.

702." What is meant by "proportional share"? Was the intended reference to a "proportionate share" determination made in accordance with the dispute resolution procedure of section 708? Or does "proportional share" refer to an allocated share of liability as determined by a court or the board in a contribution claim?

The CERCLA provision that is analogous to section 707(c) is much more straightforward and clear; CERCLA section 122(g)(5) provides that "[a] party who has resolved its liability under this subsection [i.e., a de minimis settlor] shall not be liable for claims for contribution regarding matters addressed in the settlement." CERCLA section 122(g)(5) provides clear and complete protection to the de minimis settlor against contribution claims. The protection afforded by HSCA section 707(c) is uncertain.[229]

d. Effect of cash-out settlements upon contribution claims

Under HSCA section 705(c)(2), "[a] person who has resolved its liability to the department in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement unless the terms of the settlement otherwise provide." This provision is similar to the first sentence of CERCLA section 113(f)(2). Under both provisions, a responsible party who has entered into a cash-out settlement (through the section 708 dispute resolution process, the section 709 voluntary assumption of responsibility, or a section 707 de minimis settlement) need not fear contribution claims by non-settling parties if the settlement has been administratively or judicially approved[230] and if the terms of the settlement do not

229. It is also unclear how the protection afforded by Section 707(c) relates to the greater protection afforded to settlors by section 705(c)(2). The latter provision provides absolute protection against contribution claims to persons who have resolved their liability to DER in "an administrative or judicially approved settlement." Apparently, in order to be effective, a de minimis settlement need not be administratively or judicially approved. If a de minimis settlement is *not* administratively or judicially approved, it would appear that the extent of the settlors' protection against contribution claims is governed by section 707(c). But if a de minimis settlement *is* administratively or judicially approved, it would seem that the extent of the settlor's protection against contribution claims is governed by section 705(c)(2).

230. Non-settlors will wish to oppose administrative or judicial approval of any cash-out settlement which, in the eyes of the non-settlors, requires the settlors to pay less than their allocated share of responsibility. DER's right to recover against non-settlors is limited only by the *lesser* of the consideration paid by settlors in an approved settlement or the settlors' allocated share of liability. In addition, as pointed out in the text, administrative or judicial approval of a settlement protects settlors against contribution claims by non-settlors. Thus, because administrative or judicial approval of a cash-out settlement: (1) affects DER's recovery rights against non-settlors; and, (2) insulates settlors against

otherwise provide.[231]

HSCA section 705(c)(2) goes on to provide that a settling party "may seek contribution from a nonsettling party to recover the consideration paid in excess of its allocated share of liability as determined by the court or the board." This provision is similar in concept, but not in language, to CERCLA section 113(f)(3)(B).[232] Thus, a responsible party who has entered into a large cash-out settlement with DER may seek, through a contribution claim, to recover part of the settlement amount from non-settling responsible parties; the settlor may recover from non-settling parties to the extent that the amount paid in settlement exceeds the settling party's allocated share.

Thus, under HSCA section 705(c)(2) a party to an "administrative or judicially approved" cash-out settlement receives two important benefits: (1) protection against contribution claims by non-settlors; and, (2) the right to seek contribution from non-settlors.

e. Effect of cash-out settlements upon DER actions against non-settlors

HSCA section 705(c)(1), like CERCLA section 113(f)(2), describes the impact of an approved cash-out settlement upon DER cost recovery actions against non-settlors. Both provisions make it clear that an approved cash-out settlement does not discharge the government's claims against non-settlors.

An approved cash-out settlement does, however, reduce the

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contribution claims by non-settlors, non-settlors will wish to oppose administrative or judicial approval of settlements that require settlors to pay less than proportional share of responsibility.

Federal courts have just recently begun to discuss the appropriate role of the courts in reviewing proposed consent decrees embodying settlements agreed to by EPA and responsible parties. *See, e.g.*, United States v. Rohm & Haas, 721 F. Supp. 666 (D.N.J. 1989).

231. This last phrase is not contained in CERCLA section 113(f)(2). It is not clear when the terms of a cash-out settlement would provide that the settlors would remain liable to contribution claims by non-settlors. Obviously, the settlors would not want such terms in the settlement, and there is no apparent reason why DER would wish to include in the settlement agreement terms that would protect the contribution claims of non-settlors.

232. CERCLA section 113(f)(3)(B) is more general in its language than HSCA section 705(c)(2). CERCLA section 113(f)(3)(B) provides, in relevant part, that "[a] person who has resolved its liability . . . for some or all of the costs of [a response] action in an administrative or judicially approved settlement may seek contribution from any person who is not a party to a settlement." The difference in language between CERCLA section 113(f)(3)(B) and HSCA section 705(c)(2) does not seem to be of any substantive importance.

amount or extent of the government's claims against non-settlors. Section 705(c)(1) provides that, when DER enters into an approved settlement, the effect of the settlement is to reduce DER's claim—for response costs and damages—"by the amount of the consideration paid to the department [by the settlor] or the allocated amount of the settling party's liability, whichever is less." This language differs from CERCLA section 113(f)(2), which provides that the effect of a settlement "reduces the amount of the [other non-settling parties] by the amount of the settlement."

The preceding difference in language is obviously quite significant. Where the amount of an approved settlement is less than the allocated amount of the settlor's liability, non-settlors will be liable to DER for more than their otherwise allocated shares of liability; that is, non-settlors will also be liable to DER for the amount by which a settlor's allocated share exceeds the amount of the approved settlement.[233] Where the amount of the settlement is larger than "the allocated amount of the settling party's liability"—for example, where a responsible party has paid a settlement premium under the voluntary assumption of responsibility provisions of section 709[234]—DER's claims against the non-settlors would not be reduced by the amount of the premium paid by the settlor. In this latter situation, DER would, in effect, obtain a "double recovery" of the amount by which the settlement exceeds the settlor's allocated share.[235] Presumably, in or-

233. For this reason, non-settlors will wish to oppose any proposed settlement that, in the view of the non-settlors, requires the settlor to pay less than its allocated share.

234. For a discussion of voluntary assumption of responsibility under section 709, see *supra* text accompanying notes 224-25.

235. The allowance of a "double recovery" in the circumstances described in the text is presumably based upon the General Assembly's interpretation and acceptance of the decision in Charles v. Giant Eagle Markets, 513 Pa. 474, 522 A.2d 1 (1987). In *Charles*, a case involving two joint tortfeasors, the court allowed an injured plaintiff to recover an amount in excess of the total damages awarded by a jury. The plaintiff had reached a settlement with one joint tortfeasor defendant for an amount in excess of the share that was later assigned to the settling defendant by the jury. The court rejected the non-settling defendant's claim that the damages for which it was liable should be reduced by the amount of the settlement, rather than the amount of the settling defendant's share. As a result, the plaintiff obtained a double recovery of the amount by which the settlement exceeded the settling defendant's share.

The reasoning of the court in *Charles* is questionable. *See id.* at 496, 522 A.2d at 11 (Zappalla, J., dissenting). Whatever one may think of the court's reasoning, the General Assembly was free to reject the court's approach in setting forth the effect of an approved cash-out settlement under HSCA. In allowing DER to obtain a "double recovery," the General Assembly has apparently concluded that non-settlors should not receive the benefit of any "premiums" (payments in excess of allocated share) paid by settling parties.

der to enjoy the benefits of such a double recovery, the burden of proof would be on DER to establish that the amount of consideration paid in a settlement was greater than "the allocated amount of the settling party's liability" so that DER's claims are reduced only by the smaller allocated amount.[236]

E. EFFECT OF HSCA SECTION 1301 UPON DER ENFORCEMENT

DER's authority to undertake enforcement actions under HSCA is significantly limited by the provisions of section 1301. Section 1301(a) limits the authority of DER to undertake HSCA enforcement actions against "an identified and responsible owner or operator of a site" from which there is a release; section 1301(b) limits the authority of DER to undertake HSCA enforcement actions against other "responsible persons" (generators and transporters). Both provisions limit the use of HSCA enforcement measures until such time as DER has used its enforcement powers under "other applicable environmental laws" against the owner or operator of the site from which there has been a release.

The legislative purpose behind the provisions of sections 1301(a) and (b) is clear: the General Assembly did not want DER to dip into the limited resources of the state superfund until such time as DER had exhausted other enforcement options under other environmental laws. But, as we will demonstrate, the limitations imposed by sections 1301(a) and (b) run far beyond the purpose underlying their enactment.

1. Effect of HSCA Section 1301(a)

The basic limitation imposed by HSCA section 1301(a) is set forth in the following language:

> Notwithstanding the provisions of subsection 505(c) and section 507, an identified and responsible owner or operator of a site with a release or threatened release of a hazardous substance or contaminant, shall not be subject to enforcement orders or the cost recovery provisions of this act, until [1] the department has instituted administrative or judicial enforcement action against the owner or operator under other applicable environmental

236. It is not clear how DER is to meet this burden of proof. Apparently, DER will have to rely upon the factors, set forth in section 705(b), that are to be considered in allocating liability in a contribution claim.

> laws and [2] the owner or operator has failed to comply with or is financially unable to comply with such administrative or judicial enforcement action.[237]

Of all the responsible persons identified in section 701, the present owner of a contaminated site is the easiest to identify, and thus the entity against which DER might most readily seek to exercise its HSCA enforcement authority. But the message of section 1301(a) is clear: DER may not use its HSCA enforcement authorities against the present owner[238] until DER has first instituted "administrative or judicial enforcement action" under other applicable environmental laws.

Of the various "other applicable environmental laws" that DER might draw upon, the Clean Streams Law provides DER with the broadest enforcement authority in dealing with groundwater contamination, a likely consequence of a release or threatened release. More specifically, section 316 of the Clean Streams Law provides in relevant part: "Whenever [DER] finds that pollution or a danger of pollution is resulting from a condition which exists on land in the Commonwealth, [DER] may order the landowner or occupier to correct the condition in a manner satisfactory to [DER]."[239] Section 316 gives DER broad authority to order "the landowner or occupier" to clean up contamination that is the product of a release;[240] such "landowner or occupier" corresponds to a present "owner or operator" as those terms are used in HSCA. Thus, section 1301(a) of HSCA makes it clear that, before DER may exercise its enforcement powers under

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237. The introductory clause refers to section 505(c), the provision that confers upon DER broad authority to implement an "interim response" or "remedial response"; the introductory clause also refers to the provision that authorizes DER to bring a "cost recovery" action, section 507. Thus, section 1301(a) limits the authority of DER to bring HSCA enforcement actions "notwithstanding" the authorizations set forth in section 505(c) and section 507.

238. It is not clear whether section 1301(a) limits HSCA enforcement actions against *past* owners as well as *present* owners. Under section 701 it is clear that some past owners as well as the present owner (of a site from which there is a release or threatened release) are liable. But it is not of practical importance whether HSCA enforcement actions against past owners are limited by section 1301(a), since HSCA enforcement actions against past owners are clearly limited by section 1301(b).

239. 35 PA. CONS. STAT. § 691.316 (Purdon 1971). Section 316 confers power upon the Sanitary Water Board. The powers of the Sanitary Water Board, however, were transferred to DER in 1970. Act of December 3, 1970, Pub. L. 834, § 30(a), 71 PA. CONS. STAT. § 510-1(22)(Purdon 1971).

240. The leading case on liability under section 316 is National Wood Preservers, Inc. v. Commonwealth, 489 Pa. 221, 414 A.2d 37 (1979), *appeal dismissed*, 449 U.S. 803 (1980).

HSCA against an owner or operator, it must first issue an order, or seek judicial relief, against the owner or operator ("landowner or occupier") under the Clean Streams Law.[241]

If DER does institute enforcement action against the owner or operator under the Clean Streams Law, it must continue to pursue such action according to section 1301(a) until such time as the owner or operator "fails to comply" or "is financially unable to comply" with such enforcement action. Only then is DER authorized to use its enforcement powers under HSCA.[242]

The moral of section 1301(a) is that DER may not initiate a superfund-financed cleanup, followed by a cost recovery action against the present owner or operator, until: (1) DER has sought relief (by way of an administrative or judicial cleanup order) against the owner or operator under the Clean Streams Law; and, (2) the owner or operator has failed to comply with, or is financially unable to comply with, the cleanup order. This effect of section 1301(a) is consistent with the General Assembly's desire to save the limited resources of the state superfund for those situations where there are no other enforcement options.[243]

2. Effect of HSCA Section 1301(b)

The limitation imposed by section HSCA 1301(b) is set forth in the following language:

> The department may not initiate enforcement orders nor apply the cost recovery provisions of this act against a responsible person for the release or threatened release of a hazardous substance or contaminant at a site that is the subject of subsection (a), where [1] the owner or operator of the site is financially able to comply with an administrative or judicial enforcement action instituted

241. Presumably, if DER sought to use its HSCA enforcement powers against an owner or operator without first seeking relief under the Clean Streams Law, the defendant owner or operator could raise the provisions of section 1301(a) as an absolute defense to the HSCA enforcement action.

242. Section 1301(a) provides that "in the event of noncompliance" by the owner or operator with administrative or judicial enforcement action under other applicable environmental laws, "the provisions of this act [i.e., enforcement under HSCA] may be applied by the department unless the owner or operator has obtained a supersedeas from the board or the court conducting any such judicial enforcement action."

243. Though this rationale supports the limitation imposed by section 1301(a) upon superfund-financed cleanups followed by cost recovery actions, it does not support the limitation imposed by section 1301(a) upon cleanup orders under HSCA section 505(c).

> under subsection (a), and [2(a)] the owner or operator has undertaken appropriate action to abate the release or threatened release of the hazardous substance or contaminant, as required by the administrative or judicial enforcement action, or [2(b)] the owner or operator has obtained a supersedeas from the board or the court conducting any such judicial enforcement action.[244]

This provision has a much more significant impact than its companion provision, section 1301(a). As we have seen, section 1301(a) merely precludes HSCA enforcement actions against an owner or operator until such time as DER has sought an enforcement order against the owner or operator under the Clean Streams Law (and the owner or operator has failed, or is unable, to comply with the order). In contrast, section 1301(b) precludes HSCA enforcement actions *against any responsible person* (e.g., generators or past owners or operators) *until such time as DER has sought an order under the Clean Streams Law against the present owner or operator*.

This aspect of section 1301(b) could have a perverse effect upon the willingness of responsible parties who are not the present owner or operator (e.g., generators, transporters, or past owners or operators) to undertake voluntary cleanups of a contaminated site where there is a present owner or operator who has sufficient resources to comply with a cleanup order. Section 1301(b) states that DER must look upon the present owner or operator as the primary target for cleanup responsibility; indeed, DER must seek a cleanup order (under the Clean Streams Law) against the present owner or operator before DER may think about using its HSCA enforcement powers against other responsible parties. If DER does issue or obtain such a cleanup order against the present owner or operator, it may not use its HSCA enforcement powers against other responsible parties unless: (1) the present owner or operator is financially unable to comply with the cleanup order; or, (2) a financially able present owner or operator fails to undertake the cleanup action and does not obtain relief from the cleanup order by way of supersedeas. Under these circumstances, other responsible parties (i.e., responsible parties other than the present owner or operator) will be induced to sit back and let DER issue a cleanup order under the Clean Streams Law against the present owner or operator. If such an order is-

244. The brackets have been added to clarify the structure of the section.

sues, the present owner or operator who is financially able to comply with the order will either comply with the cleanup order or seek a supersedeas. If the financially able present owner or operator complies with the cleanup order, there will be no reason for DER to bring a HSCA enforcement action against other responsible parties. It will be up to the financially able present owner or operator (who has complied with the cleanup order) to seek contribution from other responsible parties.

There will be considerable pressure upon the financially able present owner or operator to comply with a Clean Streams Law cleanup order. Failure to comply with the cleanup order subjects the owner or operator to penalties under the Clean Streams Law.[245] Such penalties can be avoided only if the owner or operator obtains a supersedeas. But, if the owner or operator obtains a supersedeas against the enforcement of a Clean Streams order, it is clear under section 1301(b) that DER may not proceed with a HSCA enforcement action against other responsible parties while the supersedeas is in effect. Thus, other responsible parties are protected against HSCA enforcement action in either event—if the financially able owner or operator complies with the cleanup order or obtains a supersedeas against the enforcement of the order. The other responsible parties are subject to HSCA enforcement actions only if the financially able present owner or operator fails to comply with the cleanup order and does not obtain a supersedeas. But, as previously stated, such an owner or operator runs the risk of being subject to substantial penalties under the Clean Streams Law.

Why does section 1301(b) put such pressure upon the financially able present owner or operator? Again, the explanation seems to be the General Assembly's desire to avoid unnecessary superfund-financed cleanups by requiring DER to look to its enforcement powers under other applicable environmental laws. Thus, in an effort to protect the limited resources of the superfund, DER must pursue the present owner or operator under the Clean Streams Law before it may pursue other responsible parties.

Though this rationale—protection of the superfund's limited resources—justifies the preclusion of superfund-financed cleanups (followed by cost recovery actions) until DER has sought a cleanup order against the present owner under the Clean Streams

245. *See* 35 PA. CONS. STAT. § 691.602, 691.605 (Purdon Supp. 1989).

Law, it does not justify the preclusion of a HSCA cleanup order against other responsible parties until DER has sought a cleanup order against the present owner under the Clean Streams Law. A HSCA cleanup order, like a Clean Streams cleanup order, does not deplete the resources of the superfund. There also seems to be no reason why DER must first seek a Clean Streams order against the present owner before it may seek a HSCA cleanup order against other responsible parties. There is no reason to believe that the release (which is the basis for issuing a cleanup order) is more attributable to the actions of the present landowner than to the actions of other responsible parties under HSCA. Indeed, HSCA recognizes that the present landowner may have had nothing to do with the activities that gave rise to the release and thus, under HSCA's "innocent landowner" exception, would not be liable under HSCA.[246]

Section 1301(b) requires DER to first seek a Clean Streams order against the present owner even if the present owner would be an "innocent landowner" under HSCA. The requirement that DER first pursue the present owner under other environmental laws—in particular, the Clean Streams Law—is unqualified; there is no exception regarding present owners who may be "innocent landowners" under HSCA. Further, if the present owner is pursued by way of a cleanup order under the Clean Streams Law, the present owner cannot avoid complying with the order by protesting that it is "innocent" for there is no "innocent landowner" defense under the Clean Streams Law. The financially able "innocent landowner" who complies with the Clean Streams cleanup order is left to seek reimbursement from responsible parties through a private cost recovery action. The financially able "innocent landowner" who does not comply with the Clean Streams cleanup order does so at the risk of incurring substantial penalties.

The message (clearly unintended) of section 1301(b) to responsible parties is to sit back and let DER proceed against the present owner (if that owner is financially able to comply with a cleanup order). The worst that can happen is that the responsible parties will be called upon to defend a contribution or private cost recovery action brought by the present owner after the owner has completed the cleanup.

246. The "innocent landowner" exception is discussed *supra* at text accompanying notes 36-51.

III. ENFORCEMENT ACTIONS BY MUNICIPALITIES

Under CERCLA, municipalities as such have no rights and no enforcement authority.[247] In contrast, HSCA contains a number of provisions which recognize municipal rights and authorize municipal enforcement. These provisions authorize cost recovery actions by municipalities, authorize municipalities to seek injunctive relief, and authorize the recovery of natural resource damages by municipalities. In conferring this enforcement authority upon municipalities, these provisions have the potential to frustrate efforts by DER to develop a consistent and uniform policy of enforcement under HSCA.

A. COST RECOVERY ACTION BY MUNICIPALITIES

HSCA section 702(a)(2) provides that responsible parties are liable for response costs incurred by "a political subdivision" and section 507(a) provides that "a municipality" may recover its response costs "in an action in equity brought before a court of competent jurisdiction."[248] Although neither the term "political subdivision" nor the term "municipality" is defined in HSCA, both terms presumably include, at the least, general purpose units of local government such as counties, cities, townships and boroughs.

Theoretically, there could be a problem in coordinating DER and municipal efforts in cleaning up a site and seeking response costs. But it will be the rare situation in which a municipality will be willing to assume the primary role in cleaning up a site; rather, one can expect that municipalities will seek to have DER assume the primary role.[249] If DER assumes that role, then DER will be the claimant for the major response costs, and municipal claims

247. Under CERCLA, an entity other than EPA or a state agency may seek to recover its response costs that are consistent with the NCP. Such recovery would be sought in a private cost recovery action. See *infra* notes 259-65 and accompanying text for a discussion of private cost recovery. Thus, a municipality, like any other legal entity, may bring a private cost recovery action under CERCLA. But CERCLA contains no provisions that expressly confer enforcement authority upon municipalities.

248. Interestingly, section 507(a) provides that an action by DER for response costs may be brought *either* in "a court of competent jurisdiction" or before EHB. A municipality's action for response costs, however, may be brought only in "a court of competent jurisdiction."

249. Arguably, a municipality could invoke the citizen suit provisions of section 1115 to bring an action seeking to require DER to perform its duties under HSCA. See *infra* text accompanying notes 268-70 for discussion of citizen suits.

will be limited to relatively minor items that go beyond the response costs incurred by DER.

B. ACTIONS FOR INJUNCTIVE RELIEF BY MUNICIPALITIES

HSCA section 1103(b) contains a broad grant of authority to local governments to seek equitable relief. Section 1103(b) provides as follows:

> In addition to any other remedies provided for in this act, upon relation of a district attorney of an affected county or upon relation of the solicitor of an affected municipality, an action in equity may be brought in a court of competent jurisdiction for an injunction to restrain any and all violations of this act or regulations promulgated under it or to restrain a public nuisance or detriment to public health, safety or welfare or the environment.

This provision has the potential to cause a lot of mischief and confusion. A municipality in which there is a contaminated site is presumably an "affected municipality,"[250] and a release of a hazardous substance is expressly declared (by section 1101) to be a "public nuisance." Therefore, section 1103(b) confers upon the solicitor of a municipality in which there is a contaminated site the authority to bring an action to "restrain" the public nuisance/release.

It is not clear what a court should do when confronted with such an action. It would seem that the court has the authority to "restrain" the public nuisance by ordering the cleanup of the contaminated site. But what should the court do in the situation where DER is already beginning to deal with the contaminated site? There is nothing in section 1103(b) that requires the court to defer to DER.[251] But if courts fashion ad hoc cleanup orders in

250. The term "affected municipality" is not defined in HSCA.

251. Municipal enforcement actions under section 1103(b) are not subject to the jurisdictional limitation imposed upon citizen suits under section 1115(b). The latter section precludes a court of common pleas from exercising jurisdiction over a citizen suit "when the department [DER] has commenced and is diligently prosecuting" an enforcement action. See *infra* text accompanying notes 267-69 for a discussion of citizen suits under section 1115. The absence of such a limitation in section 1103(b) suggests that a municipality may bring an enforcement action under section 1103(b) even when DER is already "diligently prosecuting" its own enforcement action. A court faced with such a municipal enforcement action, however, might stay the action under the doctrine of "primary jurisdiction." See *infra* note 252 for a discussion of "primary jurisdiction."

response to section 1103(b) actions, DER will lose its ability to develop consistent and uniform standards of cleanup under HSCA. It would be preferable if courts faced with section 1103(b) actions acknowledged that DER is granted "primary jurisdiction"[252] for cleaning up contaminated sites and stayed any action until DER had an opportunity to act (either by undertaking cleanup itself or by arranging for cleanup by the responsible persons). If DER then acted, the public nuisance (caused by the release) would be abated and the section 1103(b) action would then be dismissed as moot.[253]

C. ACTIONS FOR NATURAL RESOURCE DAMAGES BY MUNICIPALITIES

HSCA section 702(a)(4) provides that responsible persons are liable for, among other things, "[d]amages for injury to, destruction of, or loss of natural resources within this Commonwealth or belonging to, managed by, controlled by or appertaining to the United States, the Commonwealth, *or a political subdivision*." (Emphasis added.) In addition, HSCA section 507(a) provides that "[t]he department, a Commonwealth agency, *or a municipality* which undertakes to abate a public nuisance under this act or take a response action may recover those response costs *and natural resource damages* in an action in equity brought before a court of competent jurisdiction" (emphasis added).

There are a number of reasons why the preceding provisions are unclear in explaining the extent to which a municipality may recover natural resource damages. First, it is not clear when it can be said that a natural resource belongs to, is managed by, is controlled by, or appertains to a political subdivision[254] as op-

252. The leading case on primary jurisdiction in Pennsylvania is Elkin v. Bell Tel. Co. of Pa., 491 Pa. 123, 420 A.2d 371 (1980). In *Elkin*, the court stated that "where the subject matter [of an action] is within an agency's jurisdiction and where it is a complex matter requiring special competence, with which the judge or jury would not or could not be familiar, the proper procedure is for the court to refer the matter to the appropriate agency." *Id.* at 134, 420 A.2d at 377. In addition, the court stated that "weighing in the consideration should be need for uniformity and consistency in agency policy and the legislative intent." *Id.*

A municipal action to "restrain" a release will almost invariably be "a complex matter requiring special competence." *Id.* Additionally, as stated in the text, there is a need for uniformity and consistency in establishing cleanup standards under HSCA.

253. Related to the question discussed in this part is the power of municipalities to bring enforcement actions against responsible persons on the ground that a release (or threatened release) is a violation of a municipal ordinance. It is not clear whether such actions are preempted by HSCA.

254. HSCA section 103 defines "natural resources" as "[l]and, fish, wild-

posed to the Commonwealth.[255] Second, HSCA section 507(a) limits the right to recover natural resource damages to a municipality "which undertakes to abate a public nuisance under this act or take a response action." This limitation apparently precludes recovery of natural resource damages by a municipality when DER (rather than the municipality) has undertaken a response action.

Also unclear is the extent to which a municipality may make its own finding of the degree to which it has suffered natural resource damages and the extent to which such a finding (if authorized) should be granted deference in a subsequent action, under section 507(a), to recover such damages. HSCA section 507(d) provides that "[a] determination or assessment of damages to natural resources for the purposes of this act . . . made by the department *or other trustee* shall have the force and effect of a rebuttable presumption on behalf of the department *or other trustee* in an administrative or judicial proceeding under this act . . ." (emphasis added). Assuming that a municipality could (in a particular case) qualify as an "other trustee," [256] there are no provisions in the Act that describe the procedures that a municipality is to follow in making a determination or assessment of natural resource damages.[257] If a municipality were to make a determina-

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life, biota, air, water, groundwater, drinking water supplies and other resources belonging to, managed by, held in trust by, appertaining to or otherwise controlled by the United States, the Commonwealth *or a political subdivision*" (emphasis supplied).

255. In Lutz v. Chromatex, Inc., 718 F. Supp. 413 (M.D. Pa. 1989), plaintiffs brought a private cost recovery action under CERCLA against various responsible parties. See *infra* text accompanying notes 258-64 for a discussion of private cost recovery actions. Plaintiff sought to recover, as an item of response costs, for "loss of use of their wells." 718 F. Supp. at 418. (The wells had allegedly been contaminated as a result of a release from the site for which the defendants were responsible parties.) The court dismissed this claim as an improper effort by private individuals to recover natural resource damages. The court stated that "[u]nder CERCLA, . . . actions for injury, destruction, or loss of a natural resource may be brought only by the federal government or a state." *Id.* at 419.

Unlike CERCLA, HSCA clearly provides that a municipality (in addition to DER) may bring an action for natural resource damages. A municipality may seek damages only for natural resources "belonging to, managed by, held in trust by, appertaining to or otherwise controlled by . . . a political subdivision." To what extent is groundwater that is within the boundaries of a municipality a natural resource of the municipality? In *Lutz*, the court stated that "[i]t is obvious that the supply of drinking water in Pennsylvania *is managed and controlled by the state*" (emphasis supplied). *Id.*

256. Such an assumption is dependent upon whether, in a particular case, it can be said that certain natural resources are controlled by a municipality.

257. As discussed *supra* at text accompanying notes 192-200, there is also

tion of natural resource damages in a proceeding that was conducted without notice to responsible persons or in a proceeding in which responsible persons were not allowed to participate, there is at the very least a question whether the municipality's determination could, consistent with constitutional due process considerations, be given any effect in a subsequent judicial proceeding[258] to collect such damages.

As stated at the outset of this part, the HSCA provisions authorizing municipalities to seek response costs, injunctive relief to abate a nuisance and natural resource damages have the potential to disrupt the development of a consistent enforcement policy by DER. It is unclear whether municipalities that are unhappy with DER's enforcement decisions can simply go to court and seek response costs, injunctive relief, and natural resource damages. If courts freely entertain such actions, especially actions for injunctive relief, responsible persons will be discouraged from entering into negotiations with DER for fear that such negotiations, and any settlements produced by such negotiations, might have no effect in an action brought by an "affected municipality."

IV. CITIZEN SUITS AND PRIVATE RIGHTS OF ACTION

The primary function of both CERCLA and HSCA is to set up a legal framework for government-financed or government-induced cleanups of contaminated sites. Neither statute expressly creates a private right of action for individuals whose personal or economic interests are affected by a release of hazardous substances from a contaminated site. In sometimes differing ways, however, both statutes refer to the recovery of response costs by private individuals, recognize the rights of individuals under preexisting law, and authorize citizen suits. It is to these topics that we now turn.

A. PRIVATE COST RECOVERY ACTIONS

Both CERCLA and HSCA impose upon responsible persons liability for "other . . . costs of response incurred by any other person [i.e., any person other than a government entity]."[259] Although CERCLA section 107(a)(4)(B) clearly imposes liability

uncertainty about the procedures that DER is to follow when DER makes an assessment of natural resource damages.

258. Under section 507(a), a municipality's action to collect natural resource damages can be brought only in "a court of competent jurisdiction."

259. HSCA § 702(a)(3); CERCLA § 107(a)(4)(B).

for such costs, there was initially a question of whether CERCLA authorized a private right of action in which an individual could recover his response costs in federal court. The federal courts have consistently held that CERCLA does authorize such a private right of action.[260]

HSCA does not expressly create a private right of action in which individuals may recover their response costs. HSCA section 702(a)(3) does provide that responsible persons are liable for response costs "incurred by any other person." No provision of HSCA, however, creates a private right of action in which such "other person" may recover his response costs. Perhaps such a private right of action should be implied, as it was under CERCLA. There are, however, provisions of HSCA which do expressly provide rights of action; for example, section 507(a) provides, among other things, that a municipality may seek response costs "in an action in equity brought before a court of competent jurisdiction." There is no similar provision with respect to a private individual's claim for response costs. The express provision of a right of action for municipal response costs—contrasted with the absence of a similar provision for an individual's response costs—could lead to the conclusion that the General Assembly did not intend that there should be a private right of action for an individual's response costs and that therefore a private right of action may not properly be implied.

Though the preceding analysis has some force, the fact remains that section 702(a)(3) does impose liability upon responsible persons for response costs incurred "by any other person." This liability provision would have no practical impact unless such "other person" could bring an action to recover such costs.[261] Therefore, it is highly likely that Pennsylvania courts, like the federal courts, will conclude that an individual has a right of action to recover his response costs.

If the Pennsylvania courts do conclude that an individual does have a private right of action under HSCA to recover his

260. *See, e.g.*, City of Philadelphia v. Stepan Chem., 544 F. Supp. 1135 (E.D. Pa. 1982); Bulk Distribution Centers, Inc. v. Monsanto Co., 589 F.Supp. 1437 (S.D. Fla. 1984).

261. It is perhaps theoretically possible to argue that, though the General Assembly imposed liability upon responsible persons for response costs incurred "by any other person," the General Assembly intended that such response costs would be recoverable not in a private right of action by such other person but in a government-initiated action in which the government entity (e.g., DER) would recover, in its role of *parens patriae*, the response costs of private individuals.

response costs, it is still necessary to determine the nature of the response costs that such a private individual may recover. CERCLA section 107(a)(4)(B) limits a responsible person's liability to "any other *necessary* costs of response incurred by any other person *consistent with the national contingency plan*" (emphasis added). The language of HSCA is broader; section 702(a)(3) imposes liability upon a responsible person for "[o]ther *reasonable and necessary or appropriate costs of response incurred by any other person*" (emphasis added). It is clear that the language of HSCA is broader in two major respects. First, there is no requirement that an individual's response costs be consistent with a somewhat concrete standard—the national contingency plan.[262] Second, an individual is not limited to recovery of "necessary" response costs; an individual may recover "reasonable and appropriate" response costs. Until such time as DER seeks to limit the broad language of section 702(a)(3) through rulemaking, the courts will have considerable leeway in determining whether a response cost is "reasonable and necessary or appropriate."

Assuming a private right of action, an individual is still limited to the recovery of "costs of response." There has been considerable litigation in the federal courts concerning the nature of those matters that constitute "costs of response" that a private individual may recover under CERCLA. Perhaps the most litigated question is whether medical monitoring (or medical surveillance) costs are "costs of response" that are recoverable under CERCLA. The federal courts have split on this issue, though most courts have concluded that such costs are not recoverable "costs of response."[263] The relevant statutory language of HSCA, however, differs from the relevant statutory language of CERCLA, and it is possible that Pennsylvania courts may conclude that medical monitoring costs are recoverable private "costs of response" under HSCA.[264]

If HSCA is construed to authorize a private action for recovery of response costs, it is arguable that such private actions are limited by section 1301(a) which provides that,

262. See *supra* note 105 and accompanying text for an explanation of the national contingency plan.

263. *See, e.g.*, Lutz v. Chromatex, Inc., 718 F. Supp. 413 (M.D. Pa. 1989); Coburn v. Sun Chemical Corp., 19 Env't L. Rep. 20,256 (E.D. Pa. 1988).

264. Perhaps the most significant difference between CERCLA and HSCA is that HSCA section 103 defines "response" to include "[a]ctions at or near the location of the release, such as . . . health assessments." Private individuals seeking to recover medical monitoring costs as "costs of response" will undoubtedly argue that such costs are recoverable "health assessment" costs.

"[n]otwithstanding the provisions of . . . section 507, an identified and responsible owner or operator of a site with a release or threatened release . . . shall not be subject to . . . *the cost recovery provisions of this act*" (emphasis added) until DER has instituted enforcement actions under other environmental laws. We have seen that this provision limits the authority *of DER* to bring a cost recovery action.[265] But does it limit the bringing of a *private individual's* cost recovery action? It would seem that such an action would arise under "the cost recovery provisions of this act" although, as we have seen, the purpose of section 1301(a) was to limit DER-initiated superfund expenditures and cost recovery actions.

B. PRIVATE DAMAGE ACTIONS

Neither CERCLA nor HSCA creates a private right of action for individuals to recover for personal injuries or economic losses incurred as a result of a release of a hazardous substance.[266] At most, both statutes allow private individuals to recover their "costs of response." Neither statute, however, precludes (or preempts) a private right of action for damages under other law. HSCA section 1107 is a broad "savings clause" which provides, among other things, that "[n]othing contained in this act shall abridge or alter rights of action or remedies at law or in equity." Thus, nothing in HSCA can be construed as altering or abolishing private rights of action under common law theories, such as nuisance and negligence.[267]

C. CITIZEN SUITS

Both CERCLA and HSCA contain citizen suit provisions, which differ significantly. CERCLA section 310 authorizes two types of citizen suits: (1) an action against "any person . . . who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter"; and, (2) an action against an officer of the United States

265. See *supra* notes 237-45 and accompanying text for a discussion of the extent to which section 1301(a) and section (b) limit DER enforcement actions under HSCA.

266. A number of federal courts have expressly held that private individuals cannot recover damages for personal injuries or economic losses under CERCLA. *See, e.g.*, Artesian Water Co. v. Gov't. of New Castle County, 851 F.2d 643, 648 (3d Cir. 1988).

267. Pennsylvania federal court decisions have discussed rights of recovery under state law. *See* Lutz v. Chromatex, Inc., 718 F. Supp. 413 (M.D. Pa. 1989); Merry v. Westinghouse Electric Corp., 684 F. Supp. 847 (M.D. Pa. 1988).

in which it is alleged that the officer has failed to perform a nondiscretionary duty. HSCA section 1115(a) authorizes a citizen suit "against any person to prevent or abate a violation of this act or of any order, regulation, standard or approval issued under this act."

The second type of citizen suit authorized by CERCLA is analogous to a mandamus action. Though HSCA's citizen suit provision (section 1115) does not authorize a citizen suit against a state official for failure to perform a nondiscretionary duty, HSCA section 502(f) does preserve the "inherent right" of "any interested or aggrieved person . . . to bring an action in mandamus to correct department actions . . . ." Thus, HSCA, in preserving a private person's right to bring a mandamus action against DER, provides the functional equivalent of the second type of citizen suit authorized by CERCLA section 310.

The nature of the citizen suit expressly authorized by HSCA section 1115(a), however, differs significantly from the first type of citizen suit authorized by CERCLA section 310. The CERCLA provision authorizes a citizen's action only when the defendant "is alleged to be in violation of any *standard, regulation, condition, requirement, or order*" (emphasis added). In contrast, HSCA section 1115(a) authorizes a citizen's action "to prevent or abate a *violation of this act*" (emphasis added) as well as a violation of "any order, regulation, standard or approval" issued under HSCA. The key question is what constitutes "a violation of this act" which would trigger the right to bring a citizen suit to abate the "violation."

Though the term "violation" is not defined in HSCA, it is at least arguable that, since liability under the Act is triggered by a "release," the "release" itself is a "violation." If "violation" is so defined, section 1115(a) would authorize a citizen to go directly to court with an action to abate a release. So construed, section 1115(a) would allow a citizen to circumvent DER, the entity with primary enforcement authority under the Act, and ask a court to "prevent or abate" a release by ordering responsible parties to clean up a contaminated site. Such suits would enmesh the courts in technical and scientific complexities well beyond their expertise—for example, courts would be called upon to determine the source of the contamination and to formulate and oversee a plan for remediation.[268]

268. As discussed *supra* in text accompanying notes 250-53, courts will be

To be sure, HSCA section 1115(b) is quite clear in providing that a citizen suit may not be commenced until sixty days after the potential plaintiff has given notice to DER and that a citizen suit may not be commenced when DER "has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a state to require compliance with the statute, permit, standard, regulation, condition, requirement, prohibition or order." But this language provides no barrier to a citizen suit if the citizen-plaintiff gives the required sixty-day notice and, in response to the notice, DER decides to take no action. Indeed, DER might, in response to a sixty-day notice from a citizen, decide to investigate the site, identify responsible parties, and initiate negotiations with such parties.[269] All of this could very well take longer than 60 days. Section 1115(a), however, suggests that a citizen, unhappy with DER's delay in not initiating "diligent prosecution" within sixty days, could go directly to court and ask the court to abate the release.

Though it seems that a citizen may, under section 1115(a), bring a court action seeking to abate a release, it is far from clear what a court should do when such an action is brought. It is likely that the defendants in such an action will ask the court to stay proceedings, at least until DER has made a final decision regarding the site. Indeed, since section 1115(c) provides that DER has a right to intervene in a citizen action, it can be expected that DER will frequently (if not inevitably) intervene, if only to request that the court stay proceedings until it has fully evaluated the site. A request for a stay, whether made by the responsible party defendants or by DER as intervenor, might properly be grounded upon the doctrine of "primary jurisdiction."[270] Courts should readily grant such requests for a stay in order to allow DER, as the entity with primary responsibility for enforcement under HSCA, to work out consistent standards for enforcement. If the courts do not defer to DER, the consequence will be lengthy and complex court proceedings that produce varying and inconsistent orders of abatement.

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faced with similar problems in municipal enforcement actions under section 1103(b).

269. Indeed, it is at least arguable that HSCA section 708(a) imposes a duty upon DER to pursue a negotiated settlement before proceeding to enforcement. See *supra* text accompanying notes 217-20 for a discussion of section 708(a).

270. See *supra* note 252 for a discussion of the Pennsylvania case law of "primary jurisdiction."

V. CONCLUSION

As we have demonstrated throughout this article, HSCA is a very poorly drafted statute. It contains much needless, and apparently unintended, ambiguity. As a result, much of the initial litigation under HSCA will require the courts to resolve basic questions that should have been clearly addressed in the Act. To give but two examples: (1) How is a potential "innocent landowner" to "demonstrate to the department" that it meets the seven requirements set forth in section 701(b)(1)?; and, (2) What is the extent to which sections 1301(a) and (b) preclude enforcement actions under HSCA until DER has instituted enforcement actions under "other applicable environmental laws"? These are not issues on the periphery of the statute; they are at its heart.

When HSCA does speak clearly, it contains provisions that are distinctly and significantly different from analogous provisions in CERCLA. These differences involve basic questions relating to liability, procedures for enforcement, procedures and conditions of settlement, and the enforcement rights of municipalities and citizens. Environmental attorneys who have mastered CERCLA cannot assume that HSCA simply extends the law of CERCLA to sites that do not find their way on to the National Priorities List.

However, it is often unclear how the differences between CERCLA and HSCA should affect the counselling of clients. For example, to the extent that the liability provisions of HSCA are more or less expansive than the liability provisions of CERCLA, it is not clear how this should affect the conduct of those who are seeking to avoid liability under both acts. To be more specific, it may provide some theoretical comfort to potential mortgagees to know that HSCA provides protection against liability in the event that the mortgagee obtains title through foreclosure, but there is no such protection under CERCLA. Further, when the lending institution is contemplating the acquisition of a mortgage it does not, and cannot, know whether the mortgaged site will ever experience a release and, if it does, whether cleanup costs will be sought under CERCLA or under HSCA. Thus, the protection accorded to foreclosing mortgagees by HSCA is of little practical significance when a lending institution is deciding whether to take a mortgage.

Nevertheless, the differences between CERCLA and HSCA are highly significant once it is clear that the governmental response to a release will be under HSCA and not CERCLA. At this

point, as we have sought to demonstrate, environmental attorneys must be aware that the liability, enforcement, and settlement provisions of the two acts are very different. And yet, because of the ambiguities in HSCA, it will take years before the extent of the differences is fully understood.