

---

## Searching for Methods of Conducting Efficient CERCLA Litigation: The Argument in Support of Attorneys' Fee Awards in Section 107 Private Cost Recovery Litigation

Bryan E. Keyt

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

---

### Recommended Citation

Bryan E. Keyt, *Searching for Methods of Conducting Efficient CERCLA Litigation: The Argument in Support of Attorneys' Fee Awards in Section 107 Private Cost Recovery Litigation*, 42 DePaul L. Rev. 1029 (1993)  
Available at: <https://via.library.depaul.edu/law-review/vol42/iss3/4>

This Comments is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact [digitalservices@depaul.edu](mailto:digitalservices@depaul.edu).

# SEARCHING FOR METHODS OF CONDUCTING EFFICIENT CERCLA LITIGATION: THE ARGUMENT IN SUPPORT OF ATTORNEYS' FEE AWARDS IN SECTION 107 PRIVATE COST RECOVERY LITIGATION

## INTRODUCTION

In 1980, the Love Canal waste spill shocked the nation into recognizing that hazardous waste was a major threat to the environment.<sup>1</sup> Responding to this threat, Congress quickly passed the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).<sup>2</sup> As suggested by the title of the statute, CERCLA is about liability: who should pay and how much they should pay to clean up hazardous waste sites.<sup>3</sup> Regarding who should pay, CERCLA's purpose is "to facilitate the prompt cleanup of hazardous dumpsites by providing a means of financing both governmental and *private* responses and by placing the *ultimate financial burden* upon those responsible for the danger."<sup>4</sup> Additionally, CERCLA encour-

---

1. Debra K. Rubin & Steven W. Setzer, *The Superfund Decade: Triumphs and Troubles*, ENGINEERING NEWS REC., Nov. 26, 1990, at 38; see also Kevin F. McCarthy, *Foreword to JAN PAUL ACTON, UNDERSTANDING SUPERFUND, A PROGRESS REPORT* at iii (1989) (discussing the increased public awareness of the hazardous waste problem following the Love Canal crisis); Mary M. Fabric, *Pursuing a Cause of Action in Hazardous Waste Pollution Cases*, 29 BUFF. L. REV. 533 (1980) (tracing the history of hazardous waste disposal at the Love Canal landfill). Jan Paul Acton prepared *Understanding Superfund, A Progress Report* in 1989, examining the financial burdens of CERCLA on the Environmental Protection Agency (EPA).

2. 42 U.S.C. §§ 9601-9675 (1988).

3. Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (stating that the purpose behind CERCLA is "to provide for liability, compensation, cleanup and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites"); *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1500 (6th Cir. 1989) (stating that CERCLA was enacted "to initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites"), *cert. denied*, 494 U.S. 1057 (1990); see also *Idaho v. Hanna Mining Co.*, 882 F.2d 392, 394-95 (9th Cir. 1989) (describing the purposes of CERCLA).

4. *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1142-43 (E.D. Pa. 1982) (emphasis added); see John J. Lyons, *Deep Pockets and CERCLA: Should Superfund Liability Be Abolished?*, 6 STAN. ENVTL. L.J. 271, 275 (1986) (discussing the specific industries targeted by Congress when it passed CERCLA); Patricia L. Quentel, Comment, *The Liability of Financial Institutions for Hazardous Waste Cleanup Costs Under CERCLA*, 1988 WIS. L. REV. 139, 142 (discussing the EPA's ability to compel payment from responsible parties); see also S. REP. NO. 848, 96th Cong., 2d Sess. 33 (1980); 126 CONG. REC. 30,930, 30,932 (1980) (statement of Sen. Randolph); 126 CONG. REC. 31,950 (1980) (statement of Rep. Florio).

ages voluntary settlements among responsible parties,<sup>6</sup> advocates appropriate and timely cooperation by potentially responsible parties (PRPs),<sup>6</sup> and provides for efficient, cost-effective means of cleanup.<sup>7</sup>

Attaining these stated goals is particularly difficult because CERCLA is a unique statute in American law; it is primarily designed to right the resulting wrongs of past activities which were, at the time, proper and legal.<sup>8</sup> Because of the recently realized danger inherent in hazardous waste and the threat it poses to the environment, Congress attempted to design a system of cleanup funding and enforcement to timely meet the statutory goals. For this system to work, both government and private resources must be employed efficiently.

Despite Congress's laudable goals when enacting CERCLA, the

Cases recognizing the policy of imposing liability on responsible parties include: *Vermont v. Staco, Inc.*, 684 F. Supp. 822, 831 (D. Vt. 1988); *United States v. Mottolo*, 605 F. Supp. 898, 902 (D.N.H. 1985); *Pinole Point Properties v. Bethlehem Steel Corp.*, 596 F. Supp. 283, 287 (N.D. Cal. 1984).

5. ACTON, *supra* note 1, at 17; *see infra* note 27 (citing articles that discuss the importance of voluntary cleanup actions).

6. ACTON, *supra* note 1, at 17. Potentially Responsible Parties (PRPs) is a term used in CERCLA to identify any party suspected of being liable for response costs. Under CERCLA, the following parties may be held liable under § 107:

- (1) the owner and operator of a vessel or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
- (4) any person who accepts or accepted any 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 which causes the incurrence or response costs, of a hazardous substance . . . .

42 U.S.C. § 9607(a). This section of CERCLA has been broadly interpreted to impose liability on virtually any party remotely connected with the waste. *See infra* note 20 and accompanying text (citing articles that focus on liability issues); *see also infra* note 64 (detailing how PRPs are identified).

7. ACTON, *supra* note 1, at 18.

8. J. GORDON ARBUCKLE ET AL., *ENVIRONMENTAL LAW HANDBOOK* 471, 495 (1991). CERCLA also contains provisions requiring the filing of reports following certain environmental releases, but the focus of the statute is on old waste sites. *Id.* at 471. CERCLA is more expansive than other environmental statutes because it:

covers *all* environmental media: air, surface water, groundwater, and soil. Moreover, unlike the specific media statutes, CERCLA can apply directly to any type of industrial, commercial, or even non-commercial facility regardless of whether there are specific regulations affecting that type of facility and regardless of how that facility might impact on the environment (i.e., through stacks, pipes, impoundments, etc.).

*Id.* at 472.

original version of the statute was riddled with interpretation problems and subjected to harsh criticism.<sup>9</sup> These difficulties resulted from the haste in which it was written and the ever-changing science which interprets an environmental risk or hazard.<sup>10</sup> Finally, after six years of sifting through the hazardous waste crisis under the 1980 version of the statute, Congress recognized that CERCLA was not working efficiently and amended the statute by the Superfund Amendments and Reauthorization Acts of 1986 (SARA).<sup>11</sup> These amendments created additional incentives for achieving CERCLA's goal of prompt and comprehensive cleanup.<sup>12</sup>

Even though SARA attempted to clarify many of the interpretation problems present in CERCLA's original text, the statute remains an ambiguous, litigation-intensive statute.<sup>13</sup> As stated by one court, "CERCLA is not a paradigm of clarity or precision. It has been criticized frequently for unartful drafting and numerous ambiguities. . . . Problems of interpretation have arisen from the Act's use of inadequately defined terms, a difficulty particularly apparent in the response costs area."<sup>14</sup> This lack of precision has increased

9. See generally ACTON, *supra* note 1, at 1-2 (discussing how broad liability under CERCLA has contributed to increased litigation); William N. Hedeman et al., *Superfund Transaction Costs: A Critical Perspective on the Superfund Liability Scheme*, [1991] 21 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,413 (analyzing CERCLA and the liability it imposes); Jeffrey H. Howard & Linda E. Benfeld, *CERCLA Liability for Hazardous Waste "Generators": How Far Does Liability Extend?*, 9 *TEMP. ENVTL. L. & TECH. J.* 33 (1990) (discussing the expanding definition of "generators" and the corresponding growth in liability); Kyle E. McSlarrow et al., *A Decade of Superfund Litigation: CERCLA Case Law from 1981-1991*, [1991] 21 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,367 (discussing the development of CERCLA case law).

10. See *United States v. Mottolo*, 605 F. Supp. 898, 902-05 (D.N.H. 1985); Frank D. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980*, 8 *COLUM. J. ENVTL. L.* 1, 2 (1982); Joseph A. Sevac, Note, *Passing the Big Bucks: Contractual Transfers of Liability Between Potentially Responsible Parties Under CERCLA*, 75 *MINN. L. REV.* 1571, 1572-73 (1991).

11. Pub. L. 99-999, 100 Stat. 1613 (1986). For additional suggestions on amending the statute, see ENVIRONMENTAL LAW INST., *TOWARD A MORE EFFECTIVE SUPERFUND PROGRAM: A REPORT BY THE ENVIRONMENTAL LAW INSTITUTE* 2 (1989); William W. Balcke, *Superfund Settlements: The Failed Promise of the 1986 Amendments*, 74 *VA. L. REV.* 123 (1988), which examine the failure of CERCLA to encourage settlements of Superfund sites.

12. *Bethlehem Steel Corp. v. Bush*, 918 F.2d 1323, 1324 (7th Cir. 1990).

13. Hedeman et al., *supra* note 9, at 10,424; Lyons, *supra* note 4, at 312-18.

14. *Artesian Water Co. v. New Castle County*, 851 F.2d 643, 648 (3d Cir. 1988). "Response costs" is a term derived from "necessary costs of response." 42 U.S.C. § 9607(a)(4). Section 107(a)(4) authorizes private parties to recover "necessary costs of response" from other responsible parties. *Id.* Courts generally interpret "response costs" broadly to include even indirect costs, at least in cases involving the EPA. This is done so that the responsible parties bear the full costs of recovery. See, e.g., *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1502-04 (6th Cir. 1989) (allowing the EPA to recover its general administrative, payroll, and travel costs rather than costs specifically related to an exact site), *cert. denied*, 494 U.S. 1057 (1990). As discussed in more

both the volume and the duration of litigation when the federal government, state governments, municipal governments, or private parties attempt to utilize the provisions of the statute.<sup>15</sup>

More importantly, the statute's ambiguities have also increased the difficulty and expense of cleaning up hazardous waste sites.<sup>16</sup> An example of such ambiguities can be found in section 113 of CERCLA.<sup>17</sup> This section, in conjunction with section 107, deals with the apportionment of costs between parties deemed responsible for the cleanup of a hazardous waste site.<sup>18</sup> Although not specifically stated in the statute, CERCLA imposes strict, retroactive<sup>19</sup> liability for the cost of cleanup on a broad range of parties, many of whom may only be remotely connected with the waste.<sup>20</sup> In addition, joint and

---

detail, *infra* notes 96-101 and accompanying text, federal courts are divided on whether recovery of "necessary costs of response" authorizes private parties to recover attorneys' fees.

15. See, e.g., *Artesian Water*, 851 F.2d 643.

16. See JAN PAUL ACTON ET AL., SUPERFUND AND TRANSACTION COSTS (1992) (analyzing the cost of CERCLA incurred by large industrial firms and insurance companies). As of mid-1991, 1,236 sites were on the National Priority List (NPL). *Id.* at 2; Rubin & Setzer, *supra* note 1, at 41. Sites listed on the NPL are considered by the EPA to be the most hazardous to human health and the environment. ACTON ET AL., *supra*, at 2. In addition to the NPL sites, however, there are approximately 14,000 other sites on the EPA national inventory that may be added to the Superfund program. *Id.*

Section 105 of CERCLA directs the EPA to maintain a list of all hazardous waste sites. The purpose of maintaining the NPL is "to provide an expeditious and relatively inexpensive initial determination of which sites may warrant further action under CERCLA." *Eagle-Pitcher Indus., Inc. v. United States EPA*, 759 F.2d 905, 909 (D.C. Cir. 1985); see also 48 Fed. Reg. 40,658, 40,659 (1983) (discussing the maintenance of the NPL); Ragna Henrichs, *Superfund's NPL: The Listing Process*, 63 ST. JOHN'S L. REV. 717 (1989) (analyzing the method used by the EPA to add sites to the NPL). This list of sites is expected to increase to 2,100 by the year 2000. Hedeman et al., *supra* note 9, at 10,423.

17. 42 U.S.C. § 9613.

18. *Id.*

19. *United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989); ARBUCKLE ET AL., *supra* note 8, at 496-97.

20. ARBUCKLE ET AL., *supra* note 8, at 496; see, e.g., *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1572 (5th Cir. 1988) (imposing strict liability on past and present landowners); *Amland Properties Corp. v. Aluminum Co. of Am.*, 711 F. Supp. 784, 803 (D.N.J. 1989) (imposing strict liability "between successive landowners for the undertaking of an abnormally dangerous activity"); *Kelley v. Thomas Solvent Co.*, 714 F. Supp. 1439, 1448 (W.D. Mich. 1989) (applying joint and several liability in CERCLA actions such that if two or more defendants are responsible for indivisible injury, both are fully liable); *United States v. Hooker Chem. & Plastics Corp.*, 680 F. Supp. 546, 548 (W.D.N.Y. 1988) (imposing liability for waste disposal based on a contractual relationship with the party responsible for release).

Courts tend to interpret the liability sections of the statute broadly. For discussions of these provisions, see Howard & Benfeild, *supra* note 9; Owen T. Smith, *The Expansive Scope of Liable Parties Under CERCLA*, 63 ST. JOHN'S L. REV. 821 (1989); John A. Fielding III, Note, *Is a Contract to Formulate a Useful Product an "Arrangement for Disposal" Under CERCLA?* — *United States and Iowa v. Aceto Agric. Chem. Co., et al.*, 872 F.2d 1373 (8th Cir. 1989), 10 TEMP. ENVTL. L. & TECH. J. 125 (1991). An example of such an interpretation is the broad

several liability may be imposed, thus holding a party liable for more than its fair portion of the cleanup costs.<sup>21</sup> Moreover, the statute provides only limited defenses to liability.<sup>22</sup> Litigation over these ambiguous issues causes greater uncertainty and expense for entities contemplating or participating in hazardous waste cleanup.

Overall, the resolution of such controversial issues contributes to the enormous amount of litigation over the division of cleanup costs. This situation is complicated by the fact that in a typical situation involving CERCLA, private parties frequently must litigate not only with the Environmental Protection Agency (EPA), but also with their insurers, as well as with other PRPs.<sup>23</sup> The end result is increased legal battles and costs.

Based on the past decade of CERCLA litigation, one study estimates that private parties spend thirty to sixty percent of hazardous waste cleanup funds on legal expenses.<sup>24</sup> These figures indicate that

interpretation of "owner and operator" imposed by courts, as further discussed *infra* note 39, and the expansive definition of "arranged for disposal," discussed *infra* note 38. For a discussion of the broad discretion granted to the courts in applying joint and several liability, see *infra* note 77.

21. *United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989); *ACTON*, *supra* note 1, at 6-7; *ARBUCKLE ET AL.*, *supra* note 8, at 497.

22. CERCLA provides for the following defenses:

- (1) an act of God;
- (2) an act of war;
- (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant 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; or
- (4) any combination of the foregoing paragraphs.

42 U.S.C. § 9607(b).

Courts interpret the statutory defenses very narrowly. See, e.g., *O'Neil v. Picillo*, 682 F. Supp. 706 (D.R.I. 1988) (rejecting the due diligence defense), *cert. denied*, 493 U.S. 1071 (1990); Diane H. Nowak, *CERCLA's Innocent Landowner Defense: The Rising Standard of Environmental Due Diligence for Real Estate Transactions*, 38 *BUFF. L. REV.* 827 (1990) (explaining that the innocent landowners defense is interpreted narrowly to require due diligence on the part of the purchaser); J.B. Ruhl, *Third Party Defense to Hazardous Waste Liability: Narrowing the Contractual Relationship Exception*, 2 *S. TEX. L.J.* 291 (1988) (explaining that no courts have found the third-party defense under § 107(b)(3) to be applicable).

23. Nowak, *supra* note 22, at 830-31; Ruhl, *supra* note 22, at 292-94.

24. Hedeman et al., *supra* note 9, at 10,423. Currently the average cleanup cost per site (for the sites listed on the NPL, which are the largest and most dangerous sites) is \$25 million. Don R. Clay, *It's Time to Consider Voluntary Cleanups*, *ENVTL. F.*, Nov./Dec., 1992, at 28. The EPA estimates that \$30 billion will be spent to correct environmental damage, with the cost being split

an estimated \$4.5 to \$9 billion in legal fees will be spent over the next decade by private parties for litigation costs alone.<sup>25</sup> Additionally, Congress has expressed concern that litigation costs could exceed the total cleanup costs at a specific site.<sup>26</sup> While these figures are attractive to the attorneys who will be collecting fees,<sup>27</sup> they in-

---

evenly between the government and private parties. Hedeman et al., *supra* note 9, at 10,423. James Strock, the EPA's former assistant administrator for enforcement, estimates that ten percent of all government costs are expended on litigation and enforcement efforts. *Id.* Ten percent of the government's expected expenses equals approximately \$1.5 billion in litigation costs.

25. This estimate is based on the thirty to sixty percent of the \$15 million that will be spent by private parties on response actions. *See supra* note 24 and accompanying text (providing the figures on which the estimate is based). Not all of these costs are pure litigation costs. In this context, litigation costs may include presuit negotiation, case preparation, and general counseling expenses. Some courts have even made distinctions between various types of attorneys' fees, some of which are recoverable.

The court, in *BCW Assocs., Ltd. v. Occidental Chem. Corp.*, No. 86-5947, 1988 U.S. Dist. LEXIS 11275 (E.D. Pa. Sept. 29, 1988), awarded fees to the plaintiff for responding to the threatened release of hazardous waste and complying with CERCLA cost-recovery requirements but did not award the actual litigation expenses incurred when suing to recover response costs. *Id.* at 60-61. This case is discussed *infra* notes 155-60 and accompanying text.

26. S. REP. NO. 11, 99th Cong., 1st Sess. 54 (1985) (debating the passage of SARA). An example of the problem is illustrated by *United States v. Conservation Chem. Co.*, 628 F. Supp. 391 (W.D. Mo. 1986), where the court discussed the economic problem. In *Conservation Chemical* the costs

anticipated for cleanup were estimated at \$6 million, and attorney fees for private party defendants for pre-trial activities ranged from \$5-11 million. Similar amounts were expended by the government, depleting the government's technical and legal resources. Estimates of litigation/transaction costs prepared by Putnam, Hayes, & Bartlett, Inc., indicate that transaction costs consume 55% of the cleanup expenditures. These costs are high due in part to increasing involvement of insurance companies for the defendants.

Kimberly A. Leuc, *Private Party Settlements in the Superfund Amendment and Reauthorization Act of 1986*, 8 STAN. ENVTL. L.J. 131, 135 n.21 (1989).

The basic structure of the statute has resulted in increased litigation costs. Litigation must be initiated for the EPA to enforce the statute, for a private party to collect cleanup costs from an insurer, or for a private party to recover cleanup costs from another private party.

27. Former EPA Administrator William K. Reilly acknowledged the problem, stating: "One of the sad truths about the program is that so much of the money has gone to people in the three-piece suits, not moon suits. That's something we've begun to change." Rubin & Setzer, *supra* note 1, at 44. Don Clay, EPA Assistant Administrator for Solid Waste and Energy Response and Program Manager for Hazardous Waste Management Cleanup, argues that because of the government's focus on the most dangerous sites and the EPA's limited financial resources, finding methods to encourage voluntary cleanups by private parties is important to CERCLA's future. Clay, *supra* note 24, at 28; *see also* Jim Florio, *Voluntary Cleanups Can Achieve Results*, ENVTL. F., Nov./Dec., 1992, at 29 (suggesting that the needs of business require an increased number of voluntary cleanups in the 1990s); Patricia Williams, *The Never-Ending Cleanup Story*, ENVTL. F., Nov./Dec., 1992, at 32 (arguing that voluntary cleanups are needed to attain the Superfund's statutory goals). Some argue that the key to increasing the number of voluntary cleanups, however, is providing incentives for private parties to become involved in the process. Michael J. Murphy & Robert J. Mason, *Incentives Key to Private-Party Action*, ENVTL. F., Nov./Dec., 1992, at 30, 30-31.

dicating that substantial resources will be wasted on items that fail to directly reduce hazardous waste.<sup>28</sup>

Attorneys' fees are significant because they often constitute a major part of the transaction costs generated by CERCLA. Transaction costs also include the costs of negotiation, environmental consultants, experts, identifying all PRPs connected with the waste site, and preparing for battle, be it by negotiation and/or litigation with the EPA or other PRPs.<sup>29</sup> Generally, larger transaction costs correspond with extended litigation and response time, resulting in even larger transaction costs.<sup>30</sup> The protracted time and increased expense of CERCLA results in the waste of financial resources and the nonfulfillment of CERCLA's goals.

Given the amount of money that will be spent on attorneys' fees and transaction costs in the near future, the focus of this Comment is whether attorneys' fees, typically included in transaction costs, should be recoverable as "necessary costs of response" when a private party sues a PRP, and whether shifting these costs provides incentives for parties to settle, thus reducing the total amount of transaction costs expended by private parties.<sup>31</sup> Perhaps more importantly, this Comment examines whether the issue can be resolved

28. Hedeman et al., *supra* note 9, at 10,414.

29. *Id.*; ACTON ET AL., *supra* note 16, at 36-37. One study estimates that of all the money spent by insurers on CERCLA-related litigation, 88% is spent on transaction costs, varying between 80% to 96% for the insurers studied. *Id.* at 26, 28. This study estimates that the entire insurance industry spent \$470 million on inactive hazardous waste site claims in 1989, \$410 million of which went to transaction costs.

The \$410 million spent on transactions could have paid for a substantial amount of hazardous-waste cleanup. Based on EPA's current estimates that the average NPL site costs \$25 million to \$30 million to clean-up, these transaction costs could finance between 13 and 16 entire site cleanups in a given year. Thus, they represent a significant amount of resources that is not going to cleanup.

*Id.* at 31.

30. Hedeman et al., *supra* note 9, at 10,414.

31. Recovery of attorneys' fees has been a significant issue in CERCLA litigation and the focus of many recent articles. See, e.g., Mark Atlas, *From T & E Industries to General Electric v. Litton: Private Party Recovery of Attorneys' Fees Under CERCLA*, [1991] 21 *Env't. L. Rep. (Env't. L. Inst.)* 10,206; K.K. DuVivier & Carolyn L. Buchholz, *Attorney Fees as Superfund Response Costs*, NAT. RESOURCES & ENV'T, Summer 1991, at 34; J. Christopher Jordan, *Recovery of Attorneys' Fees in Private Contribution Actions Pursuant to Section 107(a)(4)(B)*, 10 *REV. LITIG.* 823 (1991); Christopher D. Knopf, *Breaking New Ground: Recovery of Transaction Costs in Private CERCLA Cost-Recovery Actions*, 28 *WILLAMETTE L. REV.* 495 (1992); Michael W. Steinberg, *Private Cost Recovery Litigation Under Superfund: Recent Developments*, 92 *CHEMICAL WASTE LITIG. REP.* 56, 67-68 (1991); Kanad S. Virk, *General Electric v. Litton Industrial Automation Systems, Inc.: Are Attorney Fees Recoverable in CERCLA Private Cost Recovery Actions?*, 75 *MINN. L. REV.* 1541 (1991); Eric D. Kaplan, Note, *Attorney Fee Recovery Pursuant to CERCLA Section 107(a)(4)(B)*, 42 *WASH. U. J. URB. & CONTEMP. L.* 251 (1992).



to advance the statute's goals identified by Congress. Currently, federal courts are split as to whether CERCLA section 107(a)(4)<sup>32</sup> allows private parties to recover attorneys' fees as necessary costs of response.<sup>33</sup>

This Comment focuses on three issues. First, it reviews the arguments and issues discussed by the courts when deciding whether to award attorneys' fees. Second, this Comment analyzes how the current statutory structure works to frustrate CERCLA's goals. Third, and perhaps most importantly, this Comment probes recognized theories supporting fee shifting, as related to CERCLA's statutory goals, to determine whether attorneys' fees should be recoverable to advance the statute's purposes and goals. This discussion is topical and ripe because the statute will be reviewed by Congress in 1994 when the current authorization ceases.<sup>34</sup> Thus, this Comment is ultimately concerned with how courts should interpret CERCLA and whether the statute should be amended when current authorization ceases.

## I. BACKGROUND

When passing CERCLA in 1980, Congress initially faced the problem of finding a method to fund cleanup actions. Because much of the hazardous waste in the United States was deposited many years ago, tracing liability to the responsible parties is difficult.<sup>35</sup> As a result, Congress developed a scheme to pay for cleanup or response costs<sup>36</sup> by imposing liability on the following categories of PRPs: (a) the owner and operator<sup>37</sup> of a facility located on a hazardous waste site; (b) any owner or operator of the original facility which released the hazardous substances; or (c) any party who, di-

---

32. 42 U.S.C. § 9607.

33. See *infra* notes 106-60 and accompanying text (discussing the cases that created the split in authority).

34. Pub. L. No. 101-507, 104 Stat. 1372-73 (Nov. 5, 1990). CERCLA's current authorization runs through December 31, 1994, and the funding authorization for the Superfund extends through December 31, 1995. *Id.*

35. ACTON, *supra* note 1, at 55; Balcke, *supra* note 11, at 124-25.

36. For a complete discussion of response costs, see *infra* notes 80-85 and accompanying text.

37. Courts have expanded the definition of "owner and operator" in an effort to find a revenue source for cleanup actions consistent with legislative intent. John P. Dragani, *Apportioning Liability for the Cleanup of Hazardous Waste Sites Under the Comprehensive Environmental Response, Compensation & Liability Act (CERCLA)*, 1 VILL. ENVTL. L.J. 537, 540 (1990); see also Jill E. Aversa, *Liability of Responsible Parties for Hazardous Waste Cleanup: CERCLA Section 107 Liability After One Decade*, 1 VILL. ENVTL. L.J. 563 (1990) (discussing the gradual expansion of the definition of "owner or operator").

rectly or indirectly, arranged for the disposal<sup>38</sup> or treatment of the waste.<sup>39</sup> Where a PRP initiates a response action consistent with EPA requirements,<sup>40</sup> it can then sue other PRPs for contribution.<sup>41</sup> This structure was originally developed to promote CERCLA's

38. "Arranged for disposal" also has been a hotly contested area of expanding CERCLA liability. Courts have interpreted the statute broadly to cover virtually any party remotely connected with the waste. *See, e.g.*, *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373 (8th Cir. 1989) (holding that the defendants "arranged for" the disposal of hazardous substances under CERCLA by merely contracting for the formulation of pesticides); *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155 (7th Cir. 1988) ("[T]he authority to control the handling and disposal of hazardous substances is 'critical' to the statutory scheme . . ."); James P. Teufel, *Arranging for or Disposing of Liability Under CERCLA*: *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 40 DEPAUL L. REV. 577 (1991) (discussing CERCLA's broad liability, which includes parties who simply "arrange for disposal" of waste but who do not actually dispose of waste themselves); D. Dennis Waldrop, *Waste Not, Want Not: "Arranging for Disposal Under CERCLA Section 107 (a)(3),"* 4 J. ENVTL. L. & LITIG. 143 (1989) (same).

39. 42 U.S.C. § 9607(a). Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section:

- (1) the owner and operator of a vessel or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
- (4) any person who accepts or accepted any 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 which causes the incurrence of response costs, of a hazardous substance, shall be liable for —
  - (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; and
  - (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; and
  - (C) 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; and
  - (D) the costs of any health assessment or health effects study carried out under section 104(i).

*Id.*

40. Response actions must conform with the National Contingency Plan (NCP). *Id.* § 9621. Essentially, the NCP requires the EPA to publish regulations detailing what actions satisfy the cleanup obligation. *See generally* ARBUCKLE ET AL., *supra* note 8, at 481-95 (enumerating the specific types of requirements set by the EPA).

41. Contribution actions are governed by 42 U.S.C. § 9613(f)(1), which allows any party who incurs cleanup costs to "seek contribution from any other person who is liable or potentially liable under [CERCLA § 107(a)], during or following any civil action under [CERCLA § 106] or under [CERCLA § 107(a)]." 42 U.S.C. § 9613(f)(1). As discussed, contribution actions are controlled by equitable principles: "In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." *Id.*

goals of rapid hazardous waste cleanup and assessment of liability on the responsible parties.<sup>42</sup>

### A. Division of Enforcement Power and Liability

CERCLA focuses on the identification of hazardous waste sites that pose a danger of substance release, and then it seeks to terminate any exposure of this waste to the environment. It does so by requiring the federal government or PRPs to initiate a response action.<sup>43</sup> Designed to remedy past hazardous waste<sup>44</sup> disposal problems, CERCLA authorizes the federal government, state governments, Indian tribes, and private parties to clean up hazardous sites and subsequently recover these response costs from the responsible parties.<sup>45</sup> A response action<sup>46</sup> consists of a removal<sup>47</sup> or reme-

42. See *supra* note 3 and accompanying text (discussing CERCLA's goals).

43. H.R. REP. NO. 1016(1), 96th Cong., 2d Sess. 22, reprinted in 1980 U.S.C.C.A.N. 6110, 6125. For the purposes of this Comment, cleanup actions will be referred to as response actions. For a definition of "response action," see *infra* note 46.

44. Section 9601(14) defines "hazardous waste" by reference to other statutes:

The term "hazardous substance" means (A) any substance designated pursuant to section 311 (b)(2)(A) of the Federal Water Pollution Control Act, (B) any element, compound, mixture, solution, or substance design pursuant to section 102 of this Act, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act (but not including any waste the regulation of which under the Solid Waste Disposal Act has been suspended by the Act of Congress), (D) any toxic pollutant listed under section 307(a) of the Federal Water Pollution Control Act, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act, and (F) any immediately hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 7 of the Toxic Substances Control Act. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

42 U.S.C. § 9601(14).

45. *Id.* § 9607(a)(1-4). This distinguishes CERCLA from other environmental statutes, such as the Clean Air Act and Clean Water Act, which are designed to prevent future discharges of pollution. *Cf.* Clean Water Act, 33 U.S.C. § 1365(d) (1988 & Supp. 1992); Clean Air Act, 42 U.S.C. § 7604 (1988).

46. A response action is defined in § 9601(25): "The terms 'respond' or 'response' means [sic] remove, removal, remedy, and remedial action, all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto." 42 U.S.C. § 9601(25).

47. Removal actions are broadly defined in section 101(23):

The terms "remove" or "removal" means [sic] the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of

dial<sup>48</sup> action designed to prevent future exposure of the waste to the environment through proper remediation, including treatment and disposal.

To accomplish these goals, the statute relies upon both government and private parties to conduct investigatory and cleanup actions.<sup>49</sup> As a matter of simplification and for discussion purposes, CERCLA operates at two levels.<sup>50</sup> At level one, the EPA can: (1) either initiate a response action using money from the Superfund<sup>51</sup> (federal funds specifically appropriated for hazardous waste

such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 104(b) of this Act, and any emergency assistance which may be provided under the Disaster Relief Act of 1974.

*Id.* § 9601(23).

48. The second type of cleanup activity is a remedial action that is defined in § 9601(24): The terms "remedy" or "remedial action" means [sic] those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare of the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances [or] *and associated* contaminated materials, recycling or reuse, diversion, destruction, segregation or reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or welfare.

*Id.* § 9601(24).

49. The federal government has cleanup and enforcement power under §§ 104 and 106, while private parties may recover costs under § 107. *Id.* § 9607(a). *See generally* F. Henry Habicht II, *Encouraging Settlements Under Superfund*, NAT. RESOURCES & ENV'T, Fall 1985, at 3-4 (explaining the application of the various sections of the statute to both the public and private sector).

50. For a more specific discussion of the steps involved in identifying, designating, and cleaning up a site, see ACTON, *supra* note 1, at 11-17.

51. 42 U.S.C. § 9604. The Hazardous Substance Superfund, created by 26 U.S.C. § 9507(a) (added by Pub. Law No. 99-499 on Oct. 17, 1986), was reauthorized in 1986. P.L. 99-499, 100 Stat. 1613 (1986). The Superfund is a trust fund available to finance cleanup and remedial actions where the president, through the EPA, determines that an immediate response or remedial action is necessary to protect the public health or welfare or the environment. ACTON, *supra* note 1, at 7-8.

cleanup) and then sue the responsible private parties to recover costs;<sup>52</sup> or (2) seek an administrative order compelling a private party to perform a response action itself.<sup>53</sup> At level two, a private party may execute a response action, either through its own volition or after compulsion by the EPA, and then may sue other PRPs for contribution.<sup>54</sup>

The distinction between these two levels has an impact on the attorneys' fees issue for two reasons. First, at level one, the EPA may specifically recover attorneys' fees whenever it attempts to either recover cleanup costs or compel a party to respond.<sup>55</sup> However, at level two, private parties are not explicitly authorized by statute to recover attorneys' fees when suing for contribution, and, as noted previously, federal courts are split over the proper interpretation of the statute on this issue. Significantly, when a private party sues for contribution, the suit, though enabled by statute, is governed by common law principles — principles which attempt to introduce some notion of fairness or equity into a scheme which otherwise imposes liability regardless of fault.<sup>56</sup> Level two is the point where costs are equitably distributed among the PRPs in proportion to their responsibility.<sup>57</sup>

---

52. 42 U.S.C. § 9607.

53. *Id.* § 9606.

54. *Id.* § 9612(f); see *infra* notes 75-79 and accompanying text (specifying how level two litigation proceeds).

55. 42 U.S.C. § 9606.

56. CERCLA explicitly retains common law principles in § 114, which states: "Nothing in this Act shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State." *Id.* § 9614(a). Section 113 states that when deciding contribution cases, "the court may allocate response costs among liable parties using such *equitable factors* as the court determines are appropriate." *Id.* § 9613(f)(1) (emphasis added). Apportioning costs among PRPs in an equitable manner is difficult because it is difficult to assess the risk associated with a given site or waste type. See Barry Commoner, *The Hazards of Risk Assessment*, 14 COLUM. J. ENVTL. L. 365 (1989) (explaining how risk assessments are used and abused in practice); Bernard D. Goldstein, *Risk Assessment and the Interface Between Science and the Law*, 14 COLUM. J. ENVTL. L. 343 (1989) (reviewing the legal community's use of the risk assessment process designed to utilize scientific information); Mary L. Lyndon, *Risk Assessment, Risk Communication and Legitimacy: An Introduction to the Symposium*, 14 COLUM. J. ENVTL. L. 289 (1989) (discussing qualitative risk assessment methodology and related policy); Vern R. Walker, *Evidentiary Difficulties with Quantitative Risk Assessments*, 14 COLUM. J. ENVTL. L. 469 (1989) (analyzing the evidentiary difficulties arising from the use of government-prepared risk assessment in data for civil liability).

57. Walker, *supra* note 56. Common law principles take effect at level two, thus introducing equitable principles into the legal analysis. 126 CONG. REC. 30,932 (1980). For a discussion of the equitable principles that underlie level two (i.e., contribution claims), see 42 U.S.C. § 9613(f) and Elizabeth S. Mason, *Contribution, Contribution Protection, and Nonsettlor Liability Under CERCLA: Following Laskin's Lead*, 19 B.C. ENVTL. AFF. L. REV. 73, 99-100 (1991).

This two-tier scheme is consistent with the purposes of CERCLA. CERCLA's first objective is to find a source to finance the response action.<sup>58</sup> This is accomplished at level one by imposing joint and several strict liability on the parties identified in section 107.<sup>59</sup> Level two attempts to satisfy the second objective of "placing the ultimate financial burden upon those responsible for the danger"<sup>60</sup> by correcting some of the injustice created by level one. A more thorough description of these levels and objectives is necessary to understand why fee recovery may be appropriate under section 107.

### 1. Level One: Federal Government Actions Under CERCLA

The federal government, through the EPA, may exercise its power under CERCLA in several ways. First, section 104 authorizes the EPA to remedy any hazardous waste problem using funds from the Superfund, and then to sue under sections 106 or 107 to recover response costs from any PRPs.<sup>61</sup> The EPA also has a second option under section 106 to compel a private party to undertake a response action, regardless of fault, for any waste presenting an immediate threat of danger.<sup>62</sup> When the EPA chooses either of these options, it is specifically authorized to recover any attorneys' fees incurred by the agency.<sup>63</sup>

PRPs may be identified in two different ways. First, the EPA may send an information request or section 104(e) letter to all parties identified as possibly connected with the waste site.<sup>64</sup> After compil-

58. *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1142-43 (E.D. Pa. 1982).

59. *See supra* notes 20-22 (describing different types of liability).

60. *Stepan Chem.*, 544 F. Supp. at 1142-43.

61. 42 U.S.C. § 9604 (1988).

62. *Id.* § 9606.

63. *Id.* § 9604(b)(1). "In addition, the President may undertake planning, *legal*, fiscal, economic, engineering, architectural, and other studies or investigations as he may deem necessary or appropriate to plan and direct response actions, *to recover the costs thereof*, and to enforce the provisions of this Act." *Id.* (emphasis added).

64. Under § 104(e), the EPA may require:

any person who stores, treats, or disposes of, or, where necessary to ascertain facts not available at the facility where such hazardous substances are located, who generates, transports, or otherwise handles or has handled, hazardous substances shall upon request of [the EPA] . . . where appropriate, furnish information relating to such substances and permit such person at all reasonable times to have access to, and to copy all records relating to such substances.

42 U.S.C. § 9604(e)(2).

By issuing these information requests, the EPA identifies the solvent parties that may be responsible for a portion of the waste. From this group of parties, the EPA may then compel any individual or select group to sue and compel a response action under 42 U.S.C. § 9606.

ing additional information, the EPA may then issue a section 107 general notice of liability letter to all PRPs. This notice basically informs the parties that the EPA is taking action at a site and requests their presence at a meeting.<sup>65</sup> The parties may then decide to attend the meeting and deal with the problem, or they may opt out and deal with the problem later.<sup>66</sup> Any party that decides not to cooperate with the EPA in rectifying the waste hazard is referred to as a recalcitrant PRP. Any recalcitrant PRP can be ordered to perform the work by the EPA under section 106, or be sued by a party who cooperates with the EPA and seeks contribution for the response costs.<sup>67</sup> Where the EPA identifies several parties at a particular waste site and some of those parties elect to become recalcitrant PRPs, the EPA will focus more on negotiations with the parties who have agreed to participate, allowing them to pursue private cost recovery actions against any recalcitrant PRPs.<sup>68</sup>

Second, if the section 104(e) letter fails to generate enough assistance, the EPA can seek a section 106 order forcing a party to comply with the cleanup.<sup>69</sup> Such an order is unilateral and very effective; if a party fails to comply with this order and the EPA is forced to conduct the response action, treble damages may be levied.<sup>70</sup> This grant of discretion to the EPA is significant because it may, and frequently does, choose any individual or select group of PRPs for a section 106 compliance order. The selected respondent is then forced

---

65. 42 U.S.C. § 9607.

66. ACTON ET AL., *supra* note 16, at 12.

67. 42 U.S.C. § 9606(a). Section 106 authorizes the EPA, through the use of a unilateral administrative order, to order PRPs to conduct a response action. *Id.*

68. ACTON ET AL., *supra* note 16, at 10. Often “[t]he EPA is unable to differentiate between those companies that are acting responsibly and those that are recalcitrant. A company is either forced into the NPL [cleanup] process or is ignored.” Murphy & Mason, *supra* note 27, at 31. Acton explains the EPA’s process for selecting responsible parties:

When there are a large number of PRPs at a site, EPA generally divides them into groups of defendants, referred to as tiers, based primarily on the PRPs’ financial exposure at the site or their financial viability. Tier I defendants are usually those with the largest volumetric share or largest assets. Tier II and Tier III PRPs generally have progressively smaller volumetric shares or financial assets. . . . EPA often seems to concentrate largely, and sometimes exclusively, on negotiations with Tier I defendants. EPA may leave it to the Tier I PRPs to pursue PRPs in lower tiers . . . or may enter into serious negotiations with Tier II or Tier III defendants only when matters have been settled with the Tier I defendants. This may have the effect of prolonging the period in which Tier II and Tier III defendants wait to resolve their own liability, *forcing* them to continue to incur legal expenses to protect their interests.

ACTON ET AL., *supra* note 16, at 10.

69. 42 U.S.C. § 9606(a).

70. *Id.* § 9607(c)(3); see *United States v. Parsons*, 936 F.2d 526 (11th Cir. 1991).

to perform and finance a response action, regardless of the amount of its individual involvement at a particular site.<sup>71</sup> Any identified responsible party that is compelled to finance a response action can then sue other PRPs to recover, and more equitably distribute, response costs.<sup>72</sup> These options give the EPA sufficient flexibility to allow it to find the quickest and most efficient method of responding to a waste site problem, thus satisfying the goal of timely waste cleanup. When acting under either of these options, the EPA is specifically authorized to recover all its legal costs. This is drastically different from the situation in level two, section 107 private cost recovery actions.

## 2. Level Two: The Role of Private Parties

Private parties may become involved in a response action by two methods. First, as described above, a private party may agree or be compelled to participate in a cleanup following an EPA request or a section 106 order. But perhaps more importantly, private parties who find hazardous waste deposited on their property can voluntarily undertake a response action independent of an EPA order.<sup>73</sup> This option is significant because currently there are more existing hazardous waste sites than the EPA can handle and/or may be aware of,<sup>74</sup> and the assistance of private parties is essential to respond in a timely manner to the universe of sites.<sup>75</sup> Under either of these two alternatives, the private party that undertakes the response action can sue other PRPs under sections 107 and 113 to recover response costs proportionate to the degree of each party's respective liability.<sup>76</sup> At this level equitable principles apply. Be-

71. 42 U.S.C. § 9606; see Hedeman et al., *supra* note 9, at 10,417. This discretion is the driving force behind CERCLA because of the power to impose *all* costs on *any* individual party.

72. 42 U.S.C. § 9613(f).

73. See, e.g., *General Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1390 (1991).

74. Jack Lewis, *Superfund, RCRA, and UST: The Clean-up Threesome*, EPA J., July/Aug. 1991, at 7, 9. The 1990 EPA inventory lists almost 34,000 hazardous waste sites in the United States. *ACTON ET AL.*, *supra* note 16, at 2. Approximately 14,000 of these sites could be included in the federal program and, as of mid-1991, the EPA had given only 1,236 sites priority status placing them on the NPL. *Id.*

75. *ACTON*, *supra* note 1, at 4.

76. 42 U.S.C. § 9607(a) allows a private party who conducts a response action to recover removal and remedial costs, and "any other necessary costs of response incurred by any other person consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B). This is based on the proportionate degree of liability. *Id.* § 9613.



cause CERCLA allows joint and several liability for PRPs,<sup>77</sup> any party that initiates an independent response action has an incentive to identify and sue other PRPs for response costs.<sup>78</sup> However, in contrast to level one actions by the EPA, private parties are not explicitly authorized by statute to recover attorneys' fees incurred in cleaning up the waste or when seeking contribution from PRPs. Moreover, federal courts are split on whether private parties may recover attorneys' fees.

### *B. Section 107: Liability for Hazardous Waste Cleanup Costs*

With this basic understanding of CERCLA's two levels for recovering costs, this Comment describes why this statutory scheme is important to the issue of attorneys' fees, addresses Congress's policy concerns when creating section 107, and discusses section 107 in detail.

#### *1. Importance of the Statutory Scheme*

As detailed above in the Introduction, the scheme and operation of CERCLA generate extensive litigation and transaction costs, expenses that do not directly reduce the number of hazardous waste sites.<sup>79</sup> Costs are incurred by the EPA through the process of identifying PRPs, negotiating with PRPs, directly responding to site spe-

---

77. CERCLA does not expressly impose joint and several liability, but courts have consistently allowed it. See *O'Neil v. Picillo*, 682 F. Supp. 706 (D.R.I. 1988) (holding that injury would be apportioned among several hazardous waste generators because the defendant could demonstrate that the amount was divisible), *cert. denied*, 493 U.S. 1071 (1990); *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823, 844 (W.D. Mo. 1984) (stating that CERCLA allows the government to impose joint and several liability against multiple defendants), *cert. denied*, 484 U.S. 848 (1987); *United States v. Wade*, 577 F. Supp. 1326, 1338 (E.D. Pa. 1983) (stating that federal courts may develop common law to determine liability under CERCLA); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 807-08 (S.D. Ohio 1983) (holding that common law principles must be used when assessing joint and several liability under CERCLA).

Joint and several liability may be imposed even where a party's contribution is insubstantial. *United States v. Western Processing Co.*, 734 F. Supp. 930 (W.D. Wash. 1990). See generally FRANK F. SKILLERN, ENVIRONMENTAL PROTECTION: THE LEGAL FRAMEWORK § 5A.19 (1st ed. Supp. 1992) (discussing the general principle of joint and several liability in the context of CERCLA and summarizing relevant case law).

78. A response action need not have been completed before a party may file a lawsuit. When the court reaches a judgment before the response action has been completed, it will award past costs and render a judgment for future costs. This is one example of how the statute attempts to provide settlement incentives.

79. See *supra* notes 23-31 and accompanying text (detailing the different types of transaction costs that a party is likely to incur).

cific problems,<sup>80</sup> compelling PRPs to respond, and settling cases and re-allocating expenses to and among PRPs.<sup>81</sup> PRPs incur similar costs when determining whether they are liable, litigating with the EPA, fighting with insurance companies over policy coverage,<sup>82</sup> and identifying and suing recalcitrant PRPs for contribution.<sup>83</sup> The law is not clear on whether these latter costs of suing recalcitrant PRPs may be recovered by private parties under section 107.

Throughout the process, both the EPA and PRPs generate legal, consulting, administrative, and expert fees.<sup>84</sup> Many of these costs are duplicative because private parties conduct their own, often parallel and identical, investigations into liability and technical and administrative queries and solutions, independent of the EPA's or another PRP's study.<sup>85</sup> This accrual of expenses directly results from the litigation-intensive organization of levels one and two under CERCLA. At both levels, the government, private parties, and insurance companies must incur transaction costs in order to avoid liability. This Comment, however, is only concerned with reducing the transaction costs incurred at level two, and better effectuating the goals that underlie the statute.

---

80. For example, the EPA may be required to conduct limited investigative, removal, or remedial efforts.

81. Hedeman et al., *supra* note 9, at 10,414. The EPA maintains a policy under which it will not entertain settlement discussions unless 80% of the cleanup costs would be covered. ARBUCKLE ET AL., *supra* note 8, at 501.

82. The question of insurer liability under comprehensive general liability policies is a hotly contested area of law and has been the subject of numerous law review articles. *See, e.g.*, Kathryn L. Cervon, *CERCLA Cleanup Costs as "Damages" Under the CGL Policy: Is the Cost of Hazardous Waste Cleanup Merely Small Change for the Deep Pockets of Insurers?*, 41 FED'N INS. & CORP. COUNS. Q. 391 (1991); Donald B. Hallows, *The Applicability of Comprehensive General Liability Insurance for CERCLA Response Costs*, 18 CAP. U. L. REV. 413 (1989); Laura W. Stubberud, *CERCLA: Insurance Liability for Response Costs*, 21 SW. U. L. REV. 1491 (1992); Debi L. Davis, Comment, *Insureds Versus Insurers: Litigating Comprehensive General Liability Policy Coverage in the CERCLA Arena — A Losing Battle for Both Sides*, 43 SW. L.J. 969 (1990).

83. Hedeman et al., *supra* note 9, at 10,414.

84. *Id.* at 10,415. In many circumstances, the fees generated by the EPA and PRPs are a hybrid of these different types of costs. For example, environmental consultant services may go beyond typically technical consultation to include the development of computer databases and other programs, a function usually performed by experts. OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, PUB. NO. 9200.5-008J (1990).

85. Hedeman et al., *supra* note 9, at 10,414-15, 10,421.

## 2. Policies Behind Section 107 and the Importance of Private Party Involvement

At level two, section 107 plays a vital role in fulfilling CERCLA's statutory goals<sup>86</sup> by increasing the role of private industry in the CERCLA process.<sup>87</sup> Congress created section 107 because it recognized the enormous time and expense involved in initiating a hazardous waste cleanup program. It recognized that a major portion of the financial burden and cleanup responsibility would have to be borne by private resources if the statutory goals were to be achieved.<sup>88</sup> By looking to private industry and its resources, Congress was actually trying to solve two dilemmas. First, Congress was trying to find a revenue source to absorb the majority of the program's cost, as opposed to the alternative of creating new taxes.<sup>89</sup> Second, while accomplishing its first goal, Congress did not want to blindly impose costs on all private citizens, but instead wanted to allocate liability, whenever possible, to the parties that caused or had some relationship to the environmental damage.<sup>90</sup> Therefore, section 107(a) of CERCLA created a right of action for private parties that initiate<sup>91</sup> waste cleanup actions to collect response costs from other PRPs.<sup>92</sup>

---

86. See *supra* notes 1-7 and accompanying text (discussing CERCLA's purposes).

87. See generally Jane E. Lein & Kevin M. Ward, *Private Party Response Cost Recovery Under CERCLA*, [1991] 21 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,322 (describing the role played by private parties in CERCLA litigation).

88. *Id.* at 10,322; R. Lisle Baker & Michael J. Markoff, *By-Products Liability: Using Common Law Private Actions to Clean Up Hazardous Waste Sites*, 10 *HARV. ENVTL. L. REV.* 99, 101 (1986).

89. *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 892 (9th Cir. 1986); *ACTON*, *supra* note 1, at 17; Lisa D. Martin et al., *Private Cost-Recovery Actions Under CERCLA Section 107*, 1 *ENVTL. CLAIMS J.* 377 (1989).

90. CERCLA is not a fault-based statute. See *supra* note 20 (discussing cases imposing strict liability). When CERCLA was created, Congress recognized the difficulty in identifying the specific cause for the dumping of each molecule of waste and instead decided to impose liability on any person connected with the dumping or with current land ownership. See *supra* notes 36-40 and accompanying text (discussing liable parties). Even under the current version of the statute, which imposes liability on such a broad range of parties, because the cost associated with CERCLA response actions is frequently so large that courts are reluctant to assess millions of dollars in liability on relatively minor contributors to the waste dump, some attorneys have suggested that the cost of cleaning up hazardous waste sites should be spread among taxpayers. See generally Rena I. Steinzor & Matthew F. Lintner, *Should Taxpayers Pay the Cost of Superfund?*, [1992] 22 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,089 (discussing situations where PRPs sue municipalities for contribution and how this ultimately affects taxpayers).

91. Section 107(a) applies regardless of whether the private party initiates the cleanup action on its own or whether the EPA ordered the action.

92. *McSllarrow et al.*, *supra* note 9, at 10,388. This was the general interpretation enforced by

The utilization of private resources in the battle against hazardous waste allows the government to take advantage not only of the private sector's financial resources, but also of its private administrative resources, technical expertise, and scientific equipment.<sup>93</sup> Furthermore, the statute's structure provides an incentive for private industry to correct the problem because a private party can reduce its future liability in a cost-effective manner.<sup>94</sup> These reasons, in addition to the government's lack of manpower and financial resources to conduct these response actions, lead to the inescapable conclusion that CERCLA must continue to make use of private resources if its goals are to be reached.<sup>95</sup> Furthermore, the reliance on private resources will only increase as industry becomes more sophisticated and knowledgeable about the benefits of pursuing privately initiated cleanups. While section 106 allows the EPA to respond immediately, fulfilling in part the identified goal of timely waste cleanup, Congress used section 107 to fulfill another statutory goal, that of shifting the expense of initiating and motivating response actions to the responsible parties.

### 3. Language of Section 107 Regarding Costs Recoverable by Private Parties

CERCLA section 107(a)(4) specifically allows a private party and the government to recover "necessary costs of response" from any PRPs.<sup>96</sup> As evidenced by the substantial amount of litigation on

courts until SARA was passed. In 1986, Congress explicitly stated that private parties had the right to collect all "response" costs. See *infra* notes 96-105 and accompanying text (discussing the effect of the SARA amendments).

93. Leue, *supra* note 26, at 144.

94. *Id.*; see Timothy Atkeson et al., *An Annotated Legislative History of the Superfund Amendments and Reauthorization Act of 1986 (SARA)*, [1986], 16 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10,383, 10,363 ("If EPA elects to do the cleanup itself, experience to date suggests it will be much more costly than if PRPs perform the work.").

95. Leue, *supra* note 26, at 144.

96. 42 U.S.C. § 9607(a)(4)(B). The section states in relevant part:

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release which causes the incurrence of response costs, of a hazardous substance shall be liable for —

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other *necessary costs of response* incurred by any other person consistent with the national contingency plan;

*Id.* § 9607(a)(4) (emphasis added).

the issue,<sup>97</sup> deciding what costs can properly be characterized as "necessary cost of response" is ambiguous, at best.<sup>98</sup> Although the term response costs is not specifically defined by the statute,<sup>99</sup> the definition portion of CERCLA section 101(25) states that "respond" or "response" means: "remove, removal, remedy, and remedial action, all such terms (including the terms 'removal' and 'remedial action') include *enforcement activities related thereto*."<sup>100</sup> The emphasized language was added in 1986 by the SARA amendments and has resulted in the current split among courts. The debate centers on whether "enforcement activities" includes attorneys' fees incurred by a party in its attempt to recover "response" costs for cleaning up the hazardous site.<sup>101</sup>

---

The elements necessary for a private party to establish a prima facie case to recover costs include:

- (1) the subject site is a facility as defined by CERCLA;
- (2) the defendant's hazardous substances were, at some time in the past, generated for shipment to, transported to, or disposed of at the facility;
- (3) such hazardous substances, or hazardous substances similar to them are present at the facility, and
- (4) a release or threatened release of the hazardous substances has caused the plaintiff to incur necessary costs of response.

Martin et al., *supra* note 89, at 378.

97. See *infra* note 101 and accompanying text (citing cases addressing whether attorneys' fees are recoverable under § 107).

98. See *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1500 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057 (1990); *Artesian Water Co. v. New Castle Co.*, 851 F.2d 643, 648 (3d Cir. 1988) ("CERCLA is not a paradigm of clarity or precision. . . . Problems of interpretation have arisen from the Act's use of inadequately defined terms, a difficulty particularly apparent in the response cost area." (emphasis added)). For a discussion of the costs that are recoverable as response costs, see *Lein & Ward, supra* note 87, at 10,327-32.

99. The National Contingency Plan (NCP) defines the limits and guidelines for cost recovery. ARBUCKLE ET AL., *supra* note 8, at 487.

100. 42 U.S.C. § 9601(25) (emphasis added); see *supra* notes 47-48 (defining "removal" and "remedial").

101. Cases allowing recovery include: *General Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415 (8th Cir.), *cert. denied*, 111 S. Ct. 1390 (1990); *BTR Dunlop, Inc. v. Rockwell Int'l Corp.*, 1993 U.S. Dist. LEXIS 1720 (N.D. Ill. Feb. 12, 1993); *Hastings Bldg. Prods., Inc. v. National Aluminum Corp.*, 815 F. Supp. 228 (W.D. Mich. 1993); *Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal Co.*, 814 F. Supp. 1281 (E.D. Va. 1993); *Key Tronic Corp. v. United States*, 766 F. Supp. 865 (E.D. Wash. 1991), *rev'd*, 984 F.2d 1025 (9th Cir. 1993); *Bolin v. Cessna Aircraft Co.*, 759 F. Supp. 692 (D. Kan. 1991); *Pease & Curren Ref., Inc. v. Spectrolab, Inc.*, 744 F. Supp. 945 (C.D. Cal. 1990); *Shapiro v. Alexanderson*, 741 F. Supp. 472 (S.D.N.Y. 1990).

Cases not allowing recovery include: *Fallowfield Dev. Corp. v. Strunk*, Civ. A. No. 89-8644, 1990 U.S. Dist. LEXIS 4820 (E.D. Pa. Apr. 23, 1990); *Mesiti v. Microdot, Inc.*, 739 F. Supp. 57 (D.N.H. 1990); *United States v. Hardage*, 750 F. Supp. 1460 (W.D. Okla. 1990); *T & E Indus. v. Safety Light Corp.*, 680 F. Supp. 696 (D.N.J. 1988); *Hemingway Transp. v. Kahn*, 108 B.R. 378 (Bankr. D. Mass. 1989), *aff'd*, 1983 U.S. App. LEXIS 10,180, at \*57 (1st Cir. May 4, 1993).

Three significant cases were decided immediately before publication of this Comment. In two

While SARA doubled the size of the original statute, the language of section 107, allowing for recovery of necessary costs of response, was not amended. One logical reason for this is that no dispute had developed before 1986 about whether the provision allowed recovery of attorneys' fees in private cost recovery actions. In fact, before 1986 the only case that even mentioned such an issue was *Bulk Distribution Centers, Inc. v. Monsanto Co.*,<sup>102</sup> decided in 1984. That court, however, failed to reach the ultimate issue of whether attorneys' fees may be recovered.<sup>103</sup>

The portion of SARA most pertinent to the discussion of attorneys' fees is the amended definition of "response," which now includes any "enforcement activities related thereto."<sup>104</sup> Whether this language allows a private party to recover attorneys' fees incurred during litigation against another PRP has been left to the courts to decide.<sup>105</sup>

### C. Interpretation of Section 107: The Split Among Federal Courts

Two years after SARA was passed, federal courts began to issue conflicting decisions on whether section 107 permits private parties to recover attorneys' fees generated during that litigation. Courts have developed three different positions.

#### 1. The T & E Industries Line of Cases

The court in *T & E Industries v. Safety Light Corp.*,<sup>106</sup> the first court to rule on this issue, did not allow the plaintiff to recover attorneys' fees. *T & E Industries* held that attorneys' fees were not recoverable under CERCLA because the American Rule, recognized by the Supreme Court decision of *Alyeska Pipeline Services*

cases decided on the same day, the Ninth Circuit held that attorneys' fees are not recoverable under § 107(a)(4)(B). *Key Tronic*, 984 F.2d at 1028; *Stanton Rd. Assocs. v. Lohrey Enters.*, 984 F.2d 1015, 1020 (9th Cir. 1993). The *Key Tronic* decision reversed the district court case cited *supra*.

But compare *Key Tronic* and *Stanton Road* with the recent case decided by the Sixth Circuit holding that attorneys' fees are recoverable under § 107(a)(4)(B). *Donahey v. Bogle*, 987 F.2d 1250, 1256 (6th Cir. 1993).

102. 589 F. Supp. 1437 (S.D. Fla. 1984).

103. See *Atlas*, *supra* note 31, at 10,208.

104. 42 U.S.C. § 9601(25).

105. *General Elec.*, 920 F.2d at 1422; see *infra* notes 123-37 and accompanying text (discussing *General Electric*).

106. 680 F. Supp. 696 (D.N.J. 1988).

*Co. v. Wilderness Society*,<sup>107</sup> mandates that each party to a lawsuit bear its own litigation costs absent specific statutory authorization.<sup>108</sup> The court reasoned that the only portion of CERCLA which provides for recovery of fees is the section dealing with government action<sup>109</sup> and that no such section exists with regard to private litigants.<sup>110</sup> The court drew this conclusion even though it recognized "that there was no evidence of a general intent to distinguish between costs recoverable by governmental and non-governmental entities" throughout CERCLA.<sup>111</sup> This opinion has been criticized by commentators for relying on authority that did not truly support the court's argument. While the authority followed similar reasoning, it did not distinguish between private and governmental plaintiffs in allowing the government to recover fees.<sup>112</sup> The *T & E Industries* court was the first to distinguish between the government and private plaintiffs (i.e., level one versus level two) seeking to recover response costs from private defendants.

Several other district courts subsequently followed the reasoning of *T & E Industries*.<sup>113</sup> For example, in *Fallowfield Development*

107. 421 U.S. 240 (1975).

108. *T & E Indus.*, 680 F. Supp. at 707. After this Comment was written, the Ninth Circuit also held that attorneys' fees are not recoverable under § 107(a)(4)(B). *Key Tronic Corp. v. United States*, 984 F.2d 1025, 1028 (9th Cir. 1993); *Stanton Rd. Assocs. v. Lohrey Enters.*, 984 F.2d 1015, 1020 (9th Cir. 1993). The appellate court rejected the reasoning of *General Electric*, stating:

The cost of representation cannot be shifted by implication under the American Rule. A holding that attorneys' fees are not explicitly authorized in a private response action does not "read them out" of section 9607(a)(4)(B), as suggested by the Eighth Circuit [in *General Electric*]. To the contrary, to uphold the district court's award of attorneys' fees in a private response action, we would have to read into the statute words not explicitly inserted by Congress. The Supreme Court instructed us in *Alyeska* and *Runyon* that we lack such power.

*Id.* at 1020 (citations omitted).

109. *T & E Indus.*, 680 F. Supp. at 707 (citing 42 U.S.C. § 9604).

110. *Id.* (citing 42 U.S.C. § 9604(b)).

111. *Id.*

112. Atlas, *supra* note 31, at 10,207.

113. See *Fallowfield Dev. Corp. v. Strunk*, No. 89-8644, 1990 U.S. Dist. LEXIS 4820 (E.D. Pa. Apr. 23, 1990) (discussing *T & E Industries*); *Mesiti v. Microdot, Inc.*, 739 F. Supp. 57 (D.N.H. 1990) (reviewing precedent and following *T & E Industries* without elaboration); *Hemingway Transp. v. Kahn*, 108 B.R. 378 (Bankr. D. Mass. 1989) (citing precedent and declining to award attorneys' fees).

Only one federal appellate court, the Ninth Circuit, has declined to award fees, but it did so without citing any precedent. See *Idaho v. Hanna Mining Co.*, 882 F.2d 392 (9th Cir. 1989). In *Hanna Mining*, Idaho sued the current owners of a copper and cobalt mine for damage to natural resources caused by runoff from tailing dumps. The court stated: "CERCLA does not state whether attorneys' fees may be awarded for actions for natural resources damages under 42 U.S.C. §§ 9607(a)(4)(C) and 9607(f), nor do any cases appear to resolve the question. We elect

*Corp. v. Strunk*,<sup>114</sup> the court denied a claim for fees based on the definition of response under section 101(25).<sup>115</sup> The court noted that under CERCLA the definition of recoverable response costs includes any "enforcement activities related thereto."<sup>116</sup> It reasoned that, based on the legislative history, this definition applies only to the EPA. As authority, the court cited a House report from the Committee on Energy and Commerce which referred only to the EPA's power to recover response costs.<sup>117</sup>

The *Fallowfield* court's reasoning, however, has been criticized for failing to consider other possible legislative interpretations for the change in definition which do not distinguish between the government and private parties.<sup>118</sup> The House report stresses that: "This amendment clarifies and confirms that such costs are recoverable from responsible parties, as removal or remedial costs under section 107."<sup>119</sup> Yet another House report suggests two additional interpretations: "[This amendment] modifies the definition of 'response action' to include related enforcement activities";<sup>120</sup> "[this action] amends the definition of what constitutes a response to include related enforcement activities, thereby permitting recovery of those costs."<sup>121</sup> These are just three possible interpretations of CERCLA's (and SARA's) limited legislative history. Thus, it has been argued that the *Fallowfield* court merely constructed its own interpretation of the legislative history to support the conclusion that it wanted to reach.<sup>122</sup>

## 2. *The General Electric Line of Cases*

Contrary to the federal district courts' adherence to the *T & E Industries* line of reasoning, in *General Electric Co. v. Litton Indus-*

to make no award of attorneys' fees." *Id.* at 396. The court did not state the grounds for its decision. Rather, it avoided deciding the issue based on the factual distinction that the case involved natural resource damage. *Id.*

114. No. 89-8644, 1990 U.S. Dist. LEXIS 4820 (E.D. Pa. Apr. 23, 1990).

115. *Id.* at \*34.

116. *Id.* at \*25.

117. *Id.* at \*104.

118. Atlas, *supra* note 31, at 10,209.

119. H.R. CONF. REP. NO. 962, 99th Cong., 2d Sess. 185 (1986), *reprinted in* 1986 U.S.C.A.N. 3276, 3278.

120. Atlas, *supra* note 31, at 10,209.

121. *Id.*

122. *Id.* For a discussion of the relevant legislative history, see *infra* notes 161-77 and accompanying text.



*trial Automation Systems, Inc.*,<sup>123</sup> the Eighth Circuit held that attorneys' fees are recoverable under CERCLA in section 107 private cost recovery litigation.<sup>124</sup> In this case, General Electric purchased land from Litton Industrial Automation Systems (Litton), a typewriter manufacturer who had previously dumped hazardous waste on the land.<sup>125</sup> Several years later, General Electric sold the land to Enterprise Park for commercial development.<sup>126</sup> As part of the sale, General Electric agreed to conduct a response action in order to keep the property off the state's equivalent of the federal NPL.<sup>127</sup> The site was then cleaned up using the most expensive and most effective scientific methods.<sup>128</sup> While the response action was ongoing, General Electric filed an action against Litton, which was a recalcitrant PRP,<sup>129</sup> requesting indemnification under section 107(a).<sup>130</sup>

Similar to the *T & E Industries* court, the Eighth Circuit first cited the American Rule<sup>131</sup> before it examined CERCLA for language explicitly authorizing recovery of fees.<sup>132</sup> In determining the meaning of the statute, the court focused on section 101(25), which defines "response" as "remove, removal, remedy, and remedial action; all such terms (including the terms 'removal' and 'remedial action') include *enforcement activities related thereto.*"<sup>133</sup> Based on this language, the court reasoned that:

[a] private party cost-recovery action such as this one is an enforcement activity within the meaning of the statute. Attorney fees and expenses necessarily are incurred in this kind of enforcement activity and it would strain the statutory language to the breaking point to read them out of the "necessary cost" that section 9607 (a)(4)(B) allows private parties to recover.<sup>134</sup>

123. 920 F.2d 1415 (1990), *cert. denied*, 111 S. Ct. 1390 (1991).

124. *Id.* at 1421-22. In *Donahey v. Bogle*, 987 F.2d 1250 (6th Cir. 1993), decided immediately before publication of this Comment, the Sixth Circuit adopted the reasoning of *General Electric*, 920 F.2d 1415; *Bolin v. Cessna Aircraft Co.*, 759 F. Supp. 692 (D. Kan. 1991); and *Shapiro v. Alexanderson*, 741 F. Supp. 472 (S.D. N.Y. 1990), as a basis for awarding a private party attorneys' fees under § 107. *Donahey*, 987 F.2d at 1256.

125. *General Elec.*, 920 F.2d at 1416.

126. *Id.*

127. *Id.* at 1416-17; *see supra* note 16 (defining NPL).

128. 920 F.2d at 1417.

129. *See supra* note 6 and accompanying text (defining PRPs).

130. *General Elec.*, 920 F.2d at 1417.

131. *See infra* notes 193-94 (explaining the current status of the American Rule).

132. *General Elec.*, 920 F.2d at 1421-22.

133. 42 U.S.C. 9601(25) (1988); *see General Elec.*, 920 F.2d at 1422 (emphasis added).

134. *General Elec.*, 920 F.2d at 1422 (citations omitted).

The court further stated that allowing recovery of attorneys' fees is:

consistent with two of the main purposes of CERCLA — prompt cleanup of hazardous waste sites and imposition of all cleanup costs on the responsible party. These purposes would be undermined if a non-polluter (such as GE) were forced to absorb the litigation costs of recovering its response cost from the polluter. The litigation costs could easily approach or even exceed the response costs, thereby serving as a disincentive to clean the site.<sup>135</sup>

Accordingly, the court awarded General Electric \$940,000 in response costs and \$419,000 in attorneys' fees.<sup>136</sup>

The *General Electric* opinion went a step beyond *T & E Industries*, where the court looked only to legislative history to find a congressional intent to treat private and government entities similarly.<sup>137</sup> Rather, *General Electric* was decided only after examining the purposes behind the statute, which, the court concluded, support the recovery of private parties' attorneys' fees.

Since *General Electric* was decided in 1990, the split concerning attorneys' fees has developed further as more district courts have chosen to follow the Eighth Circuit opinion. Two such district court decisions are *Pease & Curren Refining, Inc. v. Spectrolab, Inc.*<sup>138</sup> and *Key Tronic Corp. v. United States*.<sup>139</sup> Both courts reflected on the statutory language, the legislative history, and the split among district courts before concluding that attorneys' fees are recoverable response costs.<sup>140</sup>

In *Pease & Curren*, the court examined the same language behind the statute as did the *General Electric* court, but it provided more analysis of the legislative history before finding this history to be incomplete.<sup>141</sup> *Pease & Curren Refining, Inc.* (*Pease & Curren*), designated as a private party under CERCLA, sued Spectrolab to recover response costs incurred following an accident that occurred on *Pease & Curren's* property.<sup>142</sup> *Pease & Curren* was in the busi-

135. *Id.* But see *Stanton Rd. Assocs. v. Lohrey Enters.*, 984 F.2d 1015, 1020 (9th Cir. 1993) (rejecting this reasoning). For additional cases on this point, see *infra* note 148.

136. *Id.* at 1417, 1422.

137. See *supra* notes 106-12 and accompanying text (discussing *T & E Industries*).

138. 744 F. Supp. 945 (C.D. Cal. 1990).

139. 766 F. Supp. 865 (E.D. Wash. 1991), *rev'd*, 984 F.2d 1025 (9th Cir. 1993). The district court decision was reversed by the Ninth Circuit immediately before publication of this Comment. However, the lower court's basic reasoning is still relevant to the present discussion. For a discussion of the appellate court's reasoning, see *supra* note 108.

140. *Key Tronic*, 766 F. Supp. at 868-72; *Pease & Curren*, 744 F. Supp. at 949-52.

141. *Pease & Curren*, 744 F. Supp. at 949-52.

142. *Id.* at 946.

ness of extracting and refining precious metals from both liquid and solid by-products received from Spectrolab.<sup>143</sup> Before trial, Spectrolab moved to dismiss Pease & Curren's request for attorneys' fees under section 107 of CERCLA, arguing that the statute did not expressly authorize private parties to recover attorneys' fees.<sup>144</sup>

In deciding the issue, the court acknowledged that the government is expressly authorized to recover attorneys' fees but that federal courts are split on whether CERCLA allows private parties to recover attorneys' fees.<sup>145</sup> To decide the issue, the court interpreted CERCLA by trying to determine congressional intent,<sup>146</sup> as did the court in *General Electric*. The court followed the rule of statutory construction that legislative intent is to be realized by giving "effect to the plain meaning of the language used."<sup>147</sup> Following this rule, the court interpreted the term "enforcement activities" and concluded that:

Congress intended for "enforcement activities" to include attorney's fees expended to induce a responsible party to comply with the remedial actions mandated by CERCLA. The court cannot ascertain any other logical interpretation which would give effect to this phrase. If this court were to rule otherwise, the phrase "enforcement activities" would be superfluous.<sup>148</sup>

The court further found such a result to be consistent with CERCLA's purpose of responding to threats to public health caused by inadequate disposal of hazardous substances.<sup>149</sup>

Along these same lines, the *Key Tronic* decision extensively traced the history of the debate before concluding that attorneys' fees are recoverable.<sup>150</sup> There, Key Tronic Corporation (Key Tronic) sued the United States government and certain private prior landowners for recovery of response costs.<sup>151</sup> In addition to actual cleanup costs, Key Tronic argued that it was entitled to recover at-

---

143. *Id.*

144. *Id.* at 949.

145. *Id.* at 950.

146. *Id.*

147. *Id.* at 951.

148. *Id.*, see also *Hastings Bldg. Prods., Inc. v. National Aluminum Corp.*, 815 F. Supp. 228 (W.D. Mich. 1993) ("If 'enforcement activities' is not read to include attorneys' fees, this phrase becomes superfluous. I cannot conceive of any other enforcement costs private parties could incur which are related to removal, remedy and remedial action.").

149. *Pease & Curren*, 744 F. Supp. at 951.

150. *Key Tronic Corp. v. United States*, 766 F. Supp. 865, 869-70 (E.D. Wash. 1991), *rev'd*, 984 F.2d 1025 (9th Cir. 1993).

151. *Id.* at 867.

torneys' fees under the definition of enforcement costs.<sup>152</sup> The defendants responded that the specific statutory language of CERCLA mandated that only the government could institute an enforcement action under CERCLA.<sup>153</sup> The court disagreed, holding that section 101(25) of the statute, which defines terms used throughout the act, modified all other portions of the act.<sup>154</sup> Thus, the portion of the act, section 107(a)(4)(b), which provides for a private right of action and recovery of response costs includes enforcement activities.

While several of the courts allowing private parties to recover attorneys' fees have acknowledged the existence of the *T & E Industries* case, they have not analyzed that court's reasoning beyond a simple rejection of it. In contrast to both of these divergent viewpoints, one court has taken an approach that appears to be a compromise between the *T & E Industries* line of cases and the *General Electric* line of cases.

### 3. *The BCW Associates Compromise View*

The District Court for the Eastern District of Pennsylvania, in *BCW Associates, Ltd. v. Occidental Chemical Corp.*,<sup>155</sup> denied recovery of litigation costs incurred by the plaintiff but awarded fees incurred in responding to the threatened release of hazardous waste and complying with CERCLA cost-recovery requirements.<sup>156</sup> The court divided the attorneys' fees into two categories: response costs and enforcement costs. Response costs were defined as including expenses incurred in responding to the cleanup such as technical, investigation, and consultation expenses.<sup>157</sup> Enforcement costs were defined as expenses incurred by attempting to recover response costs from potentially responsible parties.<sup>158</sup> Thus, the court awarded attorneys' fees incurred in responding to the hazardous waste cleanup and the technical requirements of the statute but not those fees incurred while pursuing recovery of costs from other parties.<sup>159</sup> In fact, this bifurcation of fees was later relied on by the *Key Tronic* court to allow recovery of consultant and legal fees incurred in the

---

152. *Id.* at 869.

153. *Id.* at 870.

154. *Id.*

155. No. 86-5947, 1988 U.S. Dist. LEXIS 11275 (E.D. Pa. Sept. 29, 1988).

156. *Id.* at \*60 n.4.

157. *Id.* at \*61.

158. *Id.*

159. *Id.*

study of a hazardous waste site, even though the *Key Tronic* court further allowed recovery of all litigation fees.<sup>160</sup>

In most of the cases discussed above, the courts examined the legislative history in order to interpret the ambiguous term "enforcement activities" and to follow Congress's intent. Courts, however, have clearly disagreed on what the legislative record suggests about interpreting section 107. Therefore, an independent review of the legislative record may help to resolve the conflict between courts or, at a minimum, provide insight into the dilemma.

#### D. Legislative History and Statutory Construction

Although at least one commentator has argued to the contrary,<sup>161</sup> the three different approaches described above demonstrate that the meaning of section 107 is far from clear. Under standard rules of statutory construction or interpretation,<sup>162</sup> courts must try to implement the plain meaning<sup>163</sup> of a statute based on the statute's legislative history.<sup>164</sup> This is, in fact, what several of the courts attempted

160. *Key Tronic Corp. v. United States*, 766 F. Supp. 865 (E.D. Wash. 1991), *rev'd*, 984 F.2d 1025 (9th Cir. 1993).

161. See Knopf, *supra* note 31, at 510-13 (arguing that the plain meaning of the statute supports the conclusion that costs are recoverable).

162. Statutory construction and interpretation are closely related concepts. Professor Dickerson defines construction as follows:

Interpretation. Although in current usage the terms "construction" and "interpretation" are synonymous when used with respect to statutes, some writers have defined "construction" to include additional steps necessary to determine whether a statute that is otherwise clear in its express meaning should be applied to situations not clearly falling within it. The distinction thus made between "interpretation" and "construction" tends . . . between the ascertainment of legislative meaning (the cognitive function) and judicial lawmaking involved in administering an incomplete or imperfect statute (the creative function). However, where the latter distinction is considered useful, it has been made in those terms and not in terms of a verbal distinction that current usage apparently rejects.

REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 283-84 (1975).

163. The plain meaning rule provides:

If the words convey a definite meaning, which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it.

*Lake County v. Rollins*, 130 U.S. 662, 670 (1889). Thus, under this rule, if the statute's meaning is plain, the court may not examine other sources to find another meaning.

164. *T & E Indus. v. Safety Light Corp.*, 680 F. Supp. 696, 705 (D.N.J. 1988); Robert S. Summers, *Statutory Interpretation in the United States*, in *INTERPRETING STATUTES. A COMPARATIVE STUDY* 424 (D. Neil MacCormick & Robert S. Summers eds., 1991); see also Steven R. Greenberger, *Civil Rights and the Politics of Statutory Interpretation*, 62 U. COLO. L. REV. 37, 49-50 (1991) (suggesting that courts should read the text of a statute more broadly when its language is complicated and it lacks adequate legislative history to assist them in interpreting the

to do.<sup>165</sup> Thus, this Comment first examines the legislative history and policy objectives behind the SARA amendments and section 107 in an effort to identify other policies beyond those discussed in the cases.

The legislative history of SARA is relatively sparse and of little practical use in determining congressional intent. As the court in *United States v. Mottolo*<sup>166</sup> stated: "CERCLA has acquired a well-deserved notoriety for vaguely-drafted provisions and an indefinite, if not contradictory, legislative history."<sup>167</sup> With respect to this vague and contradictory history, only two significant facts exist regarding the amended definition of response and the issue of attorneys' fees.

The report by the House Committee on Energy and Commerce mentions the addition of the words "enforcement activities" to section 101(25), stating that this "will confirm the EPA's authority to recover costs for enforcement activities taken against responsible parties."<sup>168</sup> This report does not specifically address how the term applies to private parties. Because of this silence, the language can be used both in support of and against the recovery of attorneys' fees as evidenced by the confusion among courts and commentators. One author has argued that because these words appear in the House report and in the final statute, the House statements indicate that Congress intended to allow only the EPA and not private parties to recover attorneys' fees.<sup>169</sup> This argument is flawed, however, because when interpreting legislative history, the House report is entitled to little or no weight relative to the Conference Committee report history, which is the result of a joint effort to resolve conflicts between Senate and House proposals.<sup>170</sup>

---

statute).

165. See, e.g., *Pease & Curren Ref., Inc. v. Spectrolab, Inc.*, 744 F. Supp. 945, 951 (C.D. Cal. 1990).

166. 605 F. Supp. 898 (D.N.H. 1985).

167. *Id.* at 902.

168. H.R. REP. NO. 253, 99th Cong., 1st Sess. 66-67 (1985), reprinted in 1986 U.S.C.A.N. 2835, 2848. This language was cited by *Fallowfield Dev. Corp. v. Strunk*, No. 89-8644, 1990 U.S. Dist. LEXIS 4820, at \*17 (E.D. Pa. Apr. 23, 1990).

169. *Virk*, *supra* note 31, at 1557.

170. *Summers*, *supra* note 164, at 424 ("[The] weight of an official committee report is generally greater than the weight of a speech by a legislator interested in the bill."); see, e.g., *Sierra Club v. Clark*, 755 F.2d 608, 615-17 (8th Cir. 1985) (discussing the proper use of and weight given to legislative history); *Mills v. United States*, 713 F.2d 1249, 1252-53 (7th Cir. 1983) (using a House committee report to interpret the Criminal Justice Act), *cert. denied*, 464 U.S. 1069 (1984).

The Conference Committee report constitutes the second source of legislative history discussing the addition of the words "enforcement activities" to section 101(25). The Conference Committee report states that this addition "confirms that [response costs] are recoverable from responsible parties, as removal or remedial costs under section 107."<sup>171</sup> In this instance, the report fails to distinguish between governmental and private-party plaintiffs.<sup>172</sup> While one viewpoint argues that this is evidence of the Committee's agreement with the House report,<sup>173</sup> another argues that Congress failed to notice the distinction because the issue of attorneys' fees had previously been discussed in only one case before 1986.<sup>174</sup> In that case, *Bulk Distribution Centers, Inc. v. Monsanto Co.*,<sup>175</sup> the issue of whether a private party can recover attorneys' fees as necessary costs of response under section 107 was raised by the plaintiff, but it was not decided by the court.<sup>176</sup>

In situations where the legislative history does not support either position because of its ambiguity, courts will look to "policy considerations weighing for or against a particular construction of the statute."<sup>177</sup> Therefore, it is necessary to examine policy reasons as to whether the statute should be construed to grant private parties fee awards in CERCLA litigation.

### E. Goals and Solutions

The most significant problem with the current statutory structure and ambiguous legislative history is that there is simply too much litigation taking place over a variety of issues such as attorneys' fees. As discussed in the Introduction, the amount of money expended on attorneys' fees and other transaction costs is tremendous.<sup>178</sup> To reduce the amount of litigation and transaction costs spent in enforcing and executing the provisions of the statute, incen-

---

171. H.R. CONF. REP. No. 962, *supra* note 119, at 185, *reprinted in* 1986 U.S.C.A.N., at 3278.

172. *Id.*, *reprinted in* 1986 U.S.C.A.N., at 3278.

173. Virk, *supra* note 31, at 1558.

174. Atlas, *supra* note 31, at 10,208.

175. 589 F. Supp. 1437 (S.D. Fla. 1984).

176. *Id.* at 1452.

177. *Mills v. United States*, 713 F.2d 1249, 1254 (7th Cir. 1983) (citing *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975)), *cert. denied*, 464 U.S. 1069 (1984).

178. *See supra* notes 24-31 and accompanying text.

tives to settle and ensure early PRP participation must be placed in the statute.<sup>179</sup>

### 1. *Benefits of Settlement*

The statute's current operating deficiencies must be resolved in order to fulfill CERCLA's goals. As elaborated above, these goals are to:

- (1) "facilitate the prompt cleanup of hazardous waste";<sup>180</sup>
- (2) place the "ultimate financial burden upon those responsible for the danger";<sup>181</sup>
- (3) encourage voluntary settlements with responsible parties;<sup>182</sup>
- (4) encourage appropriate and timely cooperation by potentially responsible parties;<sup>183</sup> and
- (5) provide for efficient, cost-effective means of cleanup.<sup>184</sup>

However, these goals are difficult to meet when the average duration of an EPA investigation is eight years "from the time a site comes to the EPA's attention to the time definitive cleanup work begins."<sup>185</sup> Logically, reducing the length of litigation through settlement will help to reduce overall costs and allow money saved by settlement to be injected into a response action sooner, as well as reduce transaction costs.

Of the five goals identified above, settlement clearly serves two important purposes of CERCLA. First, it reduces the duration of litigation and provides money sooner to facilitate ongoing response actions. Second, funds are applied to protect the environment rather

179. Settlement is a goal identified by Congress during the SARA debates, 132 CONG. REC. S28,414-16 (Oct. 3, 1986) (statement of Sen. Stafford), and is one the EPA's goals when litigating with PRPs, Leue, *supra* note 26, at 135-36. Congress specifically decided that settlement was a goal of SARA because of the need to advocate voluntary cleanups and avoid protracted litigation and unnecessary transaction costs. As one method to effectuate these goals, Congress created § 122. See 42 U.S.C. 9622; see also Mason, *supra* note 57, at 87-88 (discussing the policies and incentives associated with CERCLA's contribution provisions).

Courts have previously recognized settlement incentives created by different burdens of proof. Currently courts impose the burden on the defendant to show that costs are divisible in order to avoid the imposition of joint and several liability. *O'Neil v. Picillo*, 883 F.2d 176 (1st Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990). The inherent difficulty of dividing costs under a strict, joint and several liability scheme makes it risky for the parties to allow a jury to decide the matter, thus forcing defendants to settle before trial.

180. *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1142-43 (E.D. Pa. 1982).

181. *Id.*

182. *ACTON*, *supra* note 1, at 17.

183. *Id.*

184. *Id.* at 18.

185. Hedeman et al., *supra* note 9, at 10,423.



than to cover unnecessary and unproductive legal fees.

Settlement also plays an important role in our current judicial framework.<sup>186</sup> First, settlement advances judicial economy by reducing the caseload of the overworked judiciary. Second, it furthers the productive use of resources. Frequently, litigation is a complicated and protracted process from which potential liability hangs like a dark thundercloud, preventing a defendant from engaging in productive investment of funds. Rather than wasting financial resources on attorneys' fees and other transaction costs, settlement before trial allows money to be used to clean up the waste site.

All of these concerns are directly applicable to CERCLA litigation. Due to the litigation-intensive framework underlying CERCLA and the projected increase in the number of expected lawsuits during the 1990s, the courts and Congress have an interest in encouraging the settlement of as many cases as possible.

Most importantly, settlement encourages prompt cleanup of hazardous waste. As litigation becomes more protracted, not only are economic resources wasted on attorneys' fees, but response actions are not initiated or completed. Evidence of this problem is the fact that only sixty-four of twelve hundred sites have been certified completed since the Superfund program was initiated.<sup>187</sup> Settlement would help to inject needed economic resources into the response arena.

## 2. *Achieving Settlement*

Using economic principles, Professor John Hause has demonstrated that settlement incentives are created when a party knows that attorneys' fees may be assessed against it.<sup>188</sup> The threat of fees

---

186. See Richard G. Stoll & David B. Graham, *Need for Changes in EPA's Settlement Policy*, NAT. RESOURCES & ENV'T, Fall 1985, at 7 (discussing the important role settlement plays in EPA policy and why the EPA should increase settlement efforts).

187. Georgia Sargeant, *Superfund Contractors Clean Up Few Waste Dumps, but Management Costs Rise*, 27 TRIAL 93 (1991).

188. John C. Hause, *Indemnity, Settlement, and Litigation, or I'll Be Suing You*, 18 J. LEGAL STUD. 157, 158 (1989); see also Bradley L. Smith, *Three Attorney Fee-Shifting Rules and Contingency Fees: Their Impact on Settlement Incentives*, 90 MICH. L. REV. 2154, 2162 (1992) (arguing that a fee-shifting rule promotes settlement in diversity suits involving contingency fee arrangements). But Professor Hause's conclusion is a current topic of debate among scholars. For the hypothesis that fee shifting does not encourage settlement, see Richard A. Posner, *Comment on Donohue*, 22 LAW & SOC'Y REV. 927, 928 (1988); Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 65 (1982).

encourages a party to minimize litigation costs through efficient use of resources and to avoid protracted litigation. As Professor Hause stated: "The obvious reason why indemnity would increase the settlement rate is because it tends to increase the cost savings from settling."<sup>189</sup> He concluded that switching from the American Rule to the English Rule (which grants courts the discretion to award fees to the prevailing party) would result in fewer lawsuits and more settlements.<sup>190</sup> In the context of private cost recovery, fees have only been recoverable by plaintiffs under section 107; thus the burden is being placed on defendants to settle cases and contribute money towards response actions.<sup>191</sup>

This Comment continues under the premise that settlement is beneficial and that fee shifting is one way of promoting settlement.

#### F. Attorneys' Fees Jurisprudence

After identifying the problems associated with section 107, as well as the goals that will improve the functioning of CERCLA, it is necessary to examine traditional theories behind fee shifting to determine if an amendment to section 107 would be appropriate. This can be done by reviewing the American Rule, which prohibits the recovery of attorneys' fees, as well as the legal theories that support fee awards. The reasoning behind these latter theories can then be used in two ways, either as support for an amendment by Congress

189. Hause, *supra* note 188, at 176.

190. *Id.*

191. One of the criticisms of the one-way fee shifting is that if only the defendant can be held liable for fees, the defendant is unfairly forced into settlement because of the potential economic loss posed by fee awards. One response to this criticism is that fee shifting is really just counterbalancing certain prodefendant Federal Rules of Civil Procedure, such as rules 11 and 68. Rule 11 imposes sanctions on plaintiffs that bring frivolous actions, thus providing a disincentive to challenge precedent or constitutional policies which certain groups or minorities may consider unfair. FED. R. CIV. P. 11. Rule 68 "provides that prevailing plaintiff must pay the defendant's cost if she rejects a settlement offer and recovers an amount less than that offered at trial." Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974); see FED. R. CIV. P. 68. For a discussion of the incentives created by Rule 11, see Lawrence Marshall, *The Use and Impact of Rule 11*, 86 NW. U. L. REV. 943, 960-64 (1992); Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630, 632-42 (1987). For a discussion of the incentives related to Rule 68, see Victoria Choy, *The Impact of Proposed Rule 68 on Civil Rights Litigation*, 84 COLUM. L. REV. 719 (1984); Janice Toran, *Settlement, Sanctions, and Attorney Fees: Comparing English Payment into Court and Proposed Rule 68*, 35 AM. U. L. REV. 301 (1986); Jay N. Varon, *Promoting Settlements and Limiting Litigation Costs by Means of the Offer of Judgment: Some Suggestions for Using and Revising Rule 68*, 33 AM. U. L. REV. 813 (1984); Thomas L. Cabbage III, Note, *Federal Rule 68 Offers of Judgment and Equitable Relief: Where Angels Fear to Tread*, 70 TEX. L. REV. 465 (1951).

or as grounds for courts to broadly interpret the statute until Congress clarifies the issue.

First, this section reviews the American Rule and then focuses on some exceptions that may be applicable to CERCLA litigation. There are essentially two theories supporting fee awards where a public benefit is derived from a private course of action: the private attorney general doctrine and the common benefit doctrine. Both of these theories were created to further the substantive goals of an underlying statute.<sup>192</sup>

### 1. *The Current Status of the American Rule*

Longstanding but much criticized in American jurisprudence is the American Rule, which provides that each party to the litigation pays its own costs.<sup>193</sup> The rule is based on the theory that costs should be borne by the party benefiting from the use of the judicial system to settle its disputes and that fees are simply the price of achieving justice.<sup>194</sup> In contrast to the American Rule is the English Rule, which dictates that the losing party pays the winner's expenses.<sup>195</sup> The English Rule is based on the reasoning that the losing party forced the dispute to be decided in court and should be forced to pay the fees.<sup>196</sup> Legal scholars have debated the strengths and weaknesses of these two rules,<sup>197</sup> and the current state of the law may reflect an attempt for compromise between the two extremes.

Modern attorneys' fees jurisprudence begins with the Supreme Court's decision in *Alyeska Pipeline Services Co. v. Wilderness Society*.<sup>198</sup> There, Wilderness Society filed suit seeking declaratory and injunctive relief to stop the Secretary of the Interior from issuing permits to Alyeska Pipeline for the construction of a pipeline in a

---

192. Walter B. Russell, III & Paul T. Gregory, Note, *Awards of Attorney's Fees in Environmental Litigation: Citizen's Suits and the "Appropriate" Standard*, 18 GA. L. REV. 307, 319 (1984).

193. *Alyeska Pipeline Servs. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975).

194. Scott J. Jordan, Comment, *Awarding Attorney's Fees to Environmental Plaintiffs Under a Private Attorney General Theory*, 14 B.C. ENVTL. AFF. J. 287, 290 (1987).

195. *Alyeska Pipeline*, 421 U.S. at 247.

196. Jordan, *supra* note 194, at 291.

197. For analyses of the strengths and weaknesses of the American Rule and the English Rule, see Charles T. McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 MINN. L. REV. 619 (1931); William B. Stoebuck, *Counsel Fees Included in Costs: A Logical Development*, 38 U. COLO. L. REV. 202 (1966); James H. Cheek III, Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 VAND. L. REV. 1216 (1967).

198. 421 U.S. 240 (1975).

wilderness area.<sup>199</sup> After the merits of the case were decided in favor of Wilderness Society,<sup>200</sup> the litigation focused on whether the plaintiffs could recover attorneys' fees. The District of Columbia Circuit ruled that Wilderness Society was entitled to one-half of its fees under the private attorney general doctrine.<sup>201</sup>

In a 5-4 decision, the Supreme Court disagreed and emphatically stated that federal courts must follow the American Rule except in three narrowly defined situations.<sup>202</sup> The Court acknowledged the following three exceptions to the American Rule: (1) express statutory authorization, (2) the common fund doctrine, and (3) the bad faith exception.<sup>203</sup> In acknowledging both the criticisms of the American Rule and the existence of the exceptions, the Court explicitly deferred to the legislature to create additional statutory exceptions.<sup>204</sup> Rather than continuing to adhere to common law exceptions and reasons for fee shifting, which would allow courts the discretion to fashion exceptions to the American Rule, the Supreme Court delegated this decision to Congress. Responding to this invita-

199. *Id.* at 241-42.

200. *Wilderness Soc'y v. Morton*, 479 F.2d 842 (D.C. Cir. 1973) (en banc).

201. *Wilderness Soc'y v. Morton*, 495 F.2d 1026, 1036 (D.C. Cir. 1974) (en banc), *rev'd sub. nom.*, *Alyeska Pipeline Servs. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975); see *infra* notes 207-23 and accompanying text (discussing the private attorney general doctrine).

202. *Alyeska Pipeline*, 421 U.S. at 257.

203. *Id.* at 257-58. Despite the reluctance of the Court to recognize exceptions to the American Rule, it recently awarded fees under the common law bad faith exception in *Chambers v. Nasco*, where the defendant intentionally withheld information from the trial court. 111 S. Ct. 2123 (1991). The Court expressed no reluctance to exercise its inherent power to impose sanctions for bad faith conduct. *Id.* at 2132-36. This bad faith exception, however, has not been applied in the context of CERCLA § 107.

204. *Alyeska Pipeline*, 421 U.S. at 270-71. After reciting the facts and procedural history of the litigation, the Court stated at the outset of its opinion:

We are asked to fashion a far-reaching exception to [the] "American Rule"; but having considered its origin and development, we are convinced that it would be inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation in the manner and to the extent urged by respondents and approved by the Court of Appeals.

*Id.* at 247. Later the Court explained:

We do not purport to assess the merits or demerits of the "American Rule" with respect to the allowance of attorneys' fees. It has been criticized in recent years, and courts have been urged to find exceptions to it. It is also apparent from our national experience that the encouragement of private action to implement public policy has been viewed as desirable in a variety of circumstances. But the rule followed in our courts with respect to attorneys' fees has survived. It is deeply rooted in our history and in congressional policy; and it is not for us to invade the legislature's province by redistributing litigation costs in the manner suggested by respondents and followed by the Court of Appeals.

*Id.* at 270-71 (citations omitted).

tion, Congress has subsequently created over one-hundred statutory provisions for the recovery of attorneys' fees.<sup>205</sup> While Congress has yet to explicitly create such an exception within the context of CERCLA, this Comment contends that such statutory authorization is appropriate because, in addition to the practical reasons,<sup>206</sup> common law exceptions support recovery. Such common law theories include the private attorney general doctrine and possibly the common fund and substantial benefit doctrines.

## 2. *The Private Attorney General Doctrine*

The private attorney general doctrine, although rejected by the majority in *Alyeska*, is recognized as an exception to the American Rule by both scholars and some state courts.<sup>207</sup> Even the Supreme Court recognized the doctrine for nine years before rejecting it in *Alyeska*.<sup>208</sup> Under this doctrine, fees should be awarded to plaintiffs acting in the public interest and performing functions similar to the U.S. Attorney General, as a necessary incentive to bring suit.<sup>209</sup> Additionally, shifting fees from the plaintiff to the defendant re-allocates some litigation costs to a benefited party, assuming that the litigation benefits a large class of people including the defendant.<sup>210</sup> A second assumption implicit in this doctrine is that the government is unable to enforce and prosecute all laws because of limited resources. The law must thus encourage private parties to hold wrongdoers responsible for their actions.<sup>211</sup>

Disagreeing with *Alyeska's* rejection of the private attorney gen-

---

205. Russell & Gregory, *supra* note 192, at 318.

206. See *infra* notes 248-71 and accompanying text (discussing the practical justifications for allowing the recovery of attorneys' fees in CERCLA litigation).

207. For articles supporting the private attorney general doctrine, see Jordan, *supra* note 194; Carl Cheng, Comment, *Important Rights and the Private Attorney General Doctrine*, 73 CAL. L. REV. 1929 (1985); Jim Oesterle, Note, *Implementing the Incentive Purpose of the Private Attorney General Exception* — Miotke v. City of Spokane, 101 Wn. 2d 307, 678 P.2d 803, 60 WASH. L. REV. 489 (1985). For a more critical analysis of the strengths and weaknesses of fee shifting, see Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651. For arguments against the continued use of the private attorney general doctrine, see John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215 (1983); Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339 (1990).

208. See *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968) (adopting the private attorney general doctrine).

209. Cheng, *supra* note 207, at 1931.

210. Jordan, *supra* note 194, at 294.

211. *Id.* at 287.

eral doctrine, the dissenting justices adhered to the appellate court's reasoning. Both dissenting justices advocated retention of the private attorney general doctrine, which the Supreme Court adopted only ten years earlier with regard to civil rights litigation.<sup>212</sup> The first dissenter, Justice Brennan, argued that awarding fees to the plaintiff was proper in this case, quoting the appellate court decision:

[By] [a]cting as private attorneys general, not only have [the respondents] ensured the proper functioning of our system of government, but they have advanced and protected in a very concrete manner substantial public interests. An award of fees would not have unjustly discouraged [petitioner] Alyeska from defending its case in court. And denying fees might well have deterred [the respondent] from undertaking the heavy burden of this litigation.<sup>213</sup>

In addition to advocating retention of the private attorney general doctrine, Justice Marshall, in his dissent, urged the Court to use its equitable powers to permit recovery of fees in instances beyond the three exceptions identified by the majority.<sup>214</sup> He found no basis for the majority's limitation on the equitable power of the Court.<sup>215</sup> Marshall argued that the exceptions acknowledged by the majority were created under the inherent power of the Court and had been expanded by the Court in recent cases.<sup>216</sup> Thus, he was unable to find justification for the majority's sudden retreat from its equitable powers, especially when he felt equity required that the plaintiff be compensated.<sup>217</sup>

Based on his conclusion that the private attorney general doctrine should be retained and in response to the majority's argument that

212. *Alyeska Pipeline Servs. Co. v. Wilderness Soc'y*, 421 U.S. 240, 269 (1975). The Supreme Court had previously adopted the private attorney general doctrine in *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968). The private attorney general doctrine was originally created to allow recovery of fees by civil rights plaintiffs. After the *Newman* decision, the private attorney general doctrine was expanded by lower courts to statutes which did not expressly authorize recovery. Dan B. Dobbs, *Awarding Attorney Fees Against Adversaries: Introducing the Problem*, 1986 DUKE L.J. 435, 439.

213. *Alyeska Pipeline*, 421 U.S. at 272 (Brennan, J., dissenting) (quoting *Wilderness Soc'y v. Morton*, 495 F.2d 1026, 1036 (D.C. Cir. 1974)).

214. *Id.* at 274 (Marshall, J., dissenting) (citing *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970)). Justice Marshall also relied on *Hall v. Cole*, which allowed recovery of fees by a plaintiff who sued a labor union under the free speech provisions of the Labor-Management Reporting and Disclosure Act "since the plaintiff had conferred a substantial benefit on all the members of the union by vindicating their free speech interests." *Id.* at 277 (citing *Hall v. Cole*, 412 U.S. 1 (1973)).

215. *Id.* at 282-86.

216. *Id.* at 274-75.

217. *Id.* at 274-83.

if the doctrine was retained, such an exception would swallow the rule, Marshall advocated a three-step test:

The reasonable cost of the plaintiff's representation should be placed upon the defendant if (1) the important right being protected is one actually or necessarily shared by the general public or some class thereof; (2) the plaintiff's pecuniary interest in the outcome, if any, would not normally justify incurring the cost of counsel; and (3) shifting that cost to the defendant would effectively place it on a class that benefits from the litigation.<sup>218</sup>

Using this test, Justice Marshall argued that awarding attorneys' fees was proper under the facts of *Alyeska*.

After the Supreme Court rejected the private attorney general doctrine, the California Supreme Court and the Idaho Supreme Court explicitly adopted this exception to the American Rule.<sup>219</sup> In *Serrano v. Priest*,<sup>220</sup> the plaintiffs originally challenged the constitutionality of a public school financing system. Based on the inherent equitable power of the court, the California Supreme Court found the doctrine both manageable and fair. It stated that if a trial court

determines that the litigation has resulted in the vindication of a strong or societally important public policy, that the necessary costs of securing this result transcend the individual plaintiff's pecuniary interest to an extent requiring subsidization, and that a substantial number of persons stand to benefit from the decision, the court may exercise its equitable powers to award attorney fees on this theory.<sup>221</sup>

Thus, California recognized the benefits of the private attorney general doctrine in litigation that generates a public benefit and where the burden of attorneys' fees on the plaintiff is significant.

---

218. *Id.* at 284-85.

219. For a short time, the Washington Supreme Court adopted the private attorney general doctrine as a basis for awarding attorneys' fees. In *Miotke v. City of Spokane*, 678 P.2d 803, 810 (Wash. 1984), *overruled by* *Blue Sky Advocates v. State*, 727 P.2d 644 (Wash. 1986), the plaintiffs, a group of owners of lakefront property near the Spokane River, sued the City of Spokane and the Department of Ecology for discharging raw sewage into the Spokane River, seeking an injunction against future dumping and damages for injuries suffered. The court held that fees were recoverable where plaintiffs: (1) incurred considerable expense; (2) effectuated an important policy of state environmental legislation; and (3) served a broad public benefit. *Id.* at 821; *see also* *Oesterle*, *supra* note 207. However, the Washington Supreme Court has since rejected this test and the private attorney general doctrine. *Blue Sky Advocates v. State*, 727 P.2d 644; 648 (Wash. 1986). Similar to the *Alyeska Pipeline* Court, the Washington Supreme Court elected to leave the issue of attorneys' fees for the legislature to resolve. *Id.*

220. 569 P.2d 1303 (Cal. 1977).

221. *Id.* at 1314. To decide whether to award fees, the court considered three factors: "(1) the strength or societal importance of the public policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, (3) the number of people standing to benefit from the decision." *Id.*

Similarly, in *Hellar v. Cenarrusa*,<sup>222</sup> the Idaho Supreme Court adopted the private attorney general doctrine. The case involved a plaintiff's challenge on equal protection grounds to the state legislature's reapportionment plan. After holding that the plan violated the Equal Protection Clause of the Fourteenth Amendment, the court awarded attorneys' fees and determined that the plaintiff had satisfied a three-part test.<sup>223</sup> The court examined: (1) the "strength and societal importance of the public policy indicated by the litigation"; (2) the "necessity for private enforcement and the magnitude of the resultant burden on the plaintiff"; and (3) the "number of people standing to benefit from the decision."<sup>224</sup> Notably, these three factors are similar to the factors advocated by Justice Marshall's dissent in *Alyeska*.

Thus, even after the U.S. Supreme Court's rejection of the theory, two states have adopted the private attorney general doctrine. This indicates that the doctrine retains vitality, although not yet in the context of CERCLA.

### 3. *The Common Fund Exception and Substantial Benefit Theory*

The common fund exception, also known as the common benefit exception, to the American Rule represents another one of the few instances in which courts will award fees absent explicit statutory authorization.<sup>225</sup> Fees will be awarded where the prevailing party has recovered a common fund that benefits others.<sup>226</sup> The fees will then be extracted from this fund before distribution to the plaintiff class.<sup>227</sup> Since the creation of this exception, courts have expanded it to cover situations where a plaintiff created a "common benefit" for an identifiable group.<sup>228</sup> The theory is based on the restitutionary concept of preventing unjust enrichment of other parties who may benefit from the actions of a single party.<sup>229</sup> If one party litigates a case successfully and confers a benefit upon others, the litigating

---

222. 682 P.2d 524 (Idaho 1984).

223. *Id.* at 531.

224. *Id.*

225. *Alyeska Pipeline Servs. Co. v. Wilderness Soc'y*, 421 U.S. 240, 275-76 (1975) (Marshall, J., dissenting); Robert Hogfoss, Comment, *The Equal Access to Justice Act and Its Effect on Environmental Litigation*, 15 ENVTL. L. 533, 537 (1985).

226. Hogfoss, *supra* note 225, at 537.

227. *Id.*

228. *Id.*

229. *Id.* at 538.



party's expenses should be paid out of a common fund.<sup>230</sup>

Although both the common benefit and private attorney general doctrines are based on general equitable principles, the theories differ in that the common benefit exception is based on restitutionary concepts, while the private attorney general doctrine is intended more as an economic incentive "to vindicate an important right or policy."<sup>231</sup> A second important distinction is that under the common benefit doctrine, fees are part of the judgment, rather than a separate award over and above the judgment.<sup>232</sup>

In *Alyeska Pipeline Services Co. v. Wilderness Society*, the Supreme Court acknowledged that the common benefit exception existed<sup>233</sup> and did not overrule it. However, it refused to expand exceptions to include the private attorney general doctrine.<sup>234</sup> The Court stated that such an exception should be applied where "the classes of beneficiaries were small in number and easily identifiable [and] [t]he benefits could be traced with some accuracy . . . [and] some exactitude to those benefiting."<sup>235</sup>

Closely related to the common fund exception is the substantial benefit theory, "which may be viewed as an outgrowth of the 'common fund' doctrine . . . ."<sup>236</sup> This theory is well-established in California and allows a court to award fees "when the litigant, proceeding in a representative capacity, obtains a decision resulting in the conferral of a 'substantial benefit' of a pecuniary or nonpecuniary nature."<sup>237</sup> The court "may decree that under dictates of justice those receiving the benefit should contribute to the costs of its production."<sup>238</sup> This theory was specifically created to allow fee awards where a common fund is not created.<sup>239</sup> It has been applied to constitutional challenges to state educational funding,<sup>240</sup> challenges to property taxes,<sup>241</sup> and stockholder derivative actions<sup>242</sup> among

---

230. *Id.*

231. Oesterle, *supra* note 207, at 496.

232. Dobbs, *supra* note 212, at 440-41.

233. 421 U.S. 240, 263 (1975).

234. *Id.* at 269.

235. *Id.* at 264 n.39.

236. *Serrano v. Priest*, 569 P.2d 1303, 1309 (Cal. 1977).

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Knoff v. City of San Francisco*, 81 Cal. Rptr. 683 (Ct. App. 1969).

242. *Fletcher v. A.J. Indus., Inc.*, 72 Cal. Rptr. 146 (Ct. App. 1968) (establishing the substan-

others. These traditional justifications support a fee-shifting provision in the context of CERCLA section 107 litigation.

## II. ANALYSIS

Beginning with the premise that Congress will not scrap the current liability and litigation-intensive structure of CERCLA, this Comment examines the role attorneys' fees play in allowing the statute to better function and meet Congress's original goals.<sup>243</sup> The current statutory structure attempts to satisfy at least two of those goals. Level one litigation grants the EPA discretion to initiate response actions or compel private parties to do so.<sup>244</sup> Level two litigation attempts to more equitably distribute the costs among private parties, although it is questionable whether this goal is achieved because of the expenses that a private party must incur to recover response costs from a recalcitrant PRP.<sup>245</sup> Still, in the process of attempting to fulfill these two goals, three other previously identified goals remain unfulfilled by section 107: 1) encouraging voluntary settlement with responsible parties; 2) encouraging appropriate and timely cooperation by PRPs; and 3) providing for efficient, cost-effective means of cleanup.

To meet the goals identified by Congress, additional incentives must be created to reduce litigation time and transaction costs. Rather than attempt to dissect the arguments used by courts, this Comment examines the policy concerns that should be considered when interpreting the statutory language. First, taking a practical approach, it explores incentives and disincentives created by allowing fee awards. Second, it discusses existing legal theories in support of fee shifting that suggest that Congress should amend CERCLA to allow for recovery of attorneys' fees by plaintiffs. Finally, comparing the benefits of fee shifting to CERCLA's policies, it suggests that until such an amendment is passed, courts should interpret section 107 liberally to advance the statute's policies, following the lead of *General Electric Co. v. Litton Industrial Automation Systems, Inc.*<sup>246</sup>

---

tial benefit theory as law in California). In the derivative suit context, the theory has since been superseded by statute. *Brusso v. Running Springs Country Club, Inc.*, 278 Cal. Rptr. 758, 761-62 (Ct. App. 1991).

243. See *supra* notes 1-7, 86-90 and accompanying text (identifying the goals of CERCLA).

244. See *supra* notes 51-53, 59, 61-72 and accompanying text (discussing level one).

245. See *supra* notes 56, 60, 73-78 and accompanying text (discussing level two).

246. 920 F.2d 1415 (8th Cir. 1990); see *supra* notes 123-37 and accompanying text (discussing

This Comment concludes that recovery of attorneys' fees is appropriate for four policy reasons. First, awarding fees provides an incentive for recalcitrant PRPs to participate earlier in the response process. Closely related to the first policy is the second: shifting of attorneys' fees encourages parties to participate earlier in the process, or at a minimum, eliminates the incentive to become a recalcitrant PRP. Third, the possibility of fee awards encourages settlement. Fourth, recovery of attorneys' fees by parties who clean up hazardous waste sites is equitable.

### *A. Practical Concerns and the Impact of Attorneys' Fees*

Attorneys' fees are recoverable by the EPA when litigating at level one with private parties, but may not be recoverable by private parties at level two of the analysis. This distinction creates both incentives and disincentives for private parties contemplating a response action.

#### *1. Incentives Created by Awarding Attorneys' Fees*

Amending CERCLA to allow fee awards would create incentives for private parties to undertake a response action. By knowing that they will be able to recover fees when pursuing a response action against other PRPs, private parties can better estimate whether they can afford a response action.

For example, if a party such as General Electric buys or owns a piece of property on which hazardous waste is found but the EPA has not taken any independent action to clean up a site or to force a private party to do so, the company must choose a course of action; it can either ignore a potentially hazardous environmental condition, or it can initiate investigation and cleanup.<sup>247</sup> In evaluating whether it should proceed, the company will attempt to identify all other PRPs that it may later sue for contribution to recover its costs.<sup>248</sup> First, the company will look for a pool of financially solvent PRPs, and, second, it will evaluate the potential costs of cleanup and litigation — what it will cost the company to not only complete the response action, but also to recover the response costs from other

---

*General Electric*); see also *Donahey v. Bogle*, 987 F.2d 1250 (6th Cir. 1993) (following *General Electric*).

247. See 42 U.S.C. § 9607 (1988); see also *supra* notes 68, 73 and accompanying text (discussing a private party's alternatives).

248. See 42 U.S.C. § 9607(a)(1-4).

PRPs. Unlike EPA cost-recovery actions, which are fundamentally based in legal determinations to adjudge liability, private cost-recovery actions are fact intensive and thus typically very expensive.<sup>249</sup> If the company will have to sue several other companies to recover its response costs, it may incur potentially extraordinary amounts of attorneys' fees.<sup>250</sup> The possible recovery of the fees could be the crucial factor in deciding whether to initiate a response action because attorneys' fees may be greater than the remaining, nonlegal response costs.<sup>251</sup> If the cost of recovering response costs from other parties is expected to be high, a company may decide not to take action but instead may continue to expose the environment to the waste until another party or the EPA decides to take action.<sup>252</sup>

In the example above, the party deciding whether to become involved in a cleanup will only take action if the expected benefit is greater than the expense.<sup>253</sup> *General Electric* recognized this exact point: "The litigation costs could easily approach or even exceed the response costs, thereby serving as a disincentive to clean the site."<sup>254</sup> As the law currently stands, uncertain at best, the party making this

249. For a discussion of the tremendous litigation costs, see *supra* notes 24-30 and accompanying text.

250. See *supra* notes 24-30 and accompanying text (discussing the expenses involved in bringing a response action).

251. See *General Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415 (1990), *cert. denied*, 111 S. Ct. 1390 (1991).

252. The *General Electric* court included this point in its reasoning. *Id.* at 1422. In *Hastings Bldg. Prods., Inc. v. National Aluminum Corp.*, 815 F. Supp. 228 (W.D. Mich. 1993), decided immediately before publication of this Comment, the court recognized a similar inconsistency supporting fee recovery.

Under the statutory scheme of CERCLA, property owners who discover that their land has been contaminated by another party have two choices. They can either clean it up, and then seek to recover their expenses under § 9607, or they can leave the hazardous material where it lies and institute a § 9659 action to prod the responsible party to clean it up. Attorneys' fees are clearly recoverable in § 9659 citizens suits. If courts hold that individuals and corporations who undertake clean-up efforts at their own expense cannot recover attorneys' fees after a successful § 9607 suit to recover response costs from those responsible for the contamination, then there will be little incentive to initiate early clean-up. The cost-effective strategy would be to file the citizens suit to force the hand of the responsible party. Yet the resulting delay in the removal of hazardous materials is not in the best interest of the public health or the welfare of the environment.

Without clear indication that this is the result Congress desired, I decline to read such a perverse incentive system into CERCLA.

*Id.* at 231-32.

253. Basic economic principles posit that in a perfect economy, a party will choose the course of action that is economically efficient. See PAUL A. SAMUELSON & WILLIAM D. NORDHAUSE, *ECONOMICS* 46-47 (12th ed. 1985).

254. *General Elec.*, 920 F.2d at 1422.

decision probably will make the conservative assumption that it will be unable to recover its fees. Accordingly, it may be unwilling to clean up a site.

The importance of this decisionmaking process is amplified by the number of smaller hazardous waste sites that will never be a focus of the federal or state environmental agencies due to limited financial resources. Currently, the EPA lists approximately thirty-four thousand waste sites on the national inventory list, only 1,236 of which have received priority by placement on the NPL.<sup>255</sup> Because of the limited possibility of governmental involvement, the main incentive for a property owner to pursue a \$100,000 environmental problem is knowing with a relatively high degree of certainty that he will be able to recover not only the actual cleanup costs, but also the attorneys' fees.<sup>256</sup> The importance of the attorneys' fees issue is amplified as the other factors normally compelling cleanup become less threatening. In the general order of significance, these other factors include: 1) government involvement; 2) property improvement and transfer; and 3) emergency exposure to human life and the public.

If a company initially decides not to initiate a cleanup action, the threat of EPA action under section 106 provides little added incentive for the company to participate. Once the EPA decides to become involved, the company can simply agree to participate, thus reducing the potential attorneys' fees that may be imposed under section 106. If the company knows that it is responsible in some part for the waste, it may decide not to fight the EPA.<sup>257</sup> But until this point is reached, the company has little incentive to remedy the situation.

Shifting fees, however, provides an incentive to take part earlier in the response action. If a party knows that it may be able to recover its attorneys' fees incurred in pursuing other PRPs under sections 107 and 113, the expense of conducting a private cost-recovery action is reduced, perhaps significantly depending on the number of parties involved at the site.

---

255. See *supra* notes 16 (discussing the number of hazardous waste sites on the NPL), 74 (discussing the number of potential waste sites that may be added to the NPL in the future).

256. For a discussion of the importance of incentives and voluntary cleanup by private parties, see *supra* note 27.

257. At this point, faced with a potential § 106 order, the company will comply because once a § 106 order has been issued, the penalty for noncompliance is treble damages. *United States v. Parsons*, 936 F.2d 526, 528-29 (11th Cir. 1991).

Involving private parties early in the response process is one of the central goals of SARA.<sup>258</sup> Congress recognized that EPA resources are limited and that private parties must be relied upon to complete much of the cleanup work.<sup>259</sup> One federal court has stated this point:

Congress intended § 107 as a powerful incentive for those [private] parties to expend their own funds initially without waiting for responsible persons to take action. The court can conceive of no surer method to defeat this purpose than to require private parties to shoulder the financial burden of the very litigation that is necessary to recover these costs.<sup>260</sup>

In addition to the many benefits of response action led by private parties,<sup>261</sup> this scenario saves the EPA from having to involve itself in the long process of identifying PRPs and forcing a PRP to take action.<sup>262</sup> This in turn frees the EPA to pursue other priorities.

The number of cases that fall under this hypothetical scenario is unclear because these cases rarely make it to court. But given the prevalence of hazardous waste in our society,<sup>263</sup> including the trend towards developing old industrial sites into commercially desirable uses, it is likely that many owners of commercial property will face similar decisions when deciding whether or not to improve a piece of property.

## 2. *A Practical Review of the Disincentives Created by Section 107*

The current state of the law creates a disincentive for companies to participate in the cleanup of a site once the EPA has become involved. As the statute currently stands, once the EPA decides to take action regarding a specific site, it sends out a section 104(e) letter to all PRPs requesting information about their connection to

258. Atkeson et al., *supra* note 94, at 10,365.

259. See *supra* notes 74-75, 86-95 and accompanying text (explaining the government's inability to clean up waste sites without help from private parties).

260. *Bolin v. Cessna Aircraft Co.*, 759 F. Supp. 692, 710 (D. Kan. 1991) (citations omitted) (emphasis added).

261. *Id.*

262. Under § 106, the EPA has the power to compel a response action. 42 U.S.C. § 9606 (1988); see *ACTON*, *supra* note 1, at 1, 4 (discussing how responsible parties may be forced to clean up the hazardous waste they caused); *supra* notes 16, 77, and accompanying text (explaining the process for identifying and suing PRPs).

263. Fourteen thousand waste sites exist that may be added to the NPL in the future. *ACTON ET AL.*, *supra* note 16, at 2; see *supra* note 16 and accompanying text (discussing the number of hazardous waste sites).

the site.<sup>264</sup> Next, the EPA sends out a section 107 letter, notice of general liability, that basically informs each PRP that a response action is going to take place and requests that company's presence at a meeting of PRPs. Because PRPs are only potentially responsible, the EPA typically pursues only a few of the largest ones and attempts to force them to conduct a response action. Other identified PRPs must choose whether or not they will participate in cleaning up the waste site.<sup>265</sup> If they decide to participate in the ongoing action with the EPA, the company may be held responsible for some or all of the EPA's transaction costs.<sup>266</sup> But if they decide not to participate, they may be sued later by PRPs that do participate and at that point would not be responsible for attorneys' fees.<sup>267</sup> Thus, the private party can save money by not participating and dragging out the cleanup process. By allowing this paradox to exist, the statutory scheme inadvertently invites protracted litigation, thus running up costs and prolonging response actions.

Similar to this scenario, the EPA usually selects a small number of parties to perform the response action,<sup>268</sup> and those parties must later sue other PRPs for contribution. This discretion by the EPA disadvantages the party held liable because it is forced to incur two sets of legal fees. First, the responding responsible party can be forced to reimburse the EPA for its legal fees. Second, the responsible party will later be forced to sue each of the other PRPs for contribution, incurring even greater litigation costs without being able to recover its litigation fees. If the responsible party anticipates that suing other PRPs will be more expensive than shouldering the cleanup expenses itself, it will not attempt to recover these response costs and will then be left paying more than its fair share. This is inconsistent with the purposes of level two, where CERCLA attempts to correct some of the inequities of level one.<sup>269</sup>

---

264. See 42 U.S.C. § 9604(e); see also *supra* note 64 and accompanying text (describing the identification process).

265. See *supra* notes 66-68 and accompanying text (explaining the process by which the EPA and private parties determine who will conduct a response action).

266. See *supra* notes 25-31 and accompanying text for a discussion of the types of transaction costs incurred in CERCLA litigation. For a discussion of the different parties from whom the EPA can recover transaction costs, see *supra* note 68.

267. The incentive not to participate is particularly great for the smaller PRPs whom the EPA typically does not pursue. See *supra* notes 72-73 (explaining the EPA's discretion to pursue any PRP it chooses).

268. Hedeman et al., *supra* note 9, at 10,417.

269. 42 U.S.C. § 9606; see *supra* notes 86-95 and accompanying text (explaining the policies

This entire part of the statute is driven by the EPA's discretion. The EPA decision about whom to involve is somewhat arbitrary,<sup>270</sup> depending on how many solvent PRPs are involved; and thus, whomever the EPA selects to perform the response action is forced to incur more than its fair share of litigation costs.

### 3. Settlement Incentives

One of the most obvious, and most important, practical reasons to award attorneys' fees is to provide an incentive for parties to settle.<sup>271</sup> CERCLA is litigation intensive because of the statute's structure<sup>272</sup> and because of the number of parties involved.<sup>273</sup> Fee awards serve as a mechanism to weed out both the smaller claims and CERCLA-sophisticated parties.<sup>274</sup>

For example, if a party cleans up a piece of property and pursues contribution claims against fifty other PRPs, many of those PRPs may be transporters or generators who have contributed relatively small amounts to the waste site. Thus, their anticipated liability under equitable principles is relatively small. If a PRP suspects that it did contribute or is connected to the waste and is facing substantial liability for the plaintiff's attorneys' fees, it will be more inclined to settle the case early, rather than extend the litigation.<sup>275</sup>

Second, a sophisticated CERCLA party is rewarded for avoiding settlement by deferring relatively fixed costs. Based on its past experience, a sophisticated CERCLA party will know that it can allow other PRPs to clean up the waste site even though it is liable in part for the waste. By deferring its participation, the sophisticated CERCLA party has the present use of its funds and knows that it will be held liable only if sued for contribution by one of the parties that conducts a response action. Thus, it is rewarded for its delinquent action.

If, however, attorneys' fees are recoverable and potentially signifi-

behind § 107).

270. See *supra* notes 71-72 and accompanying text (discussing the EPA's discretion).

271. This section is premised on the theory that settlement is a benefit. See *supra* notes 181-87 and accompanying text (discussing the economic benefits created by settlement).

272. See ACTON, *supra* note 1, at 53-54.

273. *Id.* at 53.

274. CERCLA-sophisticated parties are parties who have been through the response process previously and are knowledgeable of the pitfalls and loopholes of CERCLA.

275. See *supra* notes 188-89 and accompanying text (explaining why a party would have an incentive to settle).



cant, once factored into the cost equation, the sophisticated CERCLA defendant will be more inclined to settle. It will realize that attorneys' fees can be a significant expense and that delaying involvement would only increase its expenses. The award of attorneys' fees further encourages good faith by force of alternative economic detriment. The decision on whether to participate then focuses on the true issue of whether it is in fact liable under section 107, and it would no longer have the economic disincentive to participate.

With these practical ideas in mind, this Comment next examines legal theories which can be used to support fee shifting.

### B. *The Private Attorney General Doctrine*

The strongest legal argument supporting an amendment to section 107 authorizing the recovery of attorneys' fees is the private attorney general doctrine, which is based on the idea that when a party is acting for the benefit of the general public it should be awarded fees as an incentive to pursue this litigation. Because the government has limited resources, private resources are needed to fulfill these goals.<sup>276</sup> Civil rights and antitrust law are two areas which developed this theory and actually incorporated it into the statutes.<sup>277</sup> The private attorney general doctrine has previously been suggested as a rationale for recovering fees in environmental litigation. Similar to civil rights or antitrust litigation, environmental litigation frequently affects the public interest due to the fragile ecosystem in which we live.<sup>278</sup> To provide an incentive for plaintiffs to bring actions which result in a public benefit, plaintiffs should be allowed to recover their costs of litigation. Otherwise, due to the significant expense of litigation, such plaintiffs may not bring an action and the environmental damage will continue and possibly even spread, particularly if the hazardous waste enters a water system.<sup>279</sup>

Although the private attorney general doctrine was rejected by the Supreme Court in *Alyeska Pipeline Services v. Wilderness Soci-*

---

276. Jordan, *supra* note 194, at 287.

277. Antitrust Acts, 15 U.S.C. §§ 15, 26 (1988); Civil Rights Act, 42 U.S.C. § 1988 (1988).

278. Jordan, *supra* note 194, at 288-89.

279. Chemical and medical wastes are examples of materials often deemed hazardous to the environment. For a general discussion of the threats posed by these types of waste, see V.J. LANDRUM, *MEDICAL WASTE MANAGEMENT AND DISPOSAL* (1991); DAVID W. SCHNARE, *CHEMICAL CONTAMINATION AND ITS VICTIMS: MEDICAL REMEDIES, LEGAL REDRESS AND PUBLIC POLICY* (1989).

ety,<sup>280</sup> the theory behind it remains a strong argument in support of fee awards, and the doctrine actually exists where Congress has explicitly authorized<sup>281</sup> private parties to enforce a particular statute. Typically, the statutory form exists as a citizen-suit provision whereby a citizen can either sue the government or bring a direct action against the private polluter.<sup>282</sup>

The theory behind the private attorney general doctrine is that creating a private right of action and then failing to provide resources to exercise the right only serves to frustrate the purpose behind any such statute.<sup>283</sup> Since Congress created section 107 to take advantage of private resources, failing to allow successful plaintiffs to recover their fees from responsible defendants serves to weaken the power created by section 107.

In *Alyeska*, Justice Brennan argued in his dissent for the retention of the private attorney general doctrine because he believed that the absence of an opportunity to recover fees could deter a plaintiff from pursuing publicly beneficial litigation.<sup>284</sup> CERCLA litigation appears to be an example of where Brennan would have supported fee shifting. Due to the enormous cost of litigating to recover response costs, a failure to award fees would likely discourage parties from initiating cleanup actions and from suing other PRPs to recover response costs when the chance for success multiplied by the amount of recovery is less than the attorneys' fees. Thus, the

280. *Alyeska Pipeline Servs. Co. v. Wilderness Soc'y*, 421 U.S. 240, 269 (1975).

281. Because the Supreme Court severely limited the number of exceptions to the American Rule, the only method by which new exceptions can be created is through new statutory provisions. *See id.* at 271 ("[I]t is not for us to invade the legislature's province by redistributing litigation costs . . .").

282. *See, e.g.*, Endangered Species Act, 16 U.S.C. § 1540(g) (1982); Clean Water Act, 33 U.S.C. § 1365(d) (1988); Deepwater Ports Act, 33 U.S.C. §1515 (1982); Clean Air Act, 33 U.S.C. § 7604 (1988); CERCLA 42 U.S.C. § 9659. Nonenvironmental statutes containing citizen-suit provisions include the Civil Rights Act, 42 U.S.C. § 1983, and Antitrust Laws, 15 U.S.C. §§ 15, 26 (1988). The current trend, particularly in state statutes, is to authorize fee shifting. As of 1984, 1,074 state statutes authorize fee shifting. Gwyn G. Timms, *Statutorily Awarding Attorneys' Fees in Environmental Nuisance Suits: Jump Starting the Public Watchdog*, 65 S. CAL. L. REV. 1733, 1757 (1992).

CERCLA § 159 authorizes citizens' suits, which are commonly brought either to force the EPA to initiate an enforcement action against a private party, 42 U.S.C. § 9659, or directly against a private party to begin and properly conduct a response action, 42 U.S.C. § 9606. I suggest that Congress did not include such a provision in § 107 because only one case before SARA mentioned the issue, and thus Congress simply failed to consider the issue of attorneys' fees in the context of private cost-recovery actions.

283. Jordan, *supra* note 194, at 288.

284. *Alyeska Pipeline*, 421 U.S. at 273 (Brennan, J., dissenting).

goals of CERCLA are frustrated by a failure to award attorneys' fees.

An important distinction and potential weakness in applying the private attorney general doctrine to CERCLA is that while both public interest litigation based on the private attorney general doctrine and CERCLA result in a public benefit, the CERCLA private plaintiff has more of an individual economic interest in the litigation since it must otherwise bear the response costs. For example, a PRP may wish to reduce future liability (i.e., the threat of future litigation) or a private landowner may want to enhance the use or increase the value of his property by removing hazardous waste that is deterring potential buyers. To do this, the party would have to initiate a response action. In contrast, a citizens' group suing on behalf of the environment represents a broad public interest that is spread over a large group of people.<sup>285</sup> That public interest group has less of a personal economic incentive to litigate and will be more willing to leave the responsibility to others.<sup>286</sup> Thus, a statute or court should be more inclined to award fees to a prevailing citizen-suit plaintiff who would otherwise have little economic incentive to initiate a lawsuit.

Similar to the reasoning in Brennan's dissent, the test advocated by Justice Marshall in his dissent in *Alyeska* supports the recovery of fees in private cost-recovery actions. The first step of that test, which requires that the "important right being protected is one actually or necessarily shared by the general public or some class thereof," applies here.<sup>287</sup> CERCLA was created to provide for the quick cleanup of hazardous waste sites to protect human health and the environment.<sup>288</sup> Prevention of the threat to the environment, and thus protection of human health, is certainly an important right

---

285. Jordan, *supra* note 194, at 295. Jordan argues:

Private interests tend to be protected vigorously because such interests often are concentrated in a few parties who regard the outcome as very important. The result is that these parties have a strong incentive to litigate. Conversely, broad public interests affect a diffuse group of parties, few of whom have more than a small stake in the outcome. This leads to a free rider effect: those with only a small stake will tend to leave the burden to others. They calculate that their benefits are too small to justify action and that their support will not make a difference in the outcome. The result is that public interest litigation will be underfunded relative to the actual value that it has to society.

*Id.*

286. *Id.*

287. *Alyeska Pipeline*, 421 U.S. at 282-85 (Marshall, J., dissenting).

288. *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1142-43 (E.D. Pa. 1982).

shared by the general public and not just by the identified PRPs. Marshall's second step requires that the plaintiff's interest in the outcome be insufficient to justify the cost of counsel.<sup>289</sup> CERCLA litigation varies in monetary values, but the proportionate amount of response costs can be less than the anticipated litigation costs,<sup>290</sup> and thus the plaintiff has little incentive to pursue any viable claim, regardless of who is at fault. An example of this situation is *General Electric Co. v. Litton Automation Systems, Inc.*, where the plaintiff was seeking \$940,000 in response costs and \$419,000 in attorneys' fees.<sup>291</sup> The fees represented approximately fifty percent of the total amount of response costs sought. Had those fees been unrecoverable, General Electric would have had to seriously consider whether it would in fact realize any gain from pursuing litigation after factoring in the probability of recovery. Moreover, the absence of a fee-shifting provision works to defeat the statutory goal of eventually assessing costs on the identifiable responsible parties.

The third and final step of Marshall's test is that "shifting [the] cost to the defendant would effectively place it on a class that benefits from the litigation."<sup>292</sup> This requires only that the defendant also benefit from the response action. Given the broad benefit bestowed on all members of the public by taking measures to protect against future harm to the environment, the defendant would fall in this class.

Based on the application of Marshall's test from *Alyeska* and on the theories underlying the private attorney general doctrine, private plaintiffs should be able to recover fees under CERCLA. While this doctrine is not currently recognized by the Supreme Court, Congress should exercise the power left to it by the Supreme Court and amend the statute, thus effectuating the theory in statutory form.

Taken a step further, one can argue that the private attorney general doctrine supports recovery even without amending the statute. While this theory may not have independent validity in federal courts as the sole basis for fee shifting, given the ambiguous language in section 107, the policy provisions behind the statute and the theories underlying the private attorney general doctrine support

---

289. *Alyeska Pipeline*, 421 U.S. at 285 (Marshall, J., dissenting).

290. This is particularly true for some of the smaller PRPs, such as transporters, who may have delivered only a small volume of waste to the particular site.

291. *General Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1417 (8th Cir. 1990), cert. denied, 111 S. Ct. 1390 (1991).

292. *Alyeska Pipeline*, 421 U.S. at 285 (Marshall, J., dissenting).

a liberal interpretation of the statutory language. Liberal interpretation of CERCLA has already been advocated by the First, Eighth, and Ninth Circuits.<sup>293</sup> The Ninth Circuit commented that because "CERCLA is essentially a remedial statute designed by Congress to protect and preserve public health and the environment, courts are . . . obligated to construe its provisions liberally to avoid frustration of the beneficial legislative purposes . . . 'in the absence of a specific Congressional intent.'"<sup>294</sup> Thus, based on the private attorney general doctrine and the practical reasons stated above,<sup>295</sup> liberally interpreting the statute to implement CERCLA's goals is appropriate.

### 3. *The Common Benefit Doctrine and the Substantial Benefit Theory*

Two additional equity-based theories lend support to the idea that fee shifting is appropriate in level two litigation. The first theory, the common benefit doctrine, is based on the idea that if one party has acted for the benefit of all parties, it would constitute unjust enrichment of the benefited parties to not subtract litigation costs from the funds recovered.<sup>296</sup> This theory differs from the private attorney general doctrine, in that the money is taken out of the judgment rather than from an additional judgment against the defendants. To make up for this difference, California courts follow a second theory, the substantial benefit theory, which allows courts to award fees in cases involving common benefit situations but where no common fund was recovered.<sup>297</sup>

Applying the substantial benefit theory to CERCLA supports fee shifting. Where the EPA forces one party to conduct a response action, leaving it to seek reimbursement from other PRPs under sec-

---

293. See *General Elec.*, 920 F.2d at 1422 (including attorneys' fees as reasonable costs); *Wilshire Westwood Ass'n v. Atlantic Richfield Corp.*, 881 F.2d 801 (9th Cir. 1989) (applying the petroleum exclusion of CERCLA to unrefined and refined gasoline even though some components had been designated as hazardous under CERCLA); *Dedham Water Co. v. Cumberland Farms Dairy*, 805 F.2d 1074, 1081 (1st Cir. 1986) (construing CERCLA liberally to avoid frustration of legislative purpose).

294. *Wilshire*, 881 F.2d at 804 (quoting *Dedham Water Co. v. Cumberland Farms Dairy*, 805 F.2d 1074, 1081 (1st Cir. 1986)).

295. See *supra* notes 248-71 and accompanying text (discussing the practical justifications for awarding attorneys' fees under CERCLA).

296. See *supra* notes 225-42 and accompanying text (discussing the common benefit doctrine).

297. See *supra* notes 235-41 and accompanying text (explaining the substantial benefit doctrine).

tion 107, that one party remedies a dangerous situation for the benefit of the public. Often, even the defending PRP shares in the common benefit generated by the plaintiff's waste site cleanup. The plaintiff who conducts the response action may have dealt with the EPA, expended considerable amounts of time, and incurred administrative costs which are not recoverable in a contribution action.<sup>298</sup> Thus, it would constitute unjust enrichment if the court did not force the defendant to contribute to the plaintiff's litigation costs. The plaintiff assumed the burden of conducting the site investigation, conducted removal or remedial procedures, and determined the class of PRPs. By doing this without imposing any of these duties on the defendant, the plaintiff conferred a substantial benefit on all those PRPs who remained idle during the response period. Requiring those who benefited to help share in the plaintiff's litigation costs would help to restore the plaintiff to its rightful position and would prevent the defendant from being unjustly enriched.

The equitable principles behind the substantial benefit doctrine support courts liberally construing section 107, in conjunction with section 113, in order to effectuate equitable principles behind level two litigation. To implement these principles, the courts should be granted significant discretion to determine if fees should be awarded and the amount of any awards. Typically, statutes authorize courts to award reasonable fees where "appropriate," thus deferring to judicial judgment.<sup>299</sup> Each court could thus better achieve CERCLA's equitable principles and policies.

## CONCLUSION

Increasing the efficiency of CERCLA's current statutory structure must be Congress's goal when amending the statute in 1994. Wasting billions of dollars on transaction costs and attorneys' fees neither furthers CERCLA's goals nor decreases the number of hazardous waste sites. Because Congress is not likely to replace CERCLA's current statutory liability scheme, it is necessary to search

---

298. In *Key Tronic Corp. v. United States*, however, the court allowed a private party to recover response costs incurred by corporate executives. 766 F. Supp. 865 (E.D. Wash. 1991), *rev'd*, 984 F.2d 1025 (9th Cir. 1993); see *T & E Indus. v. Safety Light Corp.*, 680 F. Supp. 696 (D.N.J. 1988) (allowing recovery for time spent by a corporate president on a response action); Knopf, *supra* note 31, at 515-17 (discussing recovery of time and expenses of corporate expenditures).

299. This type of discretion is typically found in citizen-suit provisions. Russell & Gregory, *supra* note 192, at 309.

for more subtle methods of improving the operation of CERCLA.<sup>300</sup> As demonstrated by this Comment, shifting attorneys' fees from the prevailing private plaintiff to the private defendant is one such method which also fulfills CERCLA's statutory goals.

Practical concerns over incentives and disincentives created under the current version of the statute suggest that an amendment is necessary. Incentives are needed to get private parties involved earlier in the cleanup process and to encourage settlement, thus reducing the duration of litigation and the extent of transaction costs. Shifting of attorneys' fees is one such incentive. Moreover, traditional legal theories asserted as a basis for fee shifting support such a result in the context of CERCLA. The private attorney general doctrine, common fund doctrine, and substantial benefit theory support the idea that Congress should amend CERCLA and specifically create another statutory exception to the American Rule.

Achieving this fee shifting in the absence of an amendment to the statute is difficult. This Comment demonstrates the problem presented by the current version of section 107 and the controversy that it has created. This Comment suggests that the *General Electric* opinion<sup>301</sup> reflects a correct interpretation of the statute under policy grounds and that these policy reasons correspond to the reasoning underlying the private attorney general doctrine. Because CERCLA is recognized as an ambiguous and poorly-drafted statute, CERCLA's policies and purposes, along with common law theories, should be considered by courts when interpreting terms such as "necessary costs of response" and "enforcement activities."<sup>302</sup> Faithfulness to congressional intent requires that courts work to effectuate a broad and liberal interpretation of CERCLA's language in

---

300. While it is beyond the scope of this Comment to analyze the specific language to be used when amending the statute, several articles provide some background on the topic. See Greve, *supra* note 207 (discussing, in part, Congress's failure to contemplate more efficient private enforcement mechanisms); Russell & Gregory, *supra* note 192, at 307 (discussing different standards that can be used in statutes authorizing citizens to bring environmental lawsuits).

301. See also *Donahey v. Bogle*, 987 F.2d 1250 (6th Cir. 1993) (awarding fees based, in part, on the reasoning of *General Electric*).

302. See *General Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1390 (1991) (liberally interpreting § 107); *Wilshire Westwood Ass'n v. Atlantic Richfield Corp.*, 881 F.2d 801 (9th Cir. 1989) (calling for a liberal interpretation of CERCLA's language); *Key Tronic Corp. v. United States*, 766 F. Supp. 865 (E.D. Wash. 1991) (awarding attorneys' fees based on a broad interpretation of § 107), *rev'd*, 984 F.2d 1025 (9th Cir. 1993).

order to effectuate congressional goals and reduce the amount of transaction costs wasted in current litigation.

*Bryan E. Keyt*



