Washington Law Review

Volume 72 | Number 3

7-1-1997

Consistent Inconsistency: CERCLA Private Cost Recovery Actions and the Community Relations "Requirement"

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CONSISTENT INCONSISTENCY: CERCLA PRIVATE COST RECOVERY ACTIONS AND THE COMMUNITY RELATIONS "REQUIREMENT"

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Abstract: The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) provides private parties with the right to recover their cleanup costs from third parties responsible for contaminating sites with hazardous waste. To do so, plaintiffs must show that their response costs are consistent with the National Contingency Plan (NCP), which establishes procedures and standards for hazardous waste cleanup. Courts presently diverge regarding the NCP community relations requirement. Some courts find that private parties satisfy these public participation provisions by working with a government agency. Other courts hold that private parties cannot recover their cleanup costs without providing the public with an opportunity to comment. This Comment examines CERCLA and the NCP community relations requirement, and argues that courts must recognize that public participation, which involves highly localized and distinct community concerns, is crucial to the attainment of a CERCLA-quality cleanup. Therefore, private parties must provide an opportunity for public participation to recover their cleanup costs under the NCP.

Congress adopted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[1] to address the dangers to human health and the environment caused by hazardous substances. A significant feature of the statutory scheme is that it creates a private cause of action, allowing private parties to recover the costs of cleanup from other parties responsible for the contamination.[2] One of the requirements for recovery is that the plaintiff prove that its cleanup actions were consistent with the National Contingency Plan (NCP),[3] a set of criteria outlining the procedures and standards for responding to hazardous waste releases.

The NCP contains a community relations provision, which requires private parties undertaking cleanup actions to provide an opportunity for public comment.[4] Courts are divided as to the level and type of public participation necessary to demonstrate consistency with the NCP. Some courts find that as long as the cleanup is of CERCLA quality, a private party that did not provide an opportunity for public participation, but

1. Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601–9675 (1994 & Supp. I 1995)).

2. CERCLA § 107, 42 U.S.C. § 9607 (1994).

3. National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. pt. 300 (1996).

4. 40 C.F.R. § 300.700(c)(6).

worked with a government agency, can recover its cleanup costs.[5] Other courts consider the lack of public participation a bar to recovery.[6]

This Comment argues that courts lack a true understanding of public participation—an inclusive process encompassing a diversity of interests and experiences. Equally important, private party hazardous waste cleanup is a highly localized endeavor; those directly affected by both the contamination and the cleanup plan should be provided with the opportunity to be involved in decisions regarding their health and environment. Accordingly, because an agency cannot adequately represent the multifarious interests within a particular community, courts should not permit government involvement to substitute for meaningful public participation. The community relations requirement should be considered a fundamental component of a CERCLA-quality cleanup, thereby making it necessary for private parties to provide an opportunity for public participation to recover their cleanup costs under the NCP.

Part I provides a brief overview of CERCLA, and Part II examines the NCP and the specifics of the community relations requirement. Part III underscores the split in judicial interpretations of the community relations requirement, including various policy considerations underlying the two approaches. Part IV contends that courts have failed to understand the nature and importance of public participation, and argues that government involvement should not serve as a substitute for public comment. Finally, this Comment concludes that meaningful public participation is a necessary component of a CERCLA-quality cleanup.

I. CERCLA

A. Overview

It is now well established that Congress passed CERCLA in haste.[7] Spawned by Love Canal,[8] the public outcry over improper hazardous waste disposal and the concomitant demand for cleaning up hazardous

5. *See* discussion *infra* Part III.A.

6. *See* discussion *infra* Part III.B.

7. *See, e.g.*, Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 91 (3d Cir. 1988) (calling CERCLA "hastily conceived and briefly debated piece of legislation")

8. The Love Canal incident involved the improper burial of approximately 80,000 tons of hazardous waste beneath an elementary school and residential subdivision in Niagara Falls, New York. The discovery of thousands of other dumpsites followed. S. Rep. No. 96-848, at 8–10 (1980).

waste sites compelled Congress to come up with an immediate response.[9] That response took the form of CERCLA, a compromise measure passed in the waning hours of the 96th Congress.[10] As a result of its quick passage, CERCLA is vague, ambiguous, and virtually devoid of legislative history, leaving courts to fill in the gaps.[11]

Nevertheless, CERCLA's broad objectives are laudable. They include facilitating the prompt cleanup of hazardous waste sites, providing a mechanism for financing both governmental and private responses, and placing the ultimate financial burden for a cleanup on those responsible for creating the danger.[12] Congress created the Superfund, a trust fund used to finance government cleanup activities, whereby the government cleans up hazardous waste sites first and recovers its cleanup costs later.[13] The Superfund allows the government to defer the complicated and time-consuming process of determining who is responsible for the contamination and how cleanup costs should be allocated. Cleanups can occur quickly, and the entities that created the environmental problem ultimately bear the financial responsibility for replenishing the Superfund coffers.[14]

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9. *See* Rhodes v. County of Darlington, 833 F. Supp. 1163, 1172–75 (D.S.C. 1992) (discussing CERCLA's legislative history).

10. Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability ("Superfund") Act of 1980*, 8 Colum. J. Envtl. L. 1, 1 (1982).

> [Pub. L. 96-510] was considered on December 3, 1980, in the closing days of the lame duck session of an outgoing Congress. It was considered and passed, after very limited debate, under a suspension of the rules, in a situation which allowed for no amendments. Faced with a complicated bill on a take it-or-leave it basis, the House took it, groaning all the way.

Id.

11. Mobay Corp. v. Allied-Signal, Inc., 761 F. Supp. 345, 350 (D.N.J. 1991) ("CERCLA's legislative history reveals that Congress intended that the courts should develop federal common law to fill in the gaps in the statute."); *see also* William H. Rodgers, Jr., *Environmental Law* § 8.1, at 683 (2d ed. 1994) ("Alone among the environmental laws CERCLA relies upon the 'common law' to fill in crucial details and this invitation has been exercised by the courts with a vengeance in pursuit of the cleanup beacon.... [A] torrent of judicial decisions... has made Superfund the legal equivalent of a termite colony....").

12. City of Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135, 1142–43 (E.D. Pa. 1982); *see also* Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp., 976 F.2d 1338, 1340 (9th Cir. 1992) ("Congress intended to provide the federal government with the means to effectively control the spread of hazardous materials... [and] intended to affix the ultimate cost of cleaning up... to the parties responsible for the contamination."); Wickland Oil Terminals v. ASARCO, Inc., 792 F.2d 887, 890 (9th Cir. 1986) (noting that dual public/private enforcement mechanism "provide[s] a comprehensive response to the problem of hazardous substance release").

13. S. Rep. No. 96-848, at 12.

14. In truth, however, fund replenishment is largely an illusion. Only $1 billion of the $10.1 billion expended through fiscal year 1994 had been recovered by the United States in cost recovery

Government cleanups under the Superfund are lengthy and costly undertakings, however, averaging more than ten years[15] and twenty-six million dollars[16] to complete. Thus, many private property owners find it necessary to clean up the contamination themselves, lest they be unable to use their property as collateral to obtain loans, sell or lease their property, or obtain government permits to develop their land.[17]

To encourage private parties to undertake cleanup actions and thereby effectuate its goal of cleaning up hazardous waste sites quickly, Congress expressly created a private right of action for cost recovery under CERCLA section 107.[18] Under this provision, private parties initiate cleanup actions themselves and then attempt to recover their costs through the judicial process.

B. Private Cost Recovery Actions Under Section 107

CERCLA section 107(a)(4)(B) provides that any person who has responded to a release or threatened release of a hazardous substance at a facility may recover necessary response costs from a potentially responsible party (PRP).[19] Although CERCLA does not specifically delineate the elements of a prima facie claim for a section 107 cost recovery action, courts generally agree that a plaintiff must show the following: (1) the defendant falls within one of four categories of PRPs; (2) the site at issue is a "facility" as defined by CERCLA; (3) a release or threatened release of a hazardous substance from the facility occurred; (4) the release or threatened release caused the plaintiff to incur response costs; and (5) the response costs were necessary and consistent with the

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actions. General Accounting Office, *Superfund: System Enhancements Could Improve the Efficiency of Cost Recovery* 1 (GAO-AIMD-95-177 1995).

15. General Accounting Office, *Superfund: Times to Assess and Clean Up Hazardous Waste Sites Exceed Program Goals* 5 (GAO/T-RCED-97-69 1997) (explaining that sites cleaned up in 1996 took average of 10.6 years to complete).

16. General Accounting Office, *Superfund: Implications of Key Reauthorization Issues* 3 (GAO/T-RCED-96-145 1996).

17. Arnold W. Reitze, Jr. et al., *Cost Recovery by Private Parties Under CERCLA: Planning a Response Action for Maximum Recovery*, 27 Tulsa L.J. 365, 384 (1992).

18. CERCLA § 107, 42 U.S.C. § 9607 (1994).

19. *See* CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B). PRPs fall into four categories: (1) present owners or operators of a facility; (2) past owners or operators of a facility at the time of disposal; (3) generators who, in any way, arranged to dispose of the hazardous waste; and (4) hazardous waste transporters. CERCLA § 107(a)(1)–(4), 42 U.S.C. § 9607(a)(1)–(4).

National Contingency Plan.[20] Prior government approval of the cleanup plan is not a prerequisite to a section 107 private right of action.[21]

Subject to three limited defenses,[22] liability is strict for those responsible for the contamination.[23] Courts have also held that CERCLA imposes joint and several liability on all responsible parties.[24] Liable parties can then sue other PRPs for contribution to the response costs under section 113.[25]

Response costs are not defined in CERCLA, although "respond" or "response" is defined as "remove, removal, remedy, and remedial action."[26] Private parties undertake removal actions in response to an imminent threat to the public health or welfare of the environment.[27]

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20. *See, e.g.*, Dedham Water Co. v. Cumberland Farms Dairy, Inc., 889 F.2d 1146, 1150 (1st Cir. 1989); Ascon Properties, Inc. v. Mobil Oil Co., 866 F.2d 1149, 1152 (9th Cir. 1989). Note that a split of authority exists with respect to the point at which a plaintiff must demonstrate that its response costs were consistent with the NCP. Most courts indicate that the consistency requirement is part of a prima facie case establishing liability. *See, e.g.*, Cose v. Getty Oil Co., 4 F.3d 700, 703–04 (9th Cir. 1993); County Line Inv. Co. v. Tinney, 933 F.2d 1508, 1512 (10th Cir. 1991); *Dedham Water*, 889 F.2d at 1150. Other courts, however, assert that consistency goes only to the amount of recoverable damages. *See, e.g.*, Washington Dep't of Transp. v. Washington Natural Gas Co., 59 F.3d 793, 798 (9th Cir. 1995) (arguing that failure to comply with NCP is not defense to liability, but instead factual issue affecting damages); Cadillac Fairview/California, Inc. v. Dow Chem. Co., 840 F.2d 691, 695 (9th Cir. 1988); G.J. Leasing Co. v. Union Elec. Co., 825 F. Supp. 1363, 1379 (S.D. Ill. 1993), *aff'd*, 54 F.3d 379 (7th Cir. 1995); Mid Valley Bank v. North Valley Bank, 764 F. Supp. 1377, 1389 (E.D. Cal. 1991).

21. *Cadillac Fairview*, 840 F.2d at 694 ("[N]othing in the plain language of section 107(a)... indicates that a party seeking to recover its costs of response must await approval of or action by a state or local governmental entity."); *see also* Richland-Lexington Airport Dist. v. Atlas Properties, Inc., 901 F.2d 1206, 1208–09 (4th Cir. 1990); Tanglewood E. Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1575 (5th Cir. 1988).

22. Defendants must demonstrate by a preponderance of the evidence that the release or threat of release of the hazardous substance and resulting damages were caused solely by an act of God, act of war, or act or omission of a third party. CERCLA § 107(b), 42 U.S.C. § 9607(b). In general, the first two defenses almost never prevail. For a third party defense to succeed, the defendant usually must demonstrate that the third party is completely unconnected to the defendant (e.g., a "midnight dumper"). *See generally* Rodgers, *supra* note 11, § 8.8, at 796–98 (discussing § 107(b) defenses).

23. *See, e.g.*, Levin Metals Corp. v. Parr-Richmond Terminal Co., 799 F.2d 1312, 1316 (9th Cir. 1986); New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985).

24. United States v. Chem-Dyne Corp., 572 F. Supp. 802, 811 (S.D. Ohio 1983). When Congress amended CERCLA in 1986, its legislative history supported the *Chem-Dyne* ruling. *See* H.R. Rep. No. 99-253, pt. 1, at 74 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2856 ("[N]othing in this bill is intended to change the application of the uniform federal rule of joint and several liability enunciated by the *Chem-Dyne* court.").

25. CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1) (1994), states that "any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under [section 9606 or section 9607(a)]."

26. CERCLA § 101(25), 42 U.S.C. § 9601(25) (1994).

27. CERCLA § 101(23), 42 U.S.C. § 9601(23).

Removal actions are thus short-term in nature and include such measures as erecting security fencing, providing alternative water supplies, or providing temporary evacuation and housing.[28] In contrast, remedial actions represent a more permanent solution and may take several years to complete.[29] Illustrative remedial actions include cleaning up released hazardous substances and contaminated materials, repairing leaking containers, and destroying reactive wastes.[30]

Because CERCLA provides only limited guidance, courts determine recoverable response costs associated with removal and remedial measures on a case-by-case basis.[31] At a minimum, private party plaintiffs who make a prima facie showing are entitled to recover their actual cleanup costs.[32] Preliminary costs such as investigating and evaluating the hazardous substances present at a site are generally also recoverable.[33]

II. CONSISTENCY WITH THE NATIONAL CONTINGENCY PLAN

Most response costs are not recoverable unless a private party can clear the principal hurdle in section 107 cost recovery actions: demonstrating consistency with the National Contingency Plan (NCP).[34] Accomplishing this feat has proven to be a stumbling block for plaintiffs

28. CERCLA § 101(23), 42 U.S.C. § 9601(23).

29. CERCLA § 101(24), 42 U.S.C. § 9601(24). The difference between removal and remedial actions is well documented. *See, e.g.*, United States v. Alcan Aluminum Corp., 964 F.2d 252, 259 n.10 (3d Cir. 1992); VME Americas, Inc. v. Hein-Werner Corp., 946 F. Supp. 683, 689–90 (E.D. Wis. 1996); Ambrogi v. Gould, Inc. 750 F. Supp. 1233, 1240 (M.D. Pa. 1991); Amland Properties Corp. v. Aluminum Co. of Am., 711 F. Supp. 784, 795 (D.N.J. 1989).

30. CERCLA § 101(24), 42 U.S.C. § 9601(24).

31. *See* 55 Fed. Reg. 8666, 8794 (1990).

32. *See* 1 Allan J. Topol & Rebecca Snow, *Superfund Law and Procedure* § 6.3, at 606 (1992).

33. Courts now routinely award response costs for preliminary investigative measures without requiring the plaintiff to demonstrate consistency with the National Contingency Plan, normally an element of a prima facie case. *See, e.g.*, Artesian Water Co. v. Government of New Castle County, 851 F.2d 643, 651 (3d Cir. 1988); Wickland Oil Terminals v. ASARCO, Inc., 792 F.2d 887, 892 (9th Cir. 1986); Marriott Corp. v. Simkins Indus., Inc., 825 F. Supp. 1575, 1581 (S.D. Fla. 1993); *Amland*, 711 F. Supp. at 795.

34. *See, e.g.*, Washington Dep't of Transp. v. Washington Natural Gas Co., 59 F.3d 793, 799 (9th Cir. 1995) ("[A]ny 'other person' seeking response costs under § 9607(a)(4)(B) must prove that its actions are consistent with the NCP."); County Line Inv. Co. v. Tinney, 933 F.2d 1508, 1512 (10th Cir. 1991); Channel Master Satellite Sys., Inc. v. JFD Elecs. Corp., 748 F. Supp. 373, 381 (E.D.N.C. 1990); *see also* Topol & Snow, *supra* note 32, at 583 ("Under the CERCLA scheme, . . . the recovery of response costs is tied to the NCP standards and plaintiffs cannot recover costs for anything outside of the bounds set by that plan.").

time and again, as PRPs are quick to challenge a private party's compliance with the NCP in an effort to reduce or eliminate their financial responsibility for the cleanup. Once again, CERCLA provides little guidance.[35] Consequently, issues concerning what constitutes compliance with the NCP and when it should be demonstrated continue to plague courts and private party litigants alike.

A. NCP Overview

The NCP delineates procedures and standards for hazardous waste cleanups.[36] It establishes criteria for discovering and evaluating contaminated sites, guidelines on cost effectiveness, and criteria for determining the appropriate extent of response actions, including alternative remedial options.[37] Since its initial promulgation under CERCLA, the NCP has been significantly revised twice, most recently in 1990.[38] Prior to 1990, courts disagreed over whether a private party needed to demonstrate strict or substantial compliance with the NCP to recover cleanup costs from PRPs.[39]

With the 1990 NCP, the Environmental Protection Agency (EPA) recognized the pitfalls of a mechanistic rule: "providing a list of rigid requirements may serve to defeat cost recovery for meritorious cleanup actions based on a mere technical failure by the private party that has taken the response action."[40] Consistency with the NCP is now satisfied if the private party response action, "when evaluated as a whole, is in substantial compliance with the applicable requirements . . . and results in a CERCLA-quality cleanup."[41] Actions will not be considered

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35. *See Channel Master*, 748 F. Supp. at 382–83 ("The requirement that private cleanup procedures be 'consistent' with the 'national contingency plan' is confusing because CERCLA does not define the term 'consistent.'") (quoting Paul W. Heiring, Note, *Private Cost Recovery Actions Under CERCLA*, 69 Minn. L. Rev. 1135, 1142 (1985)).

36. *See* National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. pt. 300 (1996).

37. *See* 40 C.F.R. pt. 300; *see also* Pierson Sand & Gravel, Inc. v. Pierson Township, 851 F. Supp. 850, 855–56 (W.D. Mich. 1994) (citing *Channel Master*, 748 F. Supp. at 382), *aff'd*, 89 F.3d 835, No. 94-1472, 1996 WL 338624 (6th Cir. June 18, 1996).

38. *See* 55 Fed. Reg. 8666 (1990). The NCP was also amended in 1994, although the changes do not affect the portions of the regulation discussed in this Comment. *See* 59 Fed. Reg. 47,384 (1994).

39. *Compare* Amland Properties Corp. v. Aluminum Co. of Am., 711 F. Supp. 784, 796–97 (D.N.J. 1989) (upholding strict compliance) *with* Wickland Oil Terminals v. ASARCO, Inc., 792 F.2d 887, 891 (9th Cir. 1986) (rejecting strict interpretation).

40. 55 Fed. Reg. at 8793.

41. 40 C.F.R. § 300.700(c)(3)(i).

inconsistent with the NCP "based on immaterial or insubstantial deviations."[42]

Thus, the 1990 NCP is intended to serve more as a guide than a checklist.[43] The formerly mechanistic approach of crossing off completed procedural requirements one-by-one has been supplanted by a balancing approach. On one hand, a private party's response costs must be measured against a standard based on the quality of a cleanup action. Low-quality cleanups will not be tolerated.[44] On the other hand, the EPA wants to remove unnecessary procedural obstacles to NCP consistency to encourage private parties to perform voluntary cleanups of contaminated sites.[45]

Nevertheless, demonstrating consistency with the NCP continues to be a challenge for private parties undertaking section 107 cost recovery actions. The NCP "community relations" requirement has proven to be the latest obstacle, with courts differing as to what a private party plaintiff must do to demonstrate consistency.[46]

B. NCP Community Relations Requirement

The NCP requires that private parties undertaking response actions "provide an opportunity for public comment concerning the selection of the response action" based on a set of potentially applicable provisions.[47] In lieu of meeting these enumerated provisions, a private party may provide an opportunity for public comment based on "substantially equivalent state and local requirements."[48]

Details of the provisions, termed "community relations" requirements, are scattered throughout the NCP.[49] They apply to both removal and remedial actions,[50] and are intended to promote active communication between affected communities and the party undertaking the response

42. 40 C.F.R. § 300.700(c)(4).

43. 55 Fed. Reg. at 8793.

44. *Id.* (" [T]he approach taken . . . protects EPA's interest in ensuring that the benefit of a right of action under CERCLA section 107(a)(4)(B) should only be available for environmentally sound cleanups . . . .").

45. *Id.* at 8792–93.

46. *See* discussion *infra* Part III.

47. 40 C.F.R. § 300.700(c)(6).

48. 40 C.F.R. § 300.700(c)(6).

49. *See* 40 C.F.R. §§ 300.155, .415(n), .430(c), .430(f)(2)–(3), .430(f)(6), .435(c), .700(c)(6).

50. *See supra* notes 27–29 and accompanying text (discussing removal and remedial actions).

action.[51] For removal actions, significant community relations provisions include:

(1) designating a spokesperson to notify immediately-affected citizens as well as state and local officials, to respond to inquiries, and to inform the community of actions taken;[52]

(2) providing a public comment period of not less than 30 days, and responding to significant comments (for actions with less than six months before the removal begins);[53] and

(3) conducting interviews with local officials, community residents, or other interested parties, and "preparing a formal community relations plan (CRP) based on the community interviews" (for actions expected to extend beyond 120 days).[54]

For remedial actions, which result in a permanent remedy and take place over a longer period of time, community relations requirements are more substantial. In addition to interviewing affected community members and preparing a CRP,[55] a party should:

(1) publish a brief analysis of the plan in a major local newspaper;[56]

(2) provide the opportunity for a public meeting to be held at or near the site at issue;[57]

(3) keep a transcript of the meeting, and prepare a written summary of significant comments, criticisms, and relevant new information;[58]

(4) discuss any significant changes in the proposed plan and seek additional public input if new information becomes available at a later date;[59] and

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51. 40 C.F.R. § 300.155(c).
52. 40 C.F.R. § 300.415(n)(1).
53. 40 C.F.R. § 300.415(n)(2).
54. 40 C.F.R. § 300.415(n)(3).
55. 40 C.F.R. § 300.430(c)(2)(ii).
56. 40 C.F.R. § 300.430(f)(3)(i)(A).
57. 40 C.F.R. § 300.430(f)(3)(i)(D).
58. 40 C.F.R. § 300.430(f)(3)(i)(E)–(F).
59. 40 C.F.R. § 300.430(f)(3)(ii)(A)–(B).

(5) make the record of decision available for public inspection.[60]

The purpose of the CRP is three-fold: (1) to ensure appropriate opportunities for public involvement in a variety of site-related decisions, including the selection of a remedy; (2) to determine the appropriate type of activities to ensure public involvement; and (3) to provide appropriate opportunities for a community to learn about a site.[61]

Despite the detailed set of community relations criteria, it remains unclear whether public involvement is just another factor for courts to weigh to determine NCP consistency or whether it is a strict requirement such that noncompliance bars recovery. The EPA asserts that the NCP community relations provisions define the *minimum* level of public involvement necessary to ensure a CERCLA-quality cleanup:[62]

> The public—both PRPs and concerned citizens—have a strong interest in participating in cleanup decisions that may affect them, and their involvement helps to ensure that these cleanups—which are performed without governmental supervision—are carried out in an environmentally sound manner. Thus, EPA has decided that providing public participation opportunities should be a condition for cost recovery under CERCLA.[63]

At the same time, however, the EPA reiterates the importance of maintaining a less rigid "substantial compliance" philosophy: "EPA does not believe that the failure of a private party to provide a public hearing should serve to defeat a cost recovery action if the public was afforded an ample opportunity for comment."[64] Substantial compliance with a twist? Courts are left once again to put their spin on an ambiguous CERCLA concept.

III. JUDICIAL INTERPRETATIONS OF THE NCP

Although most courts agree that public participation is important, judicial pronouncements have reflected divergent interpretations of what actually constitutes the community relations requirement. Some courts place strong emphasis on the concept of a CERCLA-quality cleanup and are willing to accept government agency involvement in the cleanup

60. 40 C.F.R. § 300.430(f)(6)(ii).

61. 40 C.F.R. § 300.430(c)(2)(ii)(A)–(C).

62. 55 Fed. Reg. 8666, 8766 (1990).

63. *Id.* at 8795.

64. *Id.* at 8793.

process as a substitute for public participation.[65] They opine that state agencies represent the public interest; accordingly, as long as a private party attempts to work with an agency and attains an otherwise successful cleanup, NCP compliance is fulfilled. Other courts are unwilling to substitute government involvement for public comment.[66] They stress the significance of the EPA's language about public participation being a condition for cost recovery. Similarly, they argue that citizen participation contributes to a better understanding of the human health and environmental conditions of a particular cleanup site. Therefore, to demonstrate NCP compliance and recover its cleanup costs, a private party must have provided an opportunity for public participation.

A. Substantial Compliance: Public Agency Involvement as a Substitute for Public Comment

Several courts maintain that as long as a private party's cleanup action includes "meaningful public participation," response cost recovery should not be denied for a CERCLA-quality cleanup.[67] These courts construe meaningful public participation broadly, noting that only "some form" of a community relations plan is required and that the NCP community relations requirements are only "potentially applicable" to private party responses.[68] For removal actions, one court even commented that it is permissible to wait until after the cleanup has commenced before carrying out the community relations requirement.[69]

Courts that allow private parties to recover their response costs despite evidence of little or no public comment reason that public agency involvement in the cleanup is an adequate substitute for public comment. *General Electric Co. v. Litton Business Systems, Inc.*[70] was the first case to articulate this standard.[71] The case involved a claim by General

65. *See* discussion *infra* Part III.A.

66. *See* discussion *infra* Part III.B.

67. *See, e.g.*, Marriott Corp. v. Simkins Indus., Inc., 929 F. Supp. 396, 403 (S.D. Fla. 1996); American Color & Chem. Corp. v. Tenneco Polymers, Inc., 918 F. Supp. 945, 956 (D.S.C. 1995).

68. Hatco Corp. v. W.R. Grace & Co., 849 F. Supp. 931, 970 (D.N.J. 1994).

69. Greene v. Product Mfg. Corp., 842 F. Supp. 1321, 1326 (D. Kan. 1993).

70. 715 F. Supp. 949 (W.D. Mo. 1989), *aff'd sub nom.* General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415 (8th Cir. 1990).

71. Note that although *General Electric* interpreted the 1985 NCP, it followed the substantial compliance standard. *Id.* at 961. Courts continue to cite *General Electric* as the initial case standing for the proposition that public agency involvement is enough to demonstrate consistency with the NCP. *See, e.g.*, *American Color*, 918 F. Supp. at 956; *Hatco*, 849 F. Supp. at 968.

Electric against a former property owner to recover response costs for removing cyanide-based residue from electroplating sludge dumped into the soil.[72] Prior to the cleanup, General Electric worked with the Missouri Department of Natural Resources (MDNR).[73] Site studies and negotiations culminated in a consent decree setting forth cleanup requirements, including a provision that all actions be consistent with the NCP.[74] The MDNR continued to work with General Electric, approving all response activities through completion of the cleanup.[75]

At no time, however, did General Electric conduct a public comment period.[76] Nevertheless, the district court found that the input General Electric received from MDNR served as a substitute for public comment.[77] The court asserted, "[s]tatutes such as CERCLA which were enacted for the protection and preservation of public health are to be given an extremely liberal construction for the accomplishment of their beneficial objectives."[78] General Electric thus recovered its cleanup costs.[79]

Amcast Industrial Corp. v. Detrex Corp.[80] applied the *General Electric* rationale to remedial actions.[81] In *Amcast*, the plaintiffs sought to recover response costs for cleaning up trichloroethylene (TCE), a solvent made by Detrex.[82] Amcast contended that Detrex spilled TCE when it delivered the solvent to Amcast's site, thereby contaminating the soil and groundwater.[83] As part of its remedial action, Amcast applied for a National Pollutant Discharge Elimination System (NPDES) permit.[84] The permit was to authorize the discharge of water that had been extracted

72. *General Electric*, 715 F. Supp. at 951.

73. *Id.* at 951–52.

74. *Id.* at 952.

75. *Id.* at 954.

76. *Id.* at 961.

77. *Id.*

78. *Id.* (citing Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986)).

79. *Id.* at 963.

80. 779 F. Supp. 1519 (N.D. Ind. 1991), *rev'd in part on other grounds*, 2 F.3d 746 (7th Cir. 1993).

81. *Id.* at 1538. As with *General Electric*, the *Amcast* opinion interpreted the 1985 NCP. *Id.* at 1536. The court nevertheless opined that the result would be the same under either the strict or substantial compliance standard. *Id.* at 1537.

82. *Id.* at 1524.

83. *Id.*

84. *Id.* at 1537.

and treated to remove the TCE contamination.[85] Following a thirty-day public comment period on Amcast's application, the Indiana Department of Environmental Management (IDEM) decided not to hold a public hearing because the comments received did not demonstrate a significant public interest.[86]

Defendant Detrex argued that because the plaintiffs initiated the remedial action before public notice of the NPDES permit was issued, the public did not have any say in determining the remedy.[87] The court found otherwise. It determined that the plaintiffs satisfied the public comment provision when they applied for the NPDES permit.[88] Although the permit application did not meet NCP requirements, the fact that IDEM received public comment sufficed.[89] More importantly, the court extended the *General Electric* rationale—that complying with appropriate state requirements and receiving state agency input can serve as a substitute for public comment—to remedial actions: "[T]he admonition of liberal construction of statutes such as CERCLA applies with equal force to remedial actions under CERCLA."[90] The court thus held that the plaintiffs complied with NCP public participation requirements.[91]

Similarly, in *Hatco Corp. v. W.R. Grace & Co.*,[92] a New Jersey district court agreed that if a responding party notifies relevant regulatory agencies, the absence of an opportunity for public comment will not preclude cost recovery.[93] Plaintiff Hatco undertook three removal actions. In the first action, Hatco notified the EPA and the New Jersey Department of Environmental Protection of the contamination and its plan to undertake removal measures.[94] Notably, however, Hatco neither considered nor knew of any relevant NCP criteria, nor did Hatco publish any formal notice for public comment.[95] The court, relying on the *General Electric* analysis, nonetheless determined that the plaintiff

85. *Id.*
86. *Id.*
87. *Id.* at 1537–38.
88. *Id.*
89. *Id.* at 1537.
90. *Id.* at 1538.
91. *Id.*
92. 849 F. Supp. 931 (D.N.J. 1994).
93. *Id.* at 968.
94. *Id.*
95. *Id.* at 947–48.

substantially complied with the NCP.[96] In the second and third removal actions, Hatco did advise the public of the opportunity to comment, and the court concluded that Hatco substantially complied with the 1990 NCP.[97]

Likewise, *American Color & Chemical Corp. v. Tenneco Polymers, Inc.*[98] declared that the *General Electric* rationale also applied to the 1990 NCP.[99] In this case, American Color sought to recover response costs for remediating polychlorinated biphenyl (PCB) contamination.[100] At least nine governmental bodies or agencies, including the South Carolina Department of Health and Environmental Control (DHEC), the Beaufort County Council, the EPA, and the U.S. Army Corps of Engineers were involved in the remediation.[101] Various newspaper articles covered the contamination and cleanup efforts.[102] A plant manager at the site also spoke with approximately fifty residents about remedial alternatives.[103] At no time, however, did American Color conduct a public hearing, nor did DHEC require one.[104] Nevertheless, the district court held that American Color satisfied the community relations portion of the NCP based on substantial government involvement: "[G]overnmental agencies charged with protection of the public interest may serve as substitutes for participation by individual members of the public."[105] American Color recovered all of its response costs.[106]

Courts from *General Electric* to *American Color* have focused on the "potential applicability" of the public participation provisions rather than on the specifics of a community relations requirement. Whether a plaintiff designates a spokesperson to talk with affected citizens, prepares a formal community relations plan, or even holds a public hearing is of secondary importance. Instead, substantial compliance is often equated

96. *Id.* at 968. As in *General Electric*, the court evaluated Hatco's first removal action under the 1985 NCP based on a substantial compliance standard. *Id.* at 963–64.

97. *Id.* at 969.

98. 918 F. Supp. 945 (D.S.C. 1995).

99. *Id.* at 956.

100. *Id.* at 947.

101. *Id.* at 952.

102. *Id.* at 953.

103. *Id.* at 954.

104. *Id.* at 957.

105. *Id.*

106. *Id.* at 958.

with some form of state involvement in the cleanup process.[107] With this broad interpretation of meaningful public participation, courts hope to effectuate the 1990 NCP's goal of not defeating a cost recovery action based on a rigid set of requirements as long as a CERCLA-quality cleanup is accomplished.[108]

B. Public Comment Means Public Comment

In contrast, another line of authority adheres to a concept of public participation that stresses citizen involvement. These courts assert that the failure to provide an opportunity for public comment constitutes a material and substantial departure from the NCP.[109] Under this rule, even a successful CERCLA-quality cleanup that includes some level of state involvement is not enough to overcome a challenge based on the community relations requirement.[110] As one court succinctly pronounced,

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107. Other courts have come to similar conclusions. *See, e.g.*, Marriott Corp. v. Simkins Indus., Inc., 929 F. Supp. 396, 404 (S.D. Fla. 1996) (finding that statutory requirement for public comment was satisfied with newspaper advertisement for public hearing, notice to defendant of remediation plan, and involvement of county agency); Greene v. Product Mfg. Corp., 842 F. Supp. 1321, 1326 (D. Kan. 1993) (noting that provisions of consent decree between plaintiffs and state agency satisfied NCP requirements). The Ninth Circuit, although not commenting on state involvement, has held that substantial compliance with the public meeting requirement was enough. Louisiana-Pacific Corp. v. ASARCO, Inc., 24 F.3d 1565, 1576 (9th Cir. 1994) ("Compliance here was not perfect, but it was substantial.").

108. *See supra* text accompanying note 78; *see also American Color*, 918 F. Supp. at 955 ("CERCLA was enacted 'to encourage . . . private cleanup efforts, . . . to preserve the limited resources of the government and the Superfund, and to make those responsible bear the burden of the conditions they created.'") (quoting Con-Tech Sales Defined Benefit Trust v. Cockerham, Civ. A. No. 87-5137, 1991 WL 209791, at *4 (E.D. Pa. Oct. 9, 1991)).

109. Sherwin-Williams Co. v. City of Hamtramck, 840 F. Supp. 470, 477 (E.D. Mich. 1993); *see also* County Line Inv. Co. v. Tinney, 933 F.2d 1508, 1514 (10th Cir. 1991); PMC, Inc. v. Sherwin-Williams Co., No. 93 C 1379, 1997 WL 223060, at *8 (N.D. Ill. Apr. 29, 1997); VME Americas, Inc. v. Hein-Werner Corp., 946 F. Supp. 683, 690 (E.D. Wis. 1996); Yellow Freight Sys., Inc. v. ACF Indus., Inc., 909 F. Supp. 1290, 1301–02 (E.D. Mo. 1995); G.J. Leasing Co. v. Union Elec. Co., 854 F. Supp. 539, 566 (S.D. Ill. 1994), *aff'd*, 54 F.3d 379 (7th Cir. 1995); Gussin Enters. v. Rockola, No. 89 C 4742, 1993 WL 114643, at *5–6 (N.D. Ill. Apr. 13, 1993).

110. *See* Bethlehem Iron Works, Inc. v. Lewis Indus., Inc., No. CIV.A. 94-0752, 1996 WL 557592, at *60 (E.D. Pa. Oct. 1, 1996) (holding that communication with government agencies is not substitute for public comment, and that contrary finding would vitiate public comment requirement); *Sherwin-Williams*, 840 F. Supp. at 477 (E.D. Mich. 1993) (finding state regulatory involvement is not substitute for public comment as contemplated by 1990 NCP); Channel Master Satellite Sys., Inc. v. JFD Elecs. Corp., 748 F. Supp. 373, 390 (E.D.N.C. 1990) (rejecting plaintiff's argument that communication and cooperation with various government agencies satisfied public comment requirement).

"[p]ublic comment means just that, public comment."[111] Anything less will not suffice.

In *Channel Master Satellite Systems, Inc. v. JFD Electronics Corp.*,[112] the plaintiff brought a cost recovery action for remediation costs incurred in cleaning two contaminated areas on its property.[113] Although state environmental officials initially were not involved in considering cleanup alternatives,[114] they later assisted with the cleanup process.[115] Channel Master argued that its communication and cooperation with various governmental agencies satisfied the requirement for public comment, but a North Carolina district court rejected this contention.[116] The court explained that no statutory language in CERCLA supports the contention that working under the direction of state officials and obtaining necessary state approvals constitutes consistency with the NCP.[117] The court then distinguished *General Electric*, noting that even if state agency involvement satisfied the NCP consistency requirement, the State was not sufficiently involved in Channel Master's remediation plan.[118] Most importantly, the court posited an alternative interpretation to *General Electric*'s "extremely liberal construction" of CERCLA:

> [T]he broad goals of the statute cannot be viewed in isolation, but must instead be viewed in light of the condition precedent which Congress imposed by its choice of statutory language . . . . [C]ourts have recognized that adherence to the regulatory scheme outlined in the NCP was deemed by Congress to be more important than making CERCLA an unlimited vehicle for cleanup cost recovery.[119]

Thus, because it failed to provide an opportunity for public participation—independent of its cooperation with government

111. *Sherwin-Williams*, 840 F. Supp. at 477.

112. 748 F. Supp. 373 (E.D.N.C. 1990).

113. *Id.* at 376.

114. *Id.* at 378.

115. *Id.* at 380.

116. *Id.* at 390 ("[P]ublic input is most crucial to comply with the desire expressed by Congress in the CERCLA statute that the public have input in selecting the cleanup procedures for contaminated sites in their neighborhoods.").

117. *Id.* at 392.

118. *Id.* at 393 ("In the instant case there was no state involvement in the selection of cleanup alternatives, no intensive state-private party negotiations, no Consent Decree mandating NCP compliance, and no extensive compliance with the NCP which the state approved before and after the response actions.").

119. *Id.*

agencies—Channel Master did not satisfy the NCP consistency requirement and could not recover its cleanup costs.[120]

Other courts have found the *Channel Master* argument convincing. In *Sherwin-Williams Co. v. City of Hamtramck*,[121] for example, negotiations with the Michigan Department of Natural Resources (MDNR) did not satisfy the 1990 NCP community relations requirement.[122] The court declared that substituting state regulators for the public "is contrary to the letter and the spirit of the regulations."[123] Rather, the "regulations clearly contemplate [public] participation . . . in decisions that could affect the environmental conditions of their neighborhood."[124] The Sixth Circuit affirmed the *Sherwin-Williams* rationale in another case involving the MDNR, noting that even when a government agency itself develops a cleanup plan, the NCP requires opportunities for public participation.[125] Consequently, limited citizen involvement *after* the cleanup plan had been developed was found insufficient.[126]

VME Americas, Inc. v. Hein-Werner Corp.[127] illustrates the outermost boundary of a private party failing to recover its response costs for a CERCLA-quality cleanup. VME discovered a potentially contaminated site on its property, immediately reported the problem to the appropriate authorities, investigated the extent of the contamination, and then assumed responsibility for cleaning it up.[128] In addition, VME chose a solution that was both cost-effective and environmentally sound.[129] VME did not, however, provide the community with information about the contamination, designate a spokesperson, solicit public comment on the selection of the response action, or inform the community of actions taken.[130] As a result, a Wisconsin district court held that VME could not

120. *Id.* at 394.

121. 840 F. Supp. 470 (E.D. Mich. 1993).

122. *Id.* at 477.

123. *Id.*

124. *Id.* The court highlighted the specifics of the public comment requirements as set forth in 40 C.F.R. § 300.430(f)(3), such as publishing a brief analysis of the proposed plan in a major newspaper, allowing the submission of written and oral comments, and holding a public meeting during the comment period. *Id.*

125. Pierson Sand & Gravel, Inc. v. Pierson Township, 89 F.3d 835, No. 94-1472, 1996 WL 338624, at *5 (6th Cir. June 18, 1996).

126. *Id.* at *3–5.

127. 946 F. Supp. 683 (E.D. Wis. 1996).

128. *Id.* at 692.

129. *Id.*

130. *Id* at 690.

recover its response costs from the party most responsible for causing the contamination.[131]

First, the *VME* court said that community relations requirement applies equally to removal and remedial actions.[132] In a removal action, the 1990 NCP community relations requirement compels a private party to designate a spokesperson to inform immediately-affected citizens as well as state and local officials.[133] VME made no effort to notify the surrounding community, let alone immediately-affected citizens.[134] Second, the court reiterated the rationale articulated by *Channel Master*—that the NCP is not a regulatory obstacle course, but a set of requirements to be adhered to if a private party wants to recover response costs under CERCLA.[135] Consequently, even though the record pointed to the unfairness of a defendant escaping financial responsibility for cleaning up contamination he or she likely created, "that is what the law requires. . . . Congress and the bureaucracy deems [sic] public involvement critical to recovery under CERCLA, and the Court is duty bound to enforce their intentions in this regard."[136] Thus, from the *VME* perspective, a private party that conducts a successful cleanup cannot recover its response costs unless it provides an opportunity for public participation.[137]

C. *Policies Underlying Public Participation*

Courts allowing recovery without public participation have admitted to their liberal construction of CERCLA and the NCP public comment provisions. They reason that government agencies, especially those

131. *Id.* at 692.

132. *Id.* at 690–91 ("The NCP expressly requires public comment in removal actions (40 C.F.R. § 300.415(n)), and then twice reiterates this requirement in connection with a cost recovery action for removal costs (40 C.F.R. §§ 300.700(c)(5)(vi) & 300.700(c)(6)(ii)).") (citing Alcan-Toyo Am., Inc. v. Northern Ill. Gas Co., 904 F. Supp. 833, 836–37 (N.D. Ill. 1995)).

133. *Id.* at 690 (citing 40 C.F.R. § 300.415(n)(1)).

134. *Id.*

135. *Id.* at 693 (citing Channel Master Satellite Sys., Inc. v. JFD Elecs. Corp., 748 F. Supp. 373, 394 (E.D.N.C. 1990)).

136. *Id.* at 692–93.

137. *See also* PMC, Inc. v. Sherwin-Williams Co., No. 93 C 1379, 1997 WL 223060 (N.D. Ill. Apr. 29, 1997). Like the plaintiff in VME, PMC conducted a cleanup that the court deemed a necessary response to a human health and environment threat. *Id.* at *7. However, because PMC did not notify nearby residential and business neighbors, prepare a community relations plan, or schedule any public meetings, PMC could not recover its response costs. *Id.* at *9–10.

charged with protecting the environment, represent the public interest.[138] Three interrelated policy perspectives provide an understanding of why courts would want to grant some leeway to a private party plaintiff.

First, courts place a high priority on encouraging private parties to perform voluntary cleanups. They speak of not frustrating the goals of CERCLA, which include protecting and preserving the public health.[139] Private parties usually can clean up more quickly and for less money than the government.[140] Therefore, creating a high threshold for proving consistency with the NCP, such as strictly interpreting the community relations requirement, could discourage private initiative and ultimately lead to more pollution. By maintaining a broad construction of the substantial compliance test and by permitting state agency involvement to substitute for public comment, courts encourage future private party response cost actions.

Second, some private parties may have limited experience in performing cleanups under the NCP. Not all cleanups take place under the direction of large corporate enterprises. One can imagine a property owner who wants to construct a daycare facility, but who learns that obtaining a permit is conditioned on complying with a state order to clean up contamination created by the prior owner. Or a small business owner who plans to redevelop a contaminated site.[141] Or a nonprofit organization that needs to rebuild its tornado-damaged community center, only to discover hazardous waste in the soil. For those with little experience or understanding of environmental cleanup actions, tackling a complex regulation such as the NCP can be daunting. And like the plaintiff in *Sherwin-Williams*, these organizations may believe that simply working with state agencies and obeying state laws will suffice. So as to not penalize this practice, some courts have concluded that if a private party works extensively with a government agency to accomplish a CERCLA-quality cleanup, then the public interest is adequately represented and consistency with the NCP is satisfied.

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138. *See, e.g.*, American Color & Chem. Corp. v. Tenneco Polymers, Inc., 918 F. Supp. 945, 956–57 (D.S.C. 1995); General Elec. Co. v. Litton Bus. Sys., Inc., 715 F. Supp. 949, 961 (W.D. Mo. 1989), *aff'd sub nom.* General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F. 2d 1415 (8th Cir. 1990).

139. *See, e.g.*, *American Color*, 918 F. Supp. at 955 (citing cases); *General Electric*, 715 F. Supp. at 961 (same).

140. *See* Hazardous Waste Enforcement Policy, 50 Fed. Reg. 5034, 5035 (1985).

141. *See* Joel B. Eisen, *"Brownfields of Dreams"?: Challenges and Limits of Voluntary Cleanup Programs and Incentives*, 1996 U. Ill. L. Rev. 883, 899 (stating that developers perceive liability under CERCLA as most serious barrier to developing contaminated property, outweighing all benefits).

A third rationale for allowing state involvement to substitute for public comment is the generally unspoken belief that insisting on public participation might allow the party responsible for the contamination to escape liability. If one of CERCLA's goals is to make the polluter pay,[142] then a private party that cleaned up the contamination of another should not be punished for an otherwise successful CERCLA-quality cleanup. *General Electric* illustrates this perspective. Aware that the plaintiff's response costs approached one million dollars and satisfied that the plaintiff selected the most cost-effective, long-term remedy, the court determined that state agency input satisfied the public participation requirement.[143]

In contrast, those courts adhering to the "public comment means public comment" rationale argue that CERCLA's goal of protecting human health and the environment is better effectuated by citizen involvement.[144] *Channel Master*, for example, cautions against construing consistency with the NCP too loosely. Although a liberal construction of the NCP would serve as an incentive to encourage future private party cleanups, that incentive is not without its costs: "Unchaining private forces to begin digging up and moving hazardous wastes . . . raise[s] concerns about the environmental consequences of section 107(a)(4)(B)."[145] Because the NCP relies "almost exclusively on private judgments about complex and ambiguous environmental standards," parties undertaking cleanups must comply with the NCP to provide cohesiveness to response planning and actions.[146] Accordingly, failing to provide an opportunity for public comment has been found to constitute a material and substantial departure from the NCP.[147]

Furthermore, the complexity of the NCP does not excuse a private party from complying with the community relations requirement. Courts

142. *See* Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 Harv. Envtl. L. Rev. 199, 279 (1996).

143. *General Electric*, 715 F. Supp. at 963.

144. *See, e.g.*, PMC, Inc. v. Sherwin-Williams Co., No. 93 C 1379, 1997 WL 223060, at *8 (N.D. Ill. Apr. 29, 1997) (citing preamble to 1990 NCP, 55 Fed. Reg. 8666, 8795 (1990)); VME Americas, Inc. v. Hein-Werner Corp., 946 F. Supp. 683, 691 (E.D. Wis. 1996); Pierson Sand & Gravel, Inc. v. Pierson Township, 851 F. Supp. 850, 856 (W.D. Mich. 1994), *aff'd*, 89 F.3d 835, No. 94-1472, 1996 WL 338624 (6th Cir. June 18, 1996).

145. Channel Master Satellite Sys., Inc. v. JFD Elecs. Corp., 748 F. Supp 373, 394 (E.D.N.C. 1990) (quoting Jeffrey M. Gaba, *Recovering Hazardous Waste Cleanup Costs: The Private Cause of Action Under CERCLA*, 13 Ecology L.Q. 181, 231–32 (1986)).

146. *Id.*

147. *See* Sherwin-Williams Co. v. City of Hamtramck, 840 F. Supp. 470, 477 (E.D. Mich. 1993).

emphasize that NCP consistency should not be "reducible to an inquiry into whether the cleanup was cost-efficient or environmentally sound."[148] Public participation should be part of the inquiry as well. The general public can provide insight into the environmental conditions of its community, as distinguished from state agencies that scrutinize environmental cleanups from a regulatory perspective.[149] Equally important, courts look to the EPA's interpretation of the community relations requirement, in which the EPA finds meaningful public participation to be one of the criteria of a CERCLA-quality cleanup.[150] In this context, an omission based on lack of experience is unacceptable. The *VME* decision illustrates this perspective; even the most responsible of private parties—one that carried out a cost-effective, environmentally sound cleanup—could not recover without involving the public.[151]

Finally, although courts want to ensure that polluters pay, they also want to ensure that parties undertaking cleanups do not attempt to thwart the NCP public participation requirements.[152] By broadly construing the NCP, courts may be faced with the difficult challenge of deciding whether a private party was truly unaware of the public relations provisions or whether the party simply decided not to comply with the requirement to avoid costly delays in development.[153] Therefore, some courts have decided that public participation is not an expendable element of NCP consistency but a critical factor toward ensuring that a cleanup is done right.

IV. PUBLIC PARTICIPATION: A FUNDAMENTAL COMPONENT OF A CERCLA-QUALITY CLEANUP

The split of judicial interpretations illustrates the continuing clash of two fundamental principles in CERCLA cost recovery actions:

148. *VME*, 946 F. Supp. at 692 (citing *Channel Master*, 748 F. Supp. at 384 (quoting Amland Properties Corp. v. Aluminum Co. of Am., 711 F. Supp. 784, 796 (D.N.J. 1989))).

149. *Sherwin-Williams*, 840 F. Supp. at 477.

150. *See, e.g.*, County Line Inv. Co. v. Tinney, 933 F.2d 1508, 1514 (10th Cir. 1991); Gussin Enters. v. Rockola, No. 89 C 4742, 1993 WL 114643, at *5–6 (N.D. Ill. Apr. 13, 1993).

151. *VME*, 946 F. Supp. at 692; *see also* PMC, Inc. v. Sherwin-Williams Co., No. 93 C 1379, 1997 WL 223060, at *10 (N.D. Ill. Apr. 29, 1997).

152. *See* A.S.I., Inc. v. Sanders, No. 92-1209-PFK, 1996 WL 91626, at *4 (D. Kan. Feb. 9, 1996) (finding that plaintiff's remedial activities thwarted one of NCP's fundamental purposes: including public in proposed hazardous waste cleanups).

153. *See, e.g.*, Metropolitan Serv. Dist. v. Oregon Metal Finishers, Inc., CIV No. 90-229-JU, 1990 WL 134537, at *3 (D. Or. Sept. 11, 1990) (holding that plaintiff did not comply with NCP because plaintiff did not provide opportunity for public comment in attempt to avoid construction delays).

CERCLA-quality cleanups versus public participation. On one hand, some courts grant private parties latitude in complying with the NCP by accepting agency involvement as a substitute for public comment, provided those parties attain a CERCLA-quality cleanup.[154] On the other hand, other courts consider a lack of public participation, despite the appearance of a successful CERCLA-quality cleanup, a bar to recovery.[155] These interpretive differences continue to exist because of a fundamental failure to understand the nature and importance of public participation. Once courts come to a more complete understanding of what public participation is, they will realize that government involvement alone is insufficient to demonstrate consistency with the NCP.

A. What Is Public Participation?

Superficially, at least, most courts recognize that public participation is important. Nevertheless, many judicial interpretations continue to de-emphasize the importance of public participation in a successful cleanup when determining NCP consistency. They do so because of a general lack of understanding as to what "public participation," "community relations," "meaningful public comment," and every other similar statutorily- and judicially-created expression actually means. To resolve this conflict, all courts must realize what public participation is and whom it encompasses.

Public participation has its roots in democratic theory. Rousseau, de Tocqueville, and Jefferson all have articulated their vision of a society wherein citizens actively participate in decisions that affect them.[156] Mill believed that participation at the local level also contributed to a democratic society.[157] Modern theorists have explained that public participation engenders civic competence by permitting individuals to overcome feelings of powerlessness and alienation.[158] Other democratic

154. *See* discussion *supra* Part III.A.

155. *See* discussion *supra* Part III.B.

156. *See* Carol Pateman, *Participation and Democratic Theory* 24–30 (1970) (discussing Rousseau and de Tocqueville); Daniel Fiorino, *Environmental Risk and Democratic Process: A Critical Review*, 14 Colum. J. Envtl. L. 501, 507 (1989) (referring to EPA's "Jeffersonian faith" in public's capacity to take part in decisions affecting them).

157. *See* Pateman, *supra* note 156, at 31.

158. *See* Fiorino, *supra* note 156, at 536 (summarizing philosophies of public participation theorists B. Barber, J. Mansbridge, and C. Pateman).

values of legitimacy, education, and community empowerment may also result from a process of inclusion.[159]

The demand for public participation in decision making has remained strong over the years. It continues to play a prominent role in a variety of legislative enactments, including the Administrative Procedure Act,[160] Freedom of Information Act,[161] and Government in the Sunshine Act.[162] In the environmental arena, virtually every major environmental law contains some form of public participation provision.[163] Nevertheless, although public participation is an ideal reflected in writings on democracy and civic involvement as well as in legislative mandates, in practice two major questions remain. Who is "the public"? And what is "participation"?

In contrast to the perception that the public is a "monolithic, unarticulated mass of people," no single public can be readily defined.[164] The public is an amalgam of individuals and groups with diverse interests and experiences. In the section 107 context, which involves a private party cleaning up a site in a particular community, the public might include environmental groups, neighborhood communities, small businesses, local government, or a single interested citizen. The public's reasons for wanting to become involved in the cleanup may reflect a similar set of divergent—but localized—perspectives.[165] These reasons could include concern over increased health risks due to proximity to the contaminated site, disruption of land use activities, or environmental equity concerns.

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159. Ellison Folk, Comment, *Public Participation in the Superfund Cleanup Process*, 18 Ecology L.Q. 173, 179 (1991).

160. *See* 5 U.S.C. §§ 553, 556–557 (1994).

161. 5 U.S.C. § 552 (1994).

162. 5 U.S.C. § 552(b).

163. *See, e.g.*, Clean Water Act § 402(a), 33 U.S.C. § 1342(a) (1994) (stating that opportunity for public hearing is required to issue discharge permit); Coastal Zone Management Act § 306(d), 42 U.S.C. § 1455(d) (1994) (approving state coastal zone management plans contingent on holding public hearings); Resource Conservation and Recovery Act § 7004(b), 42 U.S.C. § 6974(b) (1994) (requiring notice and hearing for permits); Clean Air Act § 110(a), 42 U.S.C. § 7410(a) (1994) (establishing that state implementation plans can be adopted only after reasonable notice and public hearing).

164. Folk, *supra* note 159, at 191.

165. *Id.* ("Most sites affect only the local community; they fail to capture national attention, affect national interests, or involve nationally organized interest groups.").

Likewise, participation takes more than one form.[166] It is a process commonly bounded by formal notions of notice, comment, and public hearings, but also by informal activities such as creating citizen advisory groups or interviewing community residents and other affected parties to determine how and when citizens want to be involved.[167] Of course, participation also can occur in response to the lack of an opportunity to be represented—in the form of protest, for example.[168]

It is the conglomeration of these forces—the social, economic, physical, geographical, emotional, governmental, and institutional interests of a particular community—that constitutes "meaningful public participation." And whether community members actually succeed in expressing these interests is contingent on whether they are provided with the opportunity to do so. Most importantly, in a highly localized process such as hazardous waste cleanup, that opportunity cannot rest solely with government agency representation.

B. Government Involvement Is Not Enough

Although filled with good intentions, courts that accept state agency involvement as a substitute for the public are doing a disservice to the true meaning of "community relations." These courts are sacrificing diversity of representation for a misplaced belief that a governmental agency can reasonably represent all of the concerns of a particular community. True public participation, however, allows for all interests to be represented, especially where the quality of a community's health and surrounding environment are at stake.[169] Citizen involvement by those who are closest to the environmental hazard enhances the quality of a decision, which can only lead to a more effective result—one that can be readily identified as a "CERCLA-quality" cleanup.

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166. *See* Neil A. F. Popovic, *The Right to Participate in Decisions that Affect the Environment*, 10 Pace Envtl. L. Rev. 683, 691 (1993) (defining effective participation to include education about environment and things that affect it; access to information, such as knowing that it exists and is available; voice in decision making; and transparency of decisional processes by formally considering public input and explaining how that input affected decision at issue).

167. *See* National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. §§ 300.415(n), .430(c), .430(f)(3) (1996).

168. *See* Fiorino, *supra* note 158, at 504 ("Citizens in a democratic society will eventually interfere with decisions in which they do not feel represented.") (quoting B. Fischoff, *Acceptable Risk* 148 (1981)).

169. Robert R. Kuehn, *The Environmental Justice Implications of Quantitative Risk Assessment*, 1996 U. Ill. L. Rev. 103, 129–130.

Public participation, as embodied by the community relations requirement, is especially significant in the environmental justice context. Low-income communities and communities of color bear a disproportionate share of health risks from being exposed to environmental hazards.[170] At the same time, such communities often possess limited knowledge and lack the resources necessary to influence a cleanup decision, provided they have even been informed that a private party cleanup is being considered. Like all communities, they have a distinct interest in ensuring that a private party is responsive to their localized concerns. After all, just as they have been affected by the contamination, so too will they be affected by the type of cleanup action taken.[171]

Therefore, rather than have a cleanup plan "chosen" for a community, the community relations provisions require that citizens directly affected by a proposal be provided with an opportunity to be active participants in the decision making process.[172] In turn, a sense of legitimacy and fairness in the process will replace the alienation, frustration, and resentment harbored by those who feel their concerns have been disregarded.[173]

Critics of this inclusive concept of public participation have argued that placing too strong an emphasis on the community relations requirement creates additional costs and delays important decisions.[174] Furthermore, they question whether the lay public has the ability to make

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170. 1 Environmental Equity Workgroup, U.S. Envtl. Protection Agency, *Environmental Equity: Reducing Risk for All Communities* 3 (1992).

171. Eisen, *supra* note 141, at 1001–02 ("[I]f a cleanup fails, the community will have to shoulder some or all of the additional cleanup costs . . . [which thereby] lends added urgency to making the first cleanup a thorough one.").

172. *See* Kuehn, *supra* note 169, at 160. Arguing that environmental justice is concerned with process of decision making, Kuehn writes: "[Environmental justice] seeks to empower those persons subjected to involuntary risks and to give them a major role in the process of assessing and managing the risks in their communities." *Id.*

173. *See* Sheila Foster, *Race(ial) Matters: The Quest for Environmental Justice*, 20 Ecology L.Q. 721, 750 (1993) (arguing that decision making that includes public participation gains independent legitimacy because the process possesses "the liberal virtues of broad participation, tolerance, and intelligent deliberation") (quoting Daniel A. Farber, Review Essay, *Environmentalism, Economics and the Public Interest*, 41 Stan. L. Rev. 1021, 1042 (1989)); *see also* Folk, *supra* note 159, at 180 ("By involving the communities in these decisions, people will understand the limits of the decisions so they know the background. They know why the decision is made. They feel a part of the final resolution. And they can make a contribution toward achieving the cleanup they can live with.") (quoting *Dioxin Cleanup: Hearings Before the Subcomm. on Investigations and Oversight of the House Comm. on Science and Technology*, 99th Cong. 584 (1985) (statement of Lois Gibbs, Love Canal resident)).

174. *See* James L. Creighton, *The Public Involvement Manual* 20 (1981); Fiorino, *supra* note 158, at 523.

informed decisions on technically complex issues.[175] Even those who are not critical of public participation, but who truly believe that government involvement is sufficient, maintain this belief because they perceive that experts who work on behalf of the public can best further the public's goals of effective hazardous waste cleanup.[176]

To the contrary, the long-term value of public participation in hazardous waste cleanup outweighs any concerns over short-term delays and costs. An absence of opportunities for participation may increase public dissatisfaction, resulting in potential confrontation, litigation, and unwanted future delays. The community relations provisions help dissipate this potential outcome by ensuring an appropriate level of community involvement. They have been carefully integrated into the response process and represent the minimum level of participation that the EPA has found through experience to be necessary.[177]

Similarly, the technical complexities of a cleanup should not preclude public involvement. Many individuals with no formal technical training, but who are concerned about the quality of their drinking water or soil, can educate themselves about a site that significantly affects themselves, their families, or their neighbors.[178] Moreover, public participation can generate alternative—and perhaps even better—ideas about a cleanup than the more technocratic process that occurs with government agency oversight. Agency involvement, no matter how extensive, provides an incomplete picture of all the elements necessary to make a sound environmental decision. "There is a difference between the need to use good technique and provide accurate information and the need to make decisions which take into account people's values and perceptions."[179]

An agency, regardless of how committed it is to the public interest, cannot always consider these diverse values and perceptions held by non-governmental interests. For example, the concept of risk is qualitatively

175. *See* Kuehn, *supra* note 169, at 130–31 (discussing highly specialized nature of risk assessment); Ann Bray, Comment, *Scientific Decision Making: A Barrier to Citizen Participation in Environmental Decision Making*, 17 Wm. Mitchell L. Rev. 1111, 1115 (1991).

176. *See* American Color & Chem. Corp. v. Tenneco Polymers, Inc., 918 F. Supp. 945, 956–57 (1995).

177. 55 Fed. Reg. 8666, 8766–67 (1990).

178. Folk, *supra* note 159, at 181. Lois Gibbs, for example, was a mother and housewife from Love Canal who organized neighbors, insisted on more information about hazardous waste sites in her community, and demanded a quick and equitable resolution to the problem. She now heads a national organization, Citizens' Clearinghouse on Hazardous Wastes, which educates communities about hazardous waste sites and cleanup. *Id.*

179. *Id.* at 186.

(and often quantitatively) different for an agency expert than for a person or community that is bearing that risk.[180] Likewise, an environmental organization that is motivated more by aesthetic, biological, or recreational concerns may possess an entirely different approach to a cleanup than that of an adjacent community.[181]

Because hazardous waste cleanup is a highly localized process involving a particular community and a relatively well-defined set of players, a private party undertaking a cleanup should be especially aware of its role in the community of which it is a part. Although it may not have contributed to the contamination, that party must live with the repercussions related to its cleanup. Such repercussions will undoubtedly include whether it provided an opportunity for public participation and how well it responded to the community's localized concerns. Yet in this smaller context, participation should be easier to accomplish, and as a result, be encouraged more than ever.[182]

Finally, it is important to remember that the community relations requirements represent the minimum level of involvement necessary to ensure that public participation is taken seriously. Equally important is that a private party can eliminate any risk or uncertainty the full set of requirements.[183] If a community is not afforded this minimal opportunity to be involved in decisions that affect its health and environment, then a court should find that a private party has failed to demonstrate consistency with the NCP. Anything less demonstrates a lack of understanding of what meaningful public participation truly entails.

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180. *Id.* at 188. Folk writes:

> A public view of risk, while including rational notions of how many people per million can be expected to contract cancer, is more complex. Risk includes consideration of how one dies, the fear that one may die, how many people will die at one time, how concentrated the location of the deaths will be, the amount of control one has over the potential outcome, who makes the decisions, and who bears the risk.

Id. See generally Kuehn, *supra* note 169.

181. Adam N. Bram, Comment, *Public Participation Provisions Need Not Contribute to Environmental Injustice*, 5 Temp. Pol. & Civ. Rts. L. Rev. 145, 155–56 (1996) (noting that environmental groups tend to focus on enforcement to bring violators in compliance with law, while affected community may perceive imposing fines or installing cleaner technology as insufficient remedy to past exposure to toxins and continued fear of future illness).

182. *See* Folk, *supra* note 159, at 191 (noting that because of localized nature of site, "the cleanup process [is] more amenable to participation and the values participation fosters").

183. 55 Fed. Reg. 8666, 8794 (1990).

V. CONCLUSION

The National Contingency Plan states that private parties undertaking response actions should provide an opportunity for public comment.[184] In the alternative, the opportunity for public comment can be based on substantially equivalent state and local requirements.[185] Nowhere, however, does the NCP state that government agency involvement can substitute for public participation. Nor should it. Regardless of how committed an agency is to the public interest, it cannot sufficiently represent the multifarious interests embodied by a particular community.

Courts should heed the NCP community relations requirement with an eye toward encouraging proactive community involvement throughout the cleanup process. Providing an opportunity for meaningful public participation is critical to a successful cleanup. It facilitates communication between private parties and affected citizens, which results in more informed decision making, and ultimately the achievement of a more effective solution for all. Thus, courts should not pit public participation against a cleanup that appears to be cost-effective or environmentally sound. Instead, they should recognize that public participation is a fundamental component of a truly CERCLA-quality cleanup.

184. National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. § 300.700(c)(6) (1996).

185. 40 C.F.R. § 300.700(c)(6).