Vanderbilt Law Review

Volume 52
Issue 5 *Issue 5 - October 1999*

Article 5

10-1999

# Understanding Causation and Threshold of Release in CERCLA Liability: The Difference Between Single- and Multi-Polluter Contexts

Aaron Cooper

# Understanding Causation and Threshold of Release in CERCLA Liability: The Difference Between Single- and Multi-Polluter Contexts

## I. INTRODUCTION

Toxic waste has become an increasing public health problem in America.[1] Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "the Act")[2] in 1980, as a means to improve the efficiency of hazardous waste site cleanups.[3] CERCLA encourages parties to clean up toxic sites by

1. *See* United States v. Summit Equip. & Supplies, Inc., 805 F. Supp. 1422, 1427 (N.D. Ohio 1992) (discussing the " 'unfortunate human health and environmental' problems caused by the improper disposal of hazardous substances" (quoting H.R. REP. NO. 96-1016(I), at 17 (1980))).

2. 42 U.S.C. §§ 9601-9675 (1994).

3. *See, e.g.*, B.F. Goodrich v. Betkoski, 99 F.3d 505, 514 (2d Cir. 1996) (explaining that the purposes of CERCLA "include facilitating efficient responses to environmental harm, holding responsible parties liable for the costs of the cleanup, and encouraging settlements that reduce the inefficient expenditure of public funds on lengthy litigation") (citations omitted); Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 667 (5th Cir. 1989) ("CERCLA addresse[s] this problem 'by establishing a means of controlling and financing both governmental and private

allowing those parties to recover response costs from potentially responsible parties ("PRPs").[4] To accomplish this goal, CERCLA contains an expansive liability scheme that imposes strict liability on, among others, a party that has released or threatened release of a toxic substance that has caused or may cause the incurrence of response costs.[5] Liability under CERCLA may be joint or several.[6]

CERCLA is notoriously ambiguous, leaving many questions open to judicial interpretation.[7] This Note, for instance, addresses the issue of whether CERCLA's strict liability scheme includes a causation or minimum threshold of release element or defense. Courts and commentators have taken different approaches and views on this issue.[8] While the Supreme Court has not addressed this issue, the question is significant because the burden of establishing liability affects the speed and efficiency with which toxic waste sites are cleaned.

---

responses to hazardous releases at abandoned and inactive waste disposal sites.' " (quoting Bulk Distrib. Ctrs., Inc. v. Monsanto Co., 589 F. Supp. 1437, 1441 (S.D. Fla. 1984))).

4. *See Amoco Oil*, 889 F.2d at 667 ("Section 9607(a) [the cost recovery provision], one of CERCLA's key provisions for furthering this objective [of cleaning toxic waste sites], permits both government and private plaintiffs to recover from responsible parties the costs incurred in cleaning up and responding to hazardous substances at those sites."); *see also* Kalamazoo River Study Group v. Rockwell Int'l, 3 F. Supp.2d 799, 803 (W.D. Mich. 1998). A PRP is a party that falls within the category of a covered person, including any present or past owner of a hazardous wasto site, a party who has arranged for disposal of waste at the site, or a party who has transported waste to the site. *See* 42 U.S.C. § 9607(a)(1)-(4) (1994). The liability scheme is outlined in Part II, *infra*.

5. *See Amoco Oil*, 889 F.2d at 668 (detailing the elements of a CERCLA action under 42 U.S.C. § 9607).

6. An action brought as one for recovery under 42 U.S.C. § 9607 carries joint and several liability. *See* OHM Remediation Servs. v. Evans Cooperage Co., 116 F.3d 1574, 1579 (5th Cir. 1997). Joint liability is "[l]iability shared by two or more parties." BLACK'S LAW DICTIONARY 926 (7th ed. 1999). Several liability is a party's liability that is "separate and distinct from another's liability. *Id.* Some courts have allowed a party that would otherwise be jointly liable to demonstrate that its actions were divisible. *See, e.g.*, United States v. Alcan Aluminum Corp. (Alcan-2d), 990 F.2d 711, 721-22 (2d Cir. 1993) (allowing a divisibility defense and citing cases that concur). An action brought by a responsible party against another party for contribution under 42 U.S.C. § 9613 carries only several liability. *See OHM Remediation*, 116 F.3d at 1580-82. For a discussion of when courts permit actions for recovery or contribution, see generally Jason E. Panzer, *Apportioning CERCLA Liability: Cost Recovery or Contribution, Where Does a PRP Stand?*, 7 FORDHAM ENVTL. L. J. 437 (1996).

7. *See Amoco Oil*, 889 F.2d at 667 ("[B]ecause the final version was enacted as a 'last-minute compromise' between three competing bills, it has 'acquired a well-deserved notoriety for vaguely-drafted provisions and an indefinite, if not contradictory, legislative history.' " (quoting United States v. Mottolo, 605 F. Supp. 898, 902, 905 (D.N.H. 1985))).

8. This issue is discussed more specifically *infra* in Parts III and IV. As a general matter, a causation element or defense is based on the question of whether the defendant's waste necessitated response costs. *See* cases cited *infra* note 90; *see also infra* note 40 (discussing the meaning of the causation element or defense). A minimum threshold of release element or defense suggests that a court should not impose liability upon a defendant unless the defendant has contributed a significant amount of a toxic substance. *See Alcan-2d*, 990 F.2d at 716.

Those advocating a causation or minimum threshold of release requirement argue that despite the absence of an explicit threshold level in the Act, Congress did not intend to attach liability to a party that has released only a *de minimis* amount of a toxic substance.[9] Others argue that the statute's plain language indicates that Congress intended no causation requirement at the liability stage of a CERCLA recovery or contribution action.[10] Courts' approaches to this issue vary from refusing to impose a causation or threshold of release standard,[11] to allowing a defendant to raise the issue as an affirmative defense,[12] to requiring a causation or minimum threshold of release element as part of a plaintiff's prima facie case.[13]

Confusion over the different approaches to this issue has intensified because the courts have not adequately delineated between single- and multi-polluter contexts.[14] This Note presents a Model for understanding the cases based on this distinction. When the cases are placed within this Model, the majority view becomes, and should be, that in a multi-polluter context the plaintiff need not show causation or a minimum threshold of release to establish liability, but that the defendant may raise this issue as an affirmative defense by demonstrating that its release was divisible. In the single-polluter context, however, this Note argues that requiring proof of causation to establish liability advances the purpose of CERCLA.

This Note develops the argument by first providing an overview of CERCLA's liability provisions and the cost recovery process. Part III traces the case law to demonstrate the confusion over the minimum threshold and causation concepts. Part IV presents a Model for understanding the confusing approaches, considered in light of the single- and multi-polluter distinction, as consistent in furthering CERCLA's objectives. Part V concludes that, although the

---

9. *See* cases cited *infra* note 41.

10. *See* discussion *infra* Parts III and IV.

11. *See, e.g.*, A & W Smelter and Refiners, Inc. v. Clinton, 146 F.3d 1107, 1110-11 (9th Cir. 1998) (explaining that while other courts have "imposed [these defenses] through the back door . . . . it is not [the court's] function to read into the statute a limitation that Congress did not put there").

12. *See, e.g., Alcan-2d*, 990 F.2d at 721-22 (allowing a defendant to raise the defenses at the apportionment phase of litigation).

13. *See, e.g.*, Acushnet Co. v. Coators, Inc. (Coaters II), 948 F. Supp. 128, 137 (D. Mass. 1996) (requiring causation and minimum threshold of release to be part of the plaintiff's prima facie case).

14. The difference between these contexts and the implications on the causation defense are discussed *infra* Part IV. *See generally infra* note 85 (distinguishing single-polluter cases from multi-polluter cases).

courts do not always follow this Note's Model, it is appropriately the majority view.

## II. CERCLA LIABILITY AND THE COST RECOVERY PROCESS

Congress intended CERCLA to further two important goals. First, Congress intended CERCLA to shift the financial burden of cleaning sites contaminated with toxic wastes from the taxpayers to parties that contributed the waste.[15] Second, Congress intended CERCLA's liability scheme to encourage parties to clean hazardous waste sites "expeditiously."[16] CERCLA's liability scheme achieves these goals by "cast[ing] a wide net"[17] of liability that covers parties who would not be liable under traditional common law tort principles[18] and encouraging parties to settle early.

Two sections of CERCLA provide the statutory authority for a party that has incurred response costs to recover those cleanup expenses. A cost recovery action may be brought under 42 U.S.C. § 9607, and a contribution action may be plead pursuant to 42 U.S.C. § 9613.[19] Although both provisions impose strict liability,[20] a party

15. *See Alcan-2d*, 990 F.2d at 716.

16. *Id.* at 723 (explaining that Congress intended the Act to "enable the EPA to respond 'efficiently and expeditiously' to environmental threats" with assurances that its expenses will be recoverable (quoting B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1198 (2d Cir. 1992))).

17. United States v. Summit Equip. & Supplies, Inc., 805 F. Supp. 1422, 1431 (N.D. Ohio 1992).

18. *See* Evan Bogart Westerfield, Comment, *When Less is More: A Significant Risk Threshold for CERCLA Liability*, 60 U. CHI. L. REV. 697, 697-98 (1993). This is essentially the issue addressed by this Note—that courts often impose liability without consideration of causation or a *de minimis* defense that a court would consider under common law tort principles.

19. Issues have arisen concerning which parties may bring a cost recovery action. If the government performs the cleanup, it may bring a cost recovery action under § 9607 against PRPs. *See* Farmland Indus., Inc. v. Morrison-Quirk Grain Corp., 987 F.2d 1335, 1340 (8th Cir. 1993). Similarly, "innocent parties" who have incurred cleanup costs may bring a cost recovery action. *See* United Techs. Corp. v. Browning-Ferris Indus., Inc., 33 F.3d 96, 100 (1st Cir. 1994). However, the courts are split over whether one PRP may bring a cost recovery action against other PRPs. Some courts have held that allowing a PRP to plead under § 9607 is consistent with both the purpose and plain language of CERCLA. *See, e.g.*, Velsicol Chem. Corp. v. ENENCO, Inc., 9 F.3d 524, 531 (6th Cir. 1993); General Electric Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1417 (8th Cir. 1990). Other courts have held that a PRP may not bring a cost recovery action because allowing the action would render the statutory provision for contribution actions [§ 9613] superfluous. *See, e.g.*, United States v. Colorado & E. R.R., 50 F.3d 1530, 1534-35 (10th Cir. 1995) (considering an action by a PRP under CERCLA to be a claim for contribution).

20. "Congress intended that responsible parties be held strictly liable, even though an explicit provision for strict liability was not included in the [final compromise version of the Act]. Section 9601(32) provides that 'liability' under CERCLA 'shall be construed to be the

attempting to recover the costs of cleaning a toxic waste site would prefer to file a cost recovery action because it imposes joint and several liability while a contribution action imposes only several liability.[21] A successful plaintiff in a cost recovery action would therefore be able to collect any orphan share of the response costs from any responsible party.[22] Further, CERCLA specifically recognizes only three affirmative defenses that a defendant may raise to an action plead pursuant to § 9607.[23] Many courts have read the listing of these defenses to exclude any other defense.[24] Contribution actions under § 9613 do not have statutorily defined defenses, so courts have been more amenable to allowing other equitable defenses.[25] A cost recovery action, therefore, is preferable for the plaintiff both because of joint liability and the restriction on defenses.[26]

Courts often employ a bifurcated litigation process in CERCLA cases.[27] In the bifurcated process, liability is considered at the first phase of the litigation. CERCLA intentionally sets a low bar for imposing liability because the early imposition of liability encourages settlements and the efficient cleaning of waste sites.[28] A plaintiff generally must prove only four elements to establish liability.[29] A

---

standard of liability' under . . . the Clean Water Act, which courts have held to be strict liability." New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985) (citation omitted).

21. *See* 42 U.S.C. § 9613(f)(2)-(3) (1994).

22. The orphan share is the residual amount of response costs after all PRPs have contributed their liability to the cleanup. Joint liability in a cost recovery action has the effect of holding any losing defendant responsible for the response costs associated with the defendant's actions *plus* any orphan share.

23. The defenses are: (1) an act of God, 42 U.S.C. § 9607(b)(1), (2) an act of war, § 9607(b)(2), and (3) an act or omission of a third party unrelated to the defendant, § 9607(b)(3). *See also* B.F. Goodrich v. Betkoski, 99 F.3d 505, 514 (2d Cir. 1996) (listing the defenses to a cost recovery action); Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 668 n.3 (5th Cir. 1989) (also listing the defenses to a cost recovery action).

24. *See, e.g., Betkoski*, 99 F.3d at 517 (using "[t]he canon of construction that says 'expressio unius est exclusio alterius' [which] cautions against creating additional exceptions to complex statutory enactments").

25. *See* Panzer, *supra* note 6, at 452.

26. The split among circuits concerning whether a PRP may bring a cost recovery action is one source of confusion about whether there is a threshold of release or causation element in a CERCLA action. Arguably a contribution action, for practical purposes, must include a causation element at some phase of the litigation because the amount of contribution could not be determined without establishing how much of the response costs the defendant caused. The effect of allowing a PRP to bring a cost recovery action on the causation issue is beyond the scope of this Note.

27. *See* United States v. Alcan Aluminum Corp. (Alcan-2d), 990 F.2d 711, 723 (2d Cir. 1993).

28. *See id.*

29. The Act explicitly establishes these elements for cost recovery actions only. However, even courts that recoguize a difference between recovery and contribution actions look to these factors for both actions. *See, e.g.*, Farmland Indus., Inc. v. Morrison-Quirk Grain Corp., 987

plaintiff must prove that: (1) under 42 U.S.C. § 9607(a) the defendant is a "covered person,"[30] (2) the site of contamination is a covered facility,[31] (3) the defendant has released or threatened to release[32] a hazardous material,[33] and (4) the release or threatened release caused the plaintiff to incur response costs.[34]

After a court finds a PRP liable, the litigation proceeds to the apportionment phase.[35] Litigation costs at this stage are often high as each side uses expert testimony to demonstrate the extent to which a specific defendant's waste contaminated the site.[36] To recover response costs, a plaintiff must demonstrate at the apportionment stage that the costs were incurred while acting in accordance with the National Contingency Plan ("NCP").[37] The Environmental Protection Agency ("EPA") has promulgated regulations implementing the NCP,[38] which is designed to compensate cost-effective action that "adequately protects public health and the environment."[39]

Through these various provisions, CERCLA provides a liability scheme that shifts response costs from the government to private parties and encourages expeditious cleaning of toxic sites. The liability scheme uses a bifurcated process in which courts determine liability at the first phase at a relatively low cost. Costs increase if parties continue to the apportionment phase, in which any orphan share is split between responsible parties.

---

F.2d 1335, 1340 (8th Cir. 1993) (considering the elements of a recovery action in a contribution case); Premium Plastics v. LaSalle Nat'l Bank, 904 F. Supp. 809, 814 (N.D. Ill. 1995) (same).

30. A covered person is a potentially responsible party described *supra* note 4.

31. "The term 'facility' means (A) any building, structure . . . or (B) any site or area where a hazardous substance has been deposited [or] stored . . . but does not include any consumer product . . . ." 42 U.S.C. § 9601(9) (1994).

32. A "release," as defined in § 9601(22), is, among other activities, "any spilling [or] . . . discharging." For a discussion of what constitutes a release under CERCLA, see generally Craig May, Note, *Taking Action—Rejecting the Passive Disposal Theory of Prior Owner Liability Under CERCLA*, 17 VA. ENVTL. L.J. 385 (1998).

33. Hazardous material is defined in § 9601(14) by cross reference to various other statutes. Specifically, hazardous material includes any substance designated pursuant to or listed in 33 U.S.C. § 1321(b)(2), 42 U.S.C. § 9602, 42 U.S.C. § 6921, 33 U.S.C. § 1312(a), or 42 U.S.C. § 7412.

34. *See* 42 U.S.C. § 9601(14); Unitod States v. Alcan Aluminum Corp. (Alcan-2d), 990 F.2d 711, 719-20 (2d Cir. 1993); Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 668 (5th Cir. 1989) (collecting cases); *see also* Westerfield, *supra* note 18, at 700.

35. *See Alcan-2d*, 990 F.2d at 723.

36. *See* Lisa C. Goodheart & Karen A. McQuire, *Revisiting the Issue of Causation in CERCLA Contribution Litigation*, 82 MASS. L. REV. 315, 329 (1998) (discussing the difficulty of tracing waste found at sites).

37. *See* 42 U.S.C. § 9607(a)(4)(B).

38. *See* 40 C.F.R. pt. 300 (1988).

39. *Amoco Oil*, 889 F.2d at 672.

## III. COURT INTERPRETATIONS OF CAUSATION AND THRESHOLD OF RELEASE AS ELEMENTS OR DEFENSES IN CERCLA ACTIONS

Parties defending CERCLA actions have primarily raised two related defenses to liability after the plaintiff has established the elements outlined in Part II. First, defendants have argued that the plaintiff must demonstrate causation.[40] Second, defendants have argued that they are not liable unless they contributed a certain level of a hazardous substance—the minimum threshold of release defense.[41]

While the plain language of the Act and its legislative history suggest that no causation or minimum threshold element exists at the liability stage, many courts have had difficulty reconciling this interpretation with their sense of fairness.[42] Courts have expressed frustration that the language of CERCLA does not, in their opinion, permit these defenses, and many courts have therefore interposed a causation or threshold of release test.[43]

Courts have primarily responded to this issue in four ways: (1) allowing a defendant to raise causation and minimum threshold of release as affirmative defenses at the apportionment stage, (2) allowing a defendant to raise causation and minimum threshold of release as affirmative defenses at the liability stage, (3) prohibiting a causation or minimum threshold of release defense at any stage, and

---

40. The causation defense is generally phrased as either: whether the waste "caused" response costs within the meaning of 42 U.S.C. § 9607(a)(4), or whether the plaintiff can trace the waste at the contaminated site to the defendant. For defendants arguing the former, see, for example, *Licciardi v. Murphy Oil U.S.A., Inc.*, 111 F.3d 396, 398 (5th Cir. 1997), *Amoco Oil*, 889 F.2d at 670, and *Town of Oyster Bay v. Occidental Chemical Corp.*, 987 F. Supp. 182 (E.D.N.Y. 1997). *See also* A & W Smelter and Refiners, Inc. v. Clinton, 146 F.3d 1107, 1107 (9th Cir. 1998) (discussing the causation defense as a means to impose a minimum level of release requirement in the Fifth Circuit). For defendants arguing the latter, see, for example, *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 514 (2d Cir. 1996), *Alcan-2d*, 990 F.2d at 721, and *Premium Plastics v. LaSalle National Bank*, 904 F. Supp. 809, 814-15 (N.D. Ill. 1995).

41. *See, e.g., A & W Smelter*, 146 F.3d at 1110; *Licciardi*, 111 F.3d at 399; *Betkoski*, 99 F.3d at 517; *Alcan-2d*, 990 F.2d at 716; *Amoco Oil*, 889 F.2d at 669; Kalamazoo River Study Group v. Rockwell Int'l, 3 F. Supp.2d 799, 804 (W.D. Mich. 1998); Acushnet Co. v. Coaters, Inc. (Coaters II), 948 F. Supp. 128, 137-38 (D. Mass. 1996). Defendants raising this defense have used several different terms to assert the same basic defense. The theory is that the defendant has not released enough of the toxic substance te result in liability. Some courts have termed this level "*de minimis*," *see, e.g.*, United States v. New Castle County, 769 F. Supp. 591, 594 n.1 (D. Del. 1991), others a "minimum concentration," *see, e.g., Alcan-2d*, 990 F.2d at 716, and others a "threshold of significance," *see, e.g., Coaters II*, 948 F. Supp. at 138. The *Coaters II* Court explained that the threshold of significance was a higher standard than a *de minimis* standard. *Coaters II*, 948 F. Supp. at 138. For purposes of this Note, the distinction is irrelevant.

42. *See infra* Part III.C.

43. *See infra* Part III.A-B.

(4) requiring a plaintiff to include causation and minimum threshold of release as elements of the prima facie case. This Part of the Note discusses the differences in these approaches to highlight the confusion over the role of causation and minimum threshold issues in CERCLA actions.

### *A. Causation and Threshold of Release as Affirmative Defenses at the Apportionment Stage*

In *United States v. Alcan Aluminum Corp. (Alcan-2d)*, the Second Circuit openly used a "backdoor" approach to allow a causation or minimum threshold defense at the apportionment stage of a CERCLA cost recovery action.[44] The government had cleaned a site in New York that eighty-three parties had allegedly contaminated with toxic waste.[45] While eighty-two of the parties settled with the government, Alcan refused to settle, and the government proceeded with a CERCLA cost recovery action.[46]

Alcan asserted in its motion to dismiss that CERCLA's liability scheme implicitly included a minimum concentration requirement and a causation element.[47] The Second Circuit noted that the government had made its prima facie case by establishing the elements listed in the cost recovery statute.[48]

---

44. *Alcan-2d*, 990 F.2d at 722 ("In [allowing a causation defense] we candidly admit that causation is being brought back into the case—through the backdoor, after being denied entry at the frontdoor—at the apportionment stage.").

45. The government in *Alcan-2d* was both the state of New York and the United States Environmental Protection Agency. The two governments responded together to clean the contaminated site in 1977 at a cost of over $12 million. *See id.* at 717.

46. *See id.* Alcan filed a third party complaint against Cornell University seeking contribution. *See id.* Cornell maintained a stockpile of coal at its Ithaca, New York campus. *See id.* When the coal caught fire in 1974, water used to extinguish the fire caused run-off that polluted streams in the area. *See id.* Cornell agreed to neutralize the rnn-off and the EPA decided not to prosecute a CERCLA action against Cornell. *See id.* The action against Alcan was based on joint liability, so Alcan would bear not only its share but any orphan share left after the government settled with the other 82 defendants. Consequently, filing third party complaints against other PRPs was clearly in Alcan's interest. Had Cornell actually reached a settlement agreement, it would have been immune from a contribution action by another PRP. *See* 42 U.S.C. § 9613(f)(2) (1994) ("[A] person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims of contribution."). However, the court held that Cornell and the government did not reach a settlement. *See Alcan-2d*, 990 F.2d at 724-25. Rather, the government exercised its prosecutorial discretion in deciding not to file suit against Cornell. *See id.*

47. *See id.* at 720 ("Alcan attempts te interpose a number of additional defenses to prevent the imposition of liability. It argues that a polluter should not be held liable unless: a) the concentration of hazardous substances in its wastes exceeds some minimum threshold; b) its wastes fall within certain EPA reporting requirements; and c) its wastes caused the government to incur response costs.").

48. *See id.* at 724-25.

Specifically, the court held that the plain language of the cost recovery statute did not impose a minimum quantity standard to establish liability,[49] and that the elements of a plaintiff's prima facie case do not include causation.[50] However, in what the court considered an effort to avoid unjust results, it allowed an affirmative defense of causation at the apportionment stage.[51] Thus, if a trial proceeds beyond the liability stage to the apportionment stage, a defendant under *Alcan-2d* can avoid liability by showing that its portion of the hazardous waste at issue was not greater than background contamination and could not concentrate with other hazardous substances.[52] The Second Circuit created this causation defense candidly, recognizing the necessity of the defense in order to avoid what it believed would otherwise be harsh results.[53]

### *B. Causation and Threshold of Release as Affirmative Defenses at the Liability Stage*

The Fifth Circuit in *Amoco Oil Co. v. Borden, Inc.* established a similar causation defense, although the court did so at the liability stage rather than the apportionment stage.[54] The *Amoco Oil* plaintiff purchased a site from the defendant, discovered radioactive waste at the site, and filed a declaratory judgment action arguing that the defendant was liable for response costs.[55] The district court granted judgment for the defendant because the plaintiff had not demonstrated that a threshold level of radiation was present at the site.[56] The *Amoco Oil* court, on appeal, first used a plain language analysis to find that no threshold level of concentration is required for liability

49. *See id.* at 720 ("The statute on its face applies to 'any' hazardous substance, and it does not impose quantitative requirements.").

50. *See id.* at 721 ("What is *not* required is that the government show that a specific defendant's waste caused incurrence of clean-up costs . . . [because] 'including a causation requirement makes superfluous the affirmative defenses provided in section 9607(b).' " (quoting New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985))).

51. *See id.* at 722. "Having rejected Alcan's proffered defenses to liability, one would suppose there is no limit to the scope of CERCLA liability. To avoid such a harsh result courts have added a common law gloss onto the statutory framework." *Id.* at 721.

52. *See id.* at 722.

53. *See id.* at 721.

54. Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 670 (5th Cir. 1989).

55. *Id.* The defendant operated a phosphate fertilizer plant on the site before selling it to the plaintiff. *See id.* A by-product of the manufacturing process is phosphogypsum which contains low levels of radioactivity. *See id.* At the site, the defendant left other waste that was "[m]ore highly radioactive." *Id.*

56. *See id.*

to attach to a defendant under CERCLA.[57] However, the Fifth Circuit then held that a defendant will not be liable under CERCLA unless the plaintiff can demonstrate that the contamination at the site posed a threat to the public or the environment and therefore "caused the incurrence of response costs" within the meaning of § 9607(a)(4).[58]

The *Amoco Oil* causation requirement is similar to that in *Alcan-2d*, but with the important distinction that the *Amoco Oil* court allowed the defendant to raise the causation defense at the liability stage, rather than the apportionment stage.[59] The significance of this distinction is discussed in Part IV.

### *C. Rejection of the Causation and Threshold of Release Defenses at All Stages*

The Ninth Circuit has declined to allow a causation or threshold defense at any stage of a CERCLA action. In *A & W Smelter and Refiners, Inc. v. Clinton*, a landowner sought recovery of response costs incurred while complying with a government order to remove ore from a processing facility.[60] The ore contained small amounts of silver and gold along with trace amounts of lead. A & W based its defense to the recovery action on the theory that the amount of lead found in the waste was insufficient to warrant the government's cleanup.[61] The government moved for summary judgment, arguing that CERCLA includes no minimum concentration requirement.[62] After considering the Second Circuit's opinion in *Alcan-2d* and the Fifth Circuit's opinion in *Amoco Oil*, the Ninth Circuit concluded that, while those circuits have imposed a causation defense, the plain lan-

---

57. *See id.* at 669 ("[T]he plain statutory language fails to impose any quantitative requirement on the term hazardous substance and we decline to imply that any is necessary.").

58. *Id.* at 670.

59. *See id.* at 669; *supra* notes 49-53 and accompanying text. Also significant is that while the *Alcan-2d* court explicitly recognized its willingness to allow causation to become an issue through the "backdoor," *Alcan-2d*, 990 F.2d at 722, the *Amoco Oil* court created its rule without noting the extent to which the defense altered the Act's express requirements.

60. A & W Smelter and Refiners, Inc. v. Clinton, 146 F.3d 1107, 1109-10 (9th Cir. 1998). Defendant A & W's processing facility, located in the Mojave Desert, included ore containing hazardous lead. *See id.* The EPA directed A & W to dispose of the ore in an approved landfill. *See id.* A & W disposed of the ore and then filed an action seeking reimbursement of its compliance costs. *See id.*

61. A & W would have been entitled to reimbursement from the government if it were not a PRP under the cost recovery provision, 42 U.S.C. § 9607(a). Therefore, although this case was brought under different circumstances than other CERCLA recovery actions, in that the plaintiff paid the response costs and then disputed whether the costs were appropriate, the analysis is the same.

62. *See A & W Smelter*, 146 F.3d at 1110 (noting that "[i]t's not surprising that [the government] would urge an interpretation which gives it such broad discretion").

guage and legislative history of CERCLA led to the unavoidable conclusion that the Act allows neither a minimum threshold level of release nor a causation defense.[63]

### *D. Causation and Threshold of Release as Part of the Prima Facie Case*

Not all courts have found that the statutory language and legislative history of CERCLA prevents them from imposing either a causation or minimum threshold requirement.[64] Perhaps the most strongly articulated holdings in favor of causation and minimum threshold requirements are found in *Acushnet Co. v. Coaters, Inc. (Coaters I)*[65] and *Acushnet Co. v. Coaters, Inc. (Coaters II)*.[66] In *Coaters I*, the plaintiffs were a group of PRPs that had settled with the government and then sought contribution from other parties.[67] One defendant, New England Telephone and Telegraph Company ("NETT"), moved for summary judgment on the issue of liability.[68] The plaintiffs had established that they had incurred response costs as a result of a chemical found in waste materials NETT had deposited at the site.[69] The plaintiffs believed the court would find liability because they had established the elements for determining whether a party is a PRP under 42 U.S.C. § 9607(a).[70] Further, NETT did not contest that the waste it had deposited contained the chemical creosote, that creosote was present at the site, or that the response costs were justified.[71]

The Massachusetts District Court, however, held that a plaintiff must establish that the specific defendant's waste caused the

63. *See id.* at 1110-1111. "It is not [a court's] function to read into the statute a limitation that Congress did not put there." *Id.* at 1111.

64. For instance, eight years after its decision in *Amoco Oil*, the Fifth Circuit interpreted its prior decision to mean that CERCLA did impose a minimum level requirement for liability to attach. *See* Licciardi v. Murphy Oil U.S.A., Inc., 111 F.3d 396, 398 (5th Cir. 1997). In *Farmland Industries, Inc. v. Morrison-Quirk Grain Corp.*, the Eighth Circuit had no misgivings about imposing a causation requirement, holding that the issue of liability is "inextricably linked to causation." Farmland Indus. Inc. v. Morrison-Quirk Grain Corp., 987 F.2d 1335, 1339 (8th Cir. 1993).

65. Acushnet Co. v. Coaters, Inc. (Coaters I), 937 F. Supp. 988 (D. Mass. 1996).

66. Acushnet Co. v. Coaters, Inc. (Coaters II), 948 F. Supp. 128 (D. Mass. 1996).

67. *Coaters I*, 937 F. Supp. at 990.

68. *See id.*

69. NETT disposed of utility pole "butts" at the site. *See id.* Butts of NETT's poles contained creosote, a liquid that prevents wood from rotting, but contains polycyclic aromatic hydrocarbons ("PAHs"), the hazardous substance found at the site. *See id.*

70. *See id.* at 993.

71. *See id.* at 990.

pollution that resulted in the response costs.[72] The court concluded that the strict liability scheme of CERCLA imposes liability without fault, not liability without causation.[73] After examining the text of CERCLA, the court determined that the Act implied that a plaintiff must establish causation as part of the prima facie case.[74]

In the second *Coaters* decision, the district court granted motions by a number of defendants for summary judgment based upon the argument that their share of waste at the site was insufficient to impose liability.[75] Using an analysis similar to that in *Coaters I*, the court held that a plaintiff must show that each individual defendant contributed a "threshold of significance" amount of a toxic substance to the site before liability will attach.[76] In *Coaters I* and *II* the Massachusetts District Court thus determined that a CERCLA plaintiff must demonstrate, as part of its prima facie case, that the defendant released a threshold amount of a toxic substance and that the particular defendant's waste caused contamination that required cleanup costs.[77]

### *E. Summary—What is the Standard?*

At first glance, the only thing clear about the causation and threshold of release issues in CERCLA actions is that many courts

---

72. *See id.* at 992. At trial, the defendant's expert witness testified that the toxic substance in defendant's waste could not have caused the pollution at the site. The court noted that:

> [NETT's expert testified that] PAHs used in creosote-treated utility pole butts could not have leached into the surrounding soil to create a level of PAHs in the soil greater than the pre-existing background levels of PAHs already in the soil. . . . NETT's expert testified that even if NETT disposed of creosote-treated utility pole butts at the Site, the butts could not have contributed to any *response costs* incurred by the Plaintiffs.

*Id.* at 992.

73. *See id.* at 1000-01.

74. *See id.* at 993-96. While other courts held that the absence of an explicit causation requirement or defense in § 9607 meant that one did not exist, the *Coaters I* court disagreed, stating that "[t]here are many requirements in CERCLA that, without a doubt, exist yet are not stated in the plain language of [§ 9607]. . . . Silence does not, itself, speak." *Id.* at 994.

75. Acushnet Co. v. Coaters, Inc. (Coaters II), 948 F. Supp. 128, 138 (D. Mass. 1996).

76. *Id.* at 137. The *Coaters II* threshold of significance standard is not completely defined, but the court rejected the plaintiff's contention that barely more than "a scintilla or *de minimis* [release of a hazardous substance] is enough to survive a motion for judgment as a matter of law." *Id.* at 138. This decision is completely at odds with the Ninth Circuit's holding in *A & W Smelter*, discussed *supra* Part III.C, which explicitly states "[t]he Second, Third and Fifth Circuits have faced this very question and all agree that CERCLA's definition of hazardous substance has no minimum level requirement. We see no basis for parting company." A & W Smelter and Refiners, Inc. v. Clinton, 146 F.3d 1107, 1110 (9th Cir. 1998) (citations omitted).

77. *Coaters II*, 948 F. Supp. at 138; *Coaters I*, 937 F. Supp. at 933.

disagree. The standard of liability seems to depend upon the location of the waste site. The Second Circuit allowed a defendant to raise the issues at the apportionment stage, but set the bar for a successful defense very high.[78] The Fifth Circuit allowed for a causation defense at the liability stage.[79] The Ninth Circuit would not allow the defense at any stage,[80] and the District of Massachusetts has read the same language to require a plaintiff to show causation and a release that passes a threshold of significance standard at the liability stage.[81] The availability of these issues as defenses or elements of the prima facie case may significantly affect the cost and efficiency of toxic waste cleanups; thus application of these concepts affects the fulfillment of Congress's goals in enacting CERCLA.

## IV. A SINGLE- AND MULTI-POLLUTER MODEL TO ADVANCE THE PURPOSES OF CERCLA

Congress intended CERCLA's liability scheme to effectuate two important goals. First, Congress intended CERCLA to shift the financial burden for cleaning toxic waste sites from the taxpayers to parties contributing waste.[82] Second, Congress intended CERCLA's liability scheme to encourage parties to clean hazardous waste sites expeditiously.[83] CERCLA advances these goals through joint and several liability and the bifurcated judicial process that allows a plaintiff to establish defendants' liability at an early stage without extensive legal costs.[84] Whether a causation or threshold of release defense or element is appropriate, at what stage, and who should carry the burden of proof, depends on the context in which the argument arises.

---

78. *See supra* Part III.A.
79. *See supra* Part III.B.
80. *See supra* Part III.C.
81. *See supra* Part III.D.
82. *See* United States v. Alcan Aluminum Corp. (Alcan-2d), 990 F.2d 711, 716 (2d Cir. 1993).
83. *See id.* at 723.
84. *See* Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 667-68 (5th Cir. 1989) ("Bifurcation and the use of summary judgment provide efficient approaches to these cases by narrowing the issues at each phase, by avoiding remedial questions if no liability attaches, and by potentially hastening remedial action or settlement discussions once liability is determined.").

### *A. A Model Based on the Differences Between the Single- and Multi-Polluter Contexts*

CERCLA cases arise in two contexts—single-polluter and multi-polluter.[85] The Model presented here will demonstrate that CERCLA's liability scheme advances Congress's purposes in different ways depending on whether an action arises in the single- or multi-polluter context. The considerations behind allowing a causation or minimum threshold defense or element in a CERCLA action depend on the context in which the case arises. In the multi-polluter context, this Model will show that attaching liability without requiring proof of causation advances CERCLA's purposes. A court should, however, allow a defendant in a multi-polluter action to raise an affirmative defense at the apportionment stage that its waste could not have caused the incurrence of response costs.[86] This will increase the speed and ease with which a party can establish liability, which will encourage early settlements and improve the efficacy of the clean-up process. In the single-polluter context, this Model suggests that courts should require a plaintiff to make a minimal showing at the liability stage that the defendant's release caused response costs. This will protect against parties using CERCLA's broad liabilty scheme when response costs are not warranted.

Many of the CERCLA cases that initially appeared inconsistent become consistent when viewed in light of this Model.[87] Those cases that fall outside the Model often fail to distinguish between the single- and multi-polluter contexts or do not recognize the most effec-

---

85. As the titles suggest, in the single-polluter context, the plaintiff alleges that one party polluted the site, and in the multi-polluter context, the plaintiff alleges that multiple parties contributed a hazardous substance to the site. The single-polluter/multi-polluter determination is made irrespective of the number of defendants named in the complaint. In a multi-polluter case, for example, all but one party may have settled, so the plaintiff may have only named one party in the complaint. Some courts have recognized differences between the two contexts, with the most articulate discussion found in *United States v. Alcan Aluminum Corp.* (Alcan-3d), stating that the distinction between single- and multi-polluter cases "is significant for, in the multi-generator context, the fact that the response costs were justified would not per force signify that each generater's waste caused the release and the resultant response costs." United States v. Alcan Aluminum Corp (Alcan-3d), 964 F.2d 252, 266 (3d Cir. 1992).

86. For instance, the court in *A & W Smelter* discussed the possibility that without a *de minimis* standard, liability could be imposed on anyone who throws out a lemon or drops an old nickel. A & W Smelter and Refiners, Inc. v. Clinton, 146 F.3d 1107, 1110 (9th Cir. 1998); *see also Alcan-2d*, 990 F.2d at 716 (discussing defendant's view that without a de minimis defense, "breakfast cereal, the soil, and nearly everything else upon which life depends" would be considered a hazardous substance leading to liability).

87. *See* discussion *infra* Parts IV.B and IV.C.

tive means to further CERCLA's purposes. This Model explains the tension between many cases that initially appear inconsistent.

### B. Advancing CERCLA's Purposes in the Multi-Polluter Context

In the multi-polluter context, attaching liability to defendants, even if the plaintiff has not established causation or that the defendant contributed any significant level of hazardous waste to the site, best serves CERCLA's purpose. Reducing the burden for plaintiffs to establish liability furthers CERCLA's goals in two ways. First, imposing liability without proof of causation or a threshold amount of release reduces the risk that the government will be responsible for unrecoverable response costs.[88] Second, easing the plaintiff's burden of proof and minimizing litigation costs at the liability phase encourage parties to expeditiously clean toxic waste sites. Reduced litigation costs for plaintiffs encourage PRPs to settle, which in turn speeds the clean-up process.[89] A discussion of the reasoning of courts that have faced multi-polluter cases illustrates these advantages and demonstrates why allowing a limited causation defense furthers congressional objectives.

#### 1. The Meaning of Causation and Threshold of Release in the Multi-Polluter Context

The causation and minimum threshold of release arguments have different meanings in the multi-polluter context than in the single-polluter context, and this distinction is important for understanding CERCLA's liability scheme in light of Congress's objectives. In multi-polluter cases, the causation and minimum threshold defenses constitute two distinct arguments. The causation argument asserts that liability should attach to the defendant only if the plaintiff can show that the particular defendant's waste necessitated the incurrence of response costs.[90] This essentially requires the plaintiff to trace the course of each defendant's waste.[91] On the other hand, a

88. *See infra* Part IV.B.2.

89. *See infra* Part IV.B.3.

90. *See, e.g.*, B.F. Goodrich v. Betkoski, 99 F.3d 505, 516-17 (2d Cir. 1996) (considering a defendant's argument that the plaintiff must demonstrate the particular defendant's waste caused incurrence of response costs); *Alcan-2d*, 990 F.2d at 721; Farmland Indus., Inc. v. Morrison-Quirk Grain Corp., 987 F.2d 1335, 1339 (8th Cir. 1993); Kalamazoo River Study Group v. Rockwell Int'l, 3 F. Supp.2d 799, 804 (W.D. Mich. 1998); Town of Oyster Bay v. Occidental Chem. Corp., 987 F. Supp. 182, 194-95 (E.D.N.Y. 1997); Acushnet Co. v. Coaters, Inc. (Coaters I), 937 F. Supp. 988, 992 (D. Mass. 1996).

91. *See Kalamazoo*, 3 F. Supp.2d at 804.

defendant employing the minimum threshold of release defense argues that even if the plaintiff can trace waste at the site to the defendant, the court should not impose liability unless the defendant has contributed a threshold amount of a toxic substance.[92]

### 2. Refusing to Consider Causation or Minimum Threshold of Release Arguments at the Liability Phase Advances CERCLA's Purpose of Shifting Response Costs to Private Parties

Congress intended CERCLA to shift toxic waste site response costs from the government to private parties.[93] A minimum threshold defense at the liability stage could frustrate Congress's purpose by allowing multiple parties, each of whom may have only contributed a small amount of waste, to escape liability despite the potential for small amounts of waste, when aggregated, to result in sizable cleanup costs. In this scenario, each polluter may avoid liability, leaving the government with response costs, contrary to Congress's intention.

The Second Circuit has addressed these concerns.[94] In *Alcan-2d*, the defendant argued that liability should not attach without proof that the defendant contributed a threshold level of a hazardous substance.[95] The defendant contended that if no minimum level of concentration were required, then liability would attach to parties Congress did not intend to reach through CERCLA.[96] For instance, because breakfast cereal contains iron, a hazardous substance, a party who disposed of cereal at a site that later required response costs could be held jointly and severally liable for those costs.[97]

---

92. Note that in this argument the defendant is not claiming that response costs are unwarranted. Rather, the defendant claims that its contribution of waste was not significant enough to trigger liability. *See, e.g., Alcan-2d*, 990 F.2d at 716 (discussing the defendant's argument that liability should not exist "unless a responsible party has contributed some minimum concentration of a hazardous element or compound").

93. *See id.*

94. *See id.*

95. *See id.*

96. *See id.* It is unclear whether the court acceptod the defendant's contention that Congress did not intond to impose liability on parties who dispose of minimal amounts of substances not ordinarily considered hazardous. *Compare id.* at 716 (noting that if these parties were allowed to escape liability "simply by relying on the low concentration of hazardous substances in [their] wastes, . . . the government would be left to absorb the clean-up costs"), *with id.* at 717 (permitting a causation defense that "is not intended te provide an escape hatch for CERCLA defendants; rather, it will permit such a defendant to avoid liability only when its pollutants contribute no more than background contamination").

97. The court stated that:

> Alcan and a host of *amicus* briefs have presented us with a parade of horribles predicated on their view that [without a minimum concentration requirement], hazardous substances include breakfast cereal, the soil, and

The *Alcan-2d* court recognized the ramifications of this argument, but held that the government's position better represented congressional intent underlying CERCLA.[98] The government argued that if parties could avoid liability based on a low concentration of hazardous substances in its waste, then in a multi-polluter context all polluters could potentially raise this defense to avoid liability.[99] This conclusion would leave the government responsible for clean-up costs, contrary to congressional intent.[100] The court observed that rejection of a *de minimis* defense reflected Congress's desire to place the interests of taxpayers before the interests of generators of hazardous substances.[101]

### 3. Refusing to Consider Causation or Threshold of Release Arguments at the Liability Phase Advances CERCLA's Purpose of Encouraging the Expeditious and Efficient Cleaning of Toxic Waste Sites

Congress intended CERCLA to encourage the expeditious cleaning of waste sites.[102] CERCLA accomplishes this goal by promoting settlement of disputes, which expedites the cleaning process simply by allowing the cleanup to begin before the parties completely litigate the matter.[103] Decreased litigation costs result in expeditious

---

> nearly everything else upon which life depends, and that such an approach will make liable for response costs the butcher, the baker and the candlestick maker. They posit that to avoid such an absurd result, liability under [CERCLA] should not be imposed unless a responsible party has contributed some minimum concentration of a hazardous element or compound.

*Id.* at 716 (citation omitted). For a similar argument, see *A & W Smelter and Refiners, Inc. v. Clinton*, 146 F.3d 1107, 1110 (9th Cir. 1998) ("A & W asks us to read a minimum level requirement into the statute and regulations. It argues that trace levels of hazardous substances are present just about everywhere. Read as the EPA suggests, CERCLA seems to give the agency cart blanche to hold liable anyone who disposes of just about anything. Drop an old nickel that actually contains nickel? A CERCLA violation. Throw out an old lemon? It's full of citric acid, another hazardous substance.").

98. *See Alcan-2d*, 990 F.2d at 716.

99. *See id.*

100. *See id.* In this situation, multiple parties release *de minimis* amounts of a hazardous substance and the site becomes contaminated to the point that it requires response costs. However, since no party released waste sufficient to be held liable, the government must absorb the costs.

101. *See id.* at 716-17 ("In passing CERCLA Congress faced the unenviable choice of enacting a legislative scheme that would be somewhat unfair to generators of hazardous substances or one that would unfairly burden the taxpaying public. . . . There may be unfairness in the legislative plan, but we think Congress imposed responsibility on generators of hazardous substance advisedly. And, even were it not advisedly, we still must take the statute as it is.").

102. *See id.* at 723.

103. *See* B.F. Goodrich v. Betkoski, 99 F.3d 505, 527 (2d Cir. 1996) ("[CERCLA] strengthens the federal policy of encouraging CERCLA settlements. Elsewhere the Act specifically asks that

cleaning because parties will begin cleaning before liability is established, confident that they will receive reimbursement for a portion of their costs.[104]

CERCLA grants a party settling with the government immunity from suits for contribution and from joint liability, encouraging early settlements and promoting expeditious cleanup.[105] A party's failure to settle with the government could result not only in the imposition of liability for the share of recovery costs resulting from that party's own conduct, but also for any orphan share. This provision encourages a party in a multi-polluter case to settle with the government.[106]

CERCLA's liability scheme also promotes settlements through a bifurcated litigation process.[107] Litigation costs in a CERCLA action that proceed through both the liability and apportionment phases are extremely high due in part to the complex nature of the action and the expert testimony required.[108] By allowing plaintiffs to establish liability at the first phase, without considering causation, the litigation costs are higher in the second phase of the process. A plaintiff could, therefore, establish the liability of parties at a low cost, providing PRPs with an incentive to settle.

---

the government enter into CERCLA settlements 'in order to expedite effective remedial actions and minimize litigation.' [42 U.S.C.] § 9622(a). Courts considering CERCLA cases have recognized that the usual federal policy favoring settlements is even stronger in the CERCLA context.").

104. *See* United States v. Summit Equip. & Supplies, Inc., 805 F. Supp. 1422, 1429 (N.D. Ohio 1992) (quoting a House Report that explains that Congress intended CERCLA's broad reaching liability scheme to encourage private parties to respond voluntarily).

105. "A person who has resolved its liability to the United States under this subsection shall not be liable for claims for contribution regarding matters addressed in the settlement." 42 U.S.C. § 9622(h)(4) (1994). *See also Bethoski*, 99 F.3d at 527.

106. *See Bethoski*, 99 F.3d at 527; *see also* Goodheart & McQuire, *supra* note 36, at 322. A hypothetical situation demonstrates the ability of CERCLA to promote cleanup by encouraging settlement. If the government planned to clean a toxic waste site that it alleges was contaminated by ten different parties, each of whom contributed the same amount of the same hazardous substance, all parties should contribute the same amount to the government. If, however, one of the parties is insolvent, the other nine will bear responsibility for the remaining orphan share because the government may always bring a cost recovery action, which imposes joint liability. Seven of the parties then settle with the government to pay just less than one tenth each. The parties that have not settled, if they lose in court, will be responsible to pay the government not only for their one tenth share, but also the orphan shares left from the insolvent party and the amount left from the seven parties that paid less than their share. Further, the two parties that had their day in court cannot seek contribution from the parties that settled despite their having settled for less than their fair share. Parties in multi-polluter cases thus have incentive to settle, resulting in expeditious cleanup.

107. *See Alcan-2d*, 990 F.2d at 720 ("The existence of [the bifurcated process] aids Congress' purpose by encouraging settlement discussions and speeding up remedial action.").

108. *See* Goodheart & McQuire, *supra* note 36, at 332.

*B.F. Goodrich v. Betkoski* is an example of a multi-polluter case in which the court refused to allow proof of causation as a defense at the liability phase. In *Betkoski*, the Second Circuit reversed the trial court's decision to dismiss a CERCLA claim against over 1,000 PRPs.[109] The trial court granted summary judgment for most of the defendants in part because the plaintiffs had not demonstrated that the particular defendants' waste caused the cleanup costs.[110] The *Betkoski* court held this was an error and reversed, emphasizing that a plaintiff need not show that a specific defendant's waste caused the response costs.[111] The court held that summary judgment in the plaintiff's favor is appropriate when the plaintiffs make their prima facie case and the defendants do not assert any statutory defenses.[112] Causation is not one of the statutory defenses, and therefore the *Betkoski* court refused to allow causation arguments at the liability stage.[113]

The *Betkoski* holding is consistent with the purpose of CERCLA and the Model presented in this Note. If the court had allowed causation to become an issue at the liability stage, both sides would have incurred large costs in expert testimony early in the process. Experts have difficulty tracing the path of hazardous wastes, and therefore establishing that a specific defendant's waste caused the response costs is a difficult and expensive task.[114] The requirement of proof of causation at the liability stage would front-load litigation costs. This would discourage settlements because plaintiffs would have more difficulty establishing liability, and therefore lessen the likelihood of efficient responses to environmental harms.

---

109. *See Betkoski*, 99 F.3d at 528-29. This case involved two landfills in Connecticut that were listed as superfund sites by the EPA. *See id.* at 511. Coalitions of PRPs at each site settled with the EPA and agreed to clean the sites. *See id.* at 512. The coalitions then sought contribution from non-settling parties. *See id.*

110. *See id.* at 516.

111. *See id.* at 517 ("[T]he trial court's reading of CERCLA is inconsistent with the Act's language. . . . Moreover, if we required a plaintiff to show more than a release or threatened release, we essentially would be asking the plaintiffs to prove that a specific defendant's hazardous substances caused the release of a hazardous substance. No causation is needed, however, to establish liability under CERCLA.").

112. *See id.* at 514 ("Once a plaintiff makes a *prima facie* showing, a defendant may avoid liability only if it establishes . . . that the release or threatened release was caused by an act of God, an act of war, certain acts or omissions of third parties other than those with whom the defendant has a contractual relationship, or a combination of these reasons.").

113. *See id.* at 516 ("Independent releasability is not required to establish liability.").

114. *See* United States v. Alcan Aluminum Corp. (Alcan-3d), 964 F.2d 252, 265 (3d Cir. 1992) ("Congress deleted the causation language from CERCLA precisely because it was aware of the difficulties plaintiffs would confront in the multi-generator context if required to prove such a connection."); *see also* Goodheart & McQuire, *supra* note 36, at 322.

### 4. Allowing Limited Causation or Threshold of Release Arguments at the Apportionment Phase Prevents Absurd Results

Courts should allow a defendant to raise causation or threshold release arguments at the apportionment stage to avoid absurd results. Imposing joint and several liability on the person who throws away cereal at a site already contaminated by several industrial facilities does not further Congress's purpose.[115] An affirmative defense is therefore appropriate at the apportionment stage. The Second Circuit took this approach in both *Alcan-2d*[116] and *Betkoski*.[117]

The court in *Alcan-2d* held that while a defendant could not raise a minimum concentration defense at the liability stage, the defense is available at the second stage of the process—the apportionment stage.[118] At the apportionment stage, a defendant may avoid liability by demonstrating that the defendant's release, when mixed with other hazardous waste at the site, did not contribute to the response costs, or at most contributed to only a divisible portion of the harm.[119] The *Betkoski* court echoed this approach by holding that if one PRP can show that its release is divisible, it may avoid joint and several liability.[120]

A minimum threshold defense at the apportionment stage is consistent with the purpose of CERCLA in the multi-polluter context. This approach allows a plaintiff to establish liability quickly and at a low cost, which in turn encourages rapid cleanup and minimizes litigation at the outset, yet also allows a defendant to raise a narrow affirmative defense that its waste is divisible in order to avoid unjust results.

---

115. *See* United States v. Alcan Aluminum Corp. (Alcan-2d), 990 F.2d 711, 716 (2d Cir. 1993).

116. *See id.* at 723.

117. *See Betkoski*, 99 F.3d at 514.

118. *See Alcan-2d*, 990 F.2d at 722.

119. *See id.* "We hasten to add nonetheless that causation—with the burden on defendant—is reintroduced only to permit a defendant to escape payment where its pollutants did not contribute more than background contamination and also cannot concentrate." *Id.*

120. *See Betkoski*, 99 F.3d at 517 ("It follows logically that a defendant who disposes of hazardous substances that are not independently releasable may still be held liable, even though that defendant may not be required to pay damages when the cost apportionment phase of the litigation is reached.").

### *C. Advancing CERCLA's Purposes in the Single-Polluter Context by Considering the Causation or Threshold of Release Arguments at the Liability Phase*

Unlike the multi-polluter context, delaying the causation or minimum threshold argument until the apportionment stage does not further CERCLA's purpose in the single-polluter context because these defenses have a different meaning in the single-polluter context. In the multi-polluter context, these defenses are predicated on one of two theories: first, that imposing liability on a defendant for contributing a minimum amount of toxic substance to a heavily contaminated site is unfair;[121] and second, that the plaintiff should have to demonstrate that the defendant's waste was the particular waste that contaminated the site, not the waste of another PRP.[122] In the single-polluter context, however, both of these defenses are based on the theory that even if the defendant released all of the waste at the site, the waste is not significant enough to warrant response costs.[123]

In the single-polluter context, refusing to consider the causation or threshold of release defense until the apportionment stage does not advance CERCLA's purpose. Because the defense in these cases is that no response was necessary, the issue is best decided at the outset. Encouraging expeditious cleanup of sites that do not require a response clearly does not further CERCLA's purposes.[124] Regulations implementing CERCLA provide guidelines for the level of toxicity that must exist at a site in order to justify response costs.[125] If toxicity levels were not an issue at the liability phase, then defendants could be exposed to harassing and frivolous litigation as parties could threaten suit and easily establish liability even if the site did not require the party to incur response costs.[126]

---

121. *See supra* note 92 and accompanying text.

122. *See* Kalamazoo River Study Group v. Rockwell Int'l, 3 F. Supp.2d 799, 804 (W.D. Mich. 1998).

123. *See, e.g.*, A & W Smelter and Refiners, Inc. v. Clinton, 146 F.3d 1107, 1110 (9th Cir. 1998) (addressing the argument that a party should not have to bear response costs when there is not enough of a hazardous substance at a site to make the site hazardous); Licciardi v. Murphy Oil U.S.A., Inc., 111 F.3d 396, 398 (5th Cir. 1997); Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 669-70 (5th Cir. 1989).

124. CERCLA's liability scheme only provides compensation for response costs incurred consistent with the NCP. *See* 42 U.S.C. § 9607(a)(4)(B) (1994).

125. *See* 40 C.F.R. pt. 300 (1988).

126. *See Amoco Oil*, 889 F.2d at 670 ("The only concern that should support the use of a quantitative measure at the liability phase is potential abuse of the broad provisions, which may subject some defendants to harassing litigation.").

Courts should, however, set a low bar to establish that a cleanup is warranted for purposes of establishing liability. A low standard would encourage parties to err on the side of cleaning sites that may warrant a response, thereby ensuring that those sites that do require response costs are cleaned expeditiously.

In *Amoco Oil*, a case arising in the single-polluter context, the court rejected the defendant's argument that the plaintiff must demonstrate the release of a quantitative threshold of a hazardous substance in order to establish liability.[127] The Fifth Circuit first examined the text of CERCLA's cost recovery provision and held that it did not impose a minimum level of release requirement.[128] The court then rejected the plaintiff's theory of CERCLA liability—a theory identical to that later adopted by the Second Circuit in *Alcan-2d*.[129] The *Amoco Oil* plaintiff argued that liability should attach regardless of the amount of hazardous substance at the site, and that the defendant could argue at the apportionment phase that it owed no contribution.[130] The court held instead that liability would not attach unless the release of the hazardous substance "caused the incurrence of response costs."[131]

The *Amoco Oil* court set a low bar for plaintiffs to establish that a release of a hazardous substance caused the incurrence of response costs. The court held that to establish liability a plaintiff need only show that a release has or may violate the most stringent state or federal standard, even if a violation of that standard would not constitute recoverable costs in accordance with the NCP.[132] The court could then consider the recoverability of costs at the apportionment stage, in which the plaintiff would have to demonstrate that response costs were warranted.[133]

---

127. *Id.* at 668-69.

128. *See id.*

129. *See* United States v. Alcan Aluminum Corp. (Alcan-2d), 990 F.2d 711, 720-21 (2d Cir. 1993).

130. *See Amoco Oil*, 889 F.2d at 670 (rejecting plaintiff's argument that "CERCLA liability attaches upon the release of *any* quantity of a hazardous substance and that the extent of a release should be considered only at the remedial phase").

131. *Id.*

132. *See id.* at 671. "In the absence of any specific direction from Congress, we believe that the question of whether a release has caused the incurrence of response costs should rest upon a factual inquiry into the circumstances of a case and the relevant factual inquiry should focus on whether the particular hazard justified any response actions. . . . [W]e hold that a plaintiff who has incurred response costs meets the liability requirement as a matter of law if it is shown that *any* release violates, or any threatened release is likely to violate, *any* applicable state or federal standard, including the most stringent." *Id.* at 670-71.

133. *See id.*

In *Licciardi v. Murphy Oil U.S.A., Inc.*, another single-polluter case, the Fifth Circuit reaffirmed the proposition that liability will not attach simply "upon release of *any* quantity of a hazardous substance."[134] In *Licciardi*, the court did not even discuss the proposition that the statutory language does not impose any quantitative requirement, as the court had in *Amoco Oil*. Instead, the court simply stated that a plaintiff must establish that the particular hazard justified response costs at the liability stage.[135]

*Amoco Oil* and *Licciardi* are consistent with CERCLA's purpose because the Fifth Circuit considered the causation element only as a threshold for whether to apply CERCLA's liability scheme. When response costs are not justified, the court need not continue with the process, but when response costs are required, and the only question before the court is which party should bear the costs, casting a wide liability net furthers CERCLA's purposes. In these cases, because only one party is alleged to have released toxic substances, the issue is not who should bear the costs but whether costs are necessary at all. However, Congress intended that CERCLA's liability scheme be broad enough to ensure that all toxic sites will be cleaned expeditiously.[136] Accordingly, *Amoco Oil* and *Licciardi* do not require that a plaintiff establish that response costs are justified and recoverable under the NCP at the liability stage.[137] Rather, the cases hold that a plaintiff need only show that the release or threatened release violates or threatens to violate the most stringent state or federal standards, even though that standard is not as stringent as the NCP standard.[138]

By requiring some causation and minimum threshold showing at the liability stage, *Amoco Oil* and *Licciardi* appear on the surface to be inconsistent with *Alcan-2d* and *Betkoski*, where the Second Circuit allowed a causation or minimum threshold of release defense at the apportionment phase rather than at the liability phase. However, in light of the distinction between single- and multi-polluter contexts and the ways in which courts may effectuate congressional objectives based on this distinction, these cases are consistent both with each other and with CERCLA's purpose.

---

134. Licciardi v. Murphy Oil U.S.A., Inc., 111 F.3d 396, 398 (5th Cir. 1997) (quoting *Amoco Oil*, 889 F.2d at 670). The *Licciardi* plaintiff was a Louisiana landowner seeking cost recovery, pursuant to § 107, from a nearby oil refinery. *Id.* at 397.

135. *See id.*

136. *See* B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1198 (2d Cir. 1992).

137. *See supra* notes 124-25 and accompanying text.

138. *See Licciardi*, 111 F.3d at 398; *Amoco Oil*, 889 F.2d at 671.

### D. Cases Outside the Model

Recognizing the competing policy considerations of the defenses in the single- and multi-polluter contexts explains many courts' holdings that initially appear inconsistent. Further, the Model provides a framework for how future courts should resolve the current tension among the circuits. However, this Note's Model for understanding causation and minimum threshold of release in CERCLA actions is unable to reconcile the holdings of all courts on the question.

#### 1. *A & W Smelter and Refiners, Inc. v. Clinton*

In *A & W Smelter*, the Ninth Circuit examined a single-polluter case and held that CERCLA's liability scheme did not permit a defendant to assert a causation or threshold defense at any phase of CERCLA litigation.[139] Under the Model, the Ninth Circuit should have followed *Amoco Oil* and required a minimum showing that response costs were appropriate at the liability phase. While defendants in the single-polluter context may argue that the waste at the site is insufficient to warrant response costs, the *A & W Smelter* court used a textual analysis to hold that no minimum threshold or causation defense exists under CERCLA.[140] The court also considered the *Amoco Oil* holding and responded to the Fifth Circuit's decision to allow a causation defense by stating that "[w]here a party is responsible for a particular release, that party is a cause of any response to that release."[141] This argument simply changes the meaning of the word "cause." It overlooks the *Amoco Oil* court's decision to find that a party caused response costs only where the costs are justified under the NCP. Congress did not intend CERCLA to require parties to reimburse response costs unwarranted by the NCP.[142] *A & W Smelter*'s holding is contrary to congressional intent in that it finds causation any time a party's conduct leads to response costs, even when those costs are not justified. This holding could lead to harassing litigation in which liability is established even though no response costs are necessary.[143] Imposing CERCLA's liability scheme in this

139. *See* A & W Smelter and Refiners, Inc. v. Clinton, 146 F.3d 1107, 1110 (9th Cir. 1998).
140. *Id.* at 1110-11.
141. *Id.* at 1111.
142. *See supra* notes 37-39 and accompanying text.
143. *See Amoco Oil*, 889 F.2d at 670.

situation is inappropriate because it does not encourage cleanup of the toxic sites CERCLA was designed to regulate.[144]

### 2. The *Coaters* Decisions

Recent commentary has focused on the *Coaters* decisions, another line of cases that falls outside the Model.[145] In *Coaters I* and *II*, the District Court of Massachusetts used a textual argnment to impose a threshold level of release and causation requirement at the liability stage of a multi-polluter case.[146] This holding is inconsistent with Congress's purpose in enacting CERCLA and this Note's Model, which suggests that a court dealing with a multi-polluter case should only consider causation or minimum threshold of release issues at the apportionment phase. The *Coaters* court analyzed the language and legislative history of CERCLA in a manner that is at odds with other courts.[147] The *Coaters* court found that, despite the absence of a causation or a threshold level of release defense or element in the Act, those elements formulated part of a plaintiff's prima facie case under CERCLA.[148]

Commentators have discussed multiple shortcomings of the *Coaters* analysis,[149] but the most significant criticism relevant here is the district court's belief that its decision is consistent with *Alcan-2d*. The court correctly noted that *Alcan-2d* allowed a causation defense, and therefore asserted that the only difference was the burden of proof.[150] This assertion is incorrect.[151] *Alcan-2d* makes the causation and minimum threshold defenses very difficult for defendants to establish, and allows those defenses only at the apportionment stage, making plaintiff's proof of liabilty very easy.[152] The *Coaters* decisions,

---

144. *See supra* notes 124-25 and accompanying text.

145. *See generally* Goodheart & McQuire, *supra* note 36.

146. *See supra* Part III.D.

147. *See supra* Part III.E.

148. *See supra* notes 74, 76 and accompanying text. The debate among other courts considering the language and legislative history of CERCLA concerned whether causation or a minimum threshold could be raised as an affirmative defense—whether they needed to be part of a plaintiff's prima facie case was not even considered. *See supra* Part III.

149. *See generally* Goodheart & McQuire, *supra* note 36.

150. *See* Acushnet Co. v. Coaters, Inc. (Coaters I), 937 F. Supp. 988, 998-99 (D. Mass. 1996).

151. The *Coaters I* court made the analogy to both *Alcan-3d* and *Alcan-2d*. The analogy to *Alcan-3d* is more readily justifiable. In that case, the court considered divisibility at the liability stage. United States v. Alcan Aluminum Corp. (Alcan-3d), 964 F.2d 252, 268 (3d Cir. 1992). The analogy is not strong, however, as *Alcan-3d* merely considered whether the release was divisible, not whether the plaintiff had established that a particular defendant's waste could be traced to the site. *See id.*

152. *See supra* Part III.A.

on the other hand, place the burden on the plaintiff at the liability phase to prove that the defendant's conduct resulted in response costs. This distinction is significant because enabling plaintiffs to establish liability with ease results in the expeditious cleaning of waste sites, behavior Congress sought to encourage by enacting CERCLA. If other courts followed *Coaters*, parties would be less inclined to settle, litigation costs would be high, and cleanups would be delayed, thereby frustrating Congress's purpose.[153]

### 3. *Kalamazoo* and the Confusion of the Single- and Multi-Polluter Contexts

Besides *Coaters*, other courts have frustrated CERCLA's purpose by failing to distinguish between the single- and multi-polluter cases and by relying on holdings based on different contexts. The District Court for the Western District of Michigan decided *Kalamazoo River Study Group v. Rockwell International*,[154] a multi-polluter case, the same year the Ninth Circuit decided *A & W Smelter*. In *Kalamazoo*, the court followed the *Coaters* decisions, holding for two defendants at the liability stage of a CERCLA action.[155] Consistent with this Note's Model, the court first recognized that the case fell within the multi-polluter context, and therefore that plaintiff need not demonstrate that each defendant's waste caused the response costs at the site.[156] However, the court then held that a plaintiff must show that the defendants had released a threshold amount of a toxic substance.[157] While the *Kalamazoo* court's imposition of a minimum threshold requirement at the liability phase of a multi-polluter case is itself disturbing, even more disturbing is its reliance on the Fifth Circuit's decisions in *Amoco Oil* and *Licciardi* for the proposition that the plaintiff must demonstrate a minimum level of release as part of the prima facie case.[158] *Amoco Oil* and *Licciardi* involved single polluters, while *Kalamazoo* arose in a multi-polluter context. In *Amoco*

153. *See* Goodheart & McQuire, *supra* note 36, at 332-35.

154. Kalamazoo River Study Group v. Rockwell Int'l, 3 F. Supp.2d. 799 (W.D. Mich. 1998). In this case, the settling parties initiated an action against other parties they alleged to have contributed hazardous substances to the site. *See id.* at 802.

155. *Id.* at 814.

156. *See id.* at 804.

157. *See id.* at 807.

158. *See id.* at 805. "The Fifth Circuit has not based liability on the release of a minimum quantity of hazardous substances, but it has required a release sufficient to justify response costs." *Id.* This statement is flawed both because it cites cases arising in a single-polluter context, and because it considers causation and threshold of release as though they have different meanings in the single-polluter context.

*Oil* and *Licciardi*, the Fifth Circuit advanced CERCLA's purpose by allowing a causation or minimum threshold of release defense at the liability phase, while the *Kalamazoo* court hindered CERCLA's objective of promoting efficient cleaning of waste sites by making the plaintiff's prima facie case more difficult to establish.

#### 4. Summary

The causation aspect of CERCLA often confuses courts for two reasons. First, courts use the same language in both the single- and multi-polluter contexts even though causation has different meanings in the two contexts. Because the contexts differ, and therefore the defenses differ, courts can advance CERCLA's purpose in some cases by requiring some form of causation at the liability stage while advancing CERCLA's purpose in other cases by requiring some form of causation at the apportionment phase. While courts have generally come to the conclusion that furthers CERCLA's purpose, since they often come to the proper conclusion without explaining the distinction between the single- and multi-polluter contexts, many of their decisions seem inconsistent. Second, the causation element often confuses courts because not all courts recognize Congress's objectives in enacting CERCLA, especially in light of the single- and multi-polluter contexts. Consequently, many courts confuse the issue further by following cases from the wrong context.

## V. CONCLUSION

Courts deciding CERCLA cases have failed to recognize that the difference between single- and multi-polluter contexts determines the best method to advance CERCLA's purpose. The courts have confused the causation and threshold of release defenses, and have not adequately considered how the defenses differ depending on the context. When the cases dealing with these issues are considered in light of the siguificance of the single- and multi-polluter contexts, many cases that initially appear inconsistent can be reconciled with other cases as well as congressional intent underlying CERCLA. The confusion among the courts in these cases is attributable to the loose use of language in which the term "causation" takes on different meanings. Cases that fall outside the Model have not recognized the difference between single- and multi-polluter contexts and the attendant implications upon the causation and threshold of release de-

fenses. Such cases fail to interpret CERCLA in a manner consistent with Congress's objectives.

This Note's Model advances CERCLA's purposes by recognizing the importance of the single- and multi-polluter contexts and candidly applying a different standard depending on the context. In the multi-polluter context, the Model provides that a court should find liability without considering causation or a minimum threshold of release. This establishes liability at a low cost, leading to the quick and efficient cleanup of toxic sites, consistent with Congress's purpose in enacting CERCLA. The necessity of incurring response costs is not an issue in these cases, and the ease with which parties can establish liability encourages settlements and speeds the remediation process. However, to avoid holding parties liable for contribution of only a minimal amount of a toxic substance at a site, the Model allows a limited threshold of release defense at the apportionment stage.

In the single-polluter context, on the other hand, courts may accomplish the same goals while considering causation at the liability stage. In the single-polluter context, the causation defense challenges the necessity of response costs and imposes liability only when response costs are warranted. If response costs are unwarranted, then the imposition of liability does not advance Congress's purpose. This Note thus advocates a causation defense at the liability phase in single-polluter cases.

The level of difficulty and expense involved in establishing CERCLA liability has a serious impact on the speed with which the government and private parties are able to clean toxic waste sites. The causation and minimum threshold issues, if considered at the liability stage, would significantly increase those costs. Increased litigation costs at the liability phase may be justified in the single-polluter context when the issue is whether a site was sufficiently contaminated to invoke CERCLA's liability scheme at all. However,

high litigation costs would frustrate Congress's purpose in passing CERCLA in the multi-polluter context by delaying the cleanup process. As courts continue to grapple with the confusing case law on this subject, they should treat single- and multi-polluter contexts differently in order to best promote CERCLA's objectives.

*Aaron Cooper**

* I would like to thank Austin McMullen, Ryan Rafoth, Jessica Wilson, and Rod Kanter for spending considerable time making this Note readable. Thanks also go to Jack Preis, Christin Camp, Winston King, and Kathryn Hannen, each of whom read this Note more times than anyone should. I would also like to extend my appreciation to Congressman Andrews and staff for providing me my first opportunity to work on CERCLA issues. Most importantly, I thank my parents and family for their love and support throughout.