

Cleveland State University
EngagedScholarship@CSU



Cleveland-Marshall
College of Law Library

Cleveland State Law Review

Law Journals

1984

Judicial Development of Standards of Liability in Government Enforcement Actions under the Comprehensive Environmental Response, Compensation and Liability Act

Stephen Q. Giblin

Dennis M. Kelly

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/clevstrev>

 Part of the [Environmental Law Commons](#), and the [Legislation Commons](#)

How does access to this work benefit you? Let us know!

Recommended Citation

Stephen Q. Giblin & Dennis M. Kelly, Judicial Development of Standards of Liability in Government Enforcement Actions under the Comprehensive Environmental Response, Compensation and Liability Act, 33 Clev. St. L. Rev. 1 (1984-1985)

This Article is brought to you for free and open access by the Law Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

ARTICLES

JUDICIAL DEVELOPMENT OF STANDARDS OF LIABILITY IN GOVERNMENT ENFORCEMENT ACTIONS UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT

STEPHEN Q. GIBLIN*

DENNIS M. KELLY**

I. INTRODUCTION	1
II. GENERAL STATUTORY FRAMEWORK	4
III. GOVERNMENT ENFORCEMENT ACTIONS UNDER CERCLA	6
A. <i>Liability Under Section 107</i>	8
1. Persons Liable	8
2. Standards of Liability	11
3. Defenses to Liability and Elements of Recovery ..	13
4. Recovery of Particular Response Costs	17
B. <i>Actions For Injunctive Relief Under Section 106</i>	20
1. Persons Liable	22
2. Standards of Liability	25
3. Scope of Injunctive Relief	26
IV. CONCLUSION	28

I. INTRODUCTION

The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA)¹ represents the first major attempt on a national level to address the problem of abandoned hazardous waste sites.² Primarily through the imposition of a tax upon the sale of certain

* Associate, Jones, Day, Reavis & Pogue, Cleveland, Ohio. B.A. 1977, Washington & Lee University; J.D., 1980, Duke University.

** Partner, Jones, Day, Reavis & Pogue, Cleveland, Ohio. A.B. 1965, John Carroll University; J.D., 1968, University of Notre Dame.

¹ Pub. L. No. 96-510, 94 Stat. 2767 (1980)(codified as amended in scattered sections of 42 U.S.C. §§ 9601- 9657 (Supp. V 1981)).

² The Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (1976) (42 U.S.C. current version at §§ 6901-6986 (1976 & Supp. V 1981) [hereinafter cited as RCRA], provided for the establishment of a "cradle-to-grave" regulatory program covering the generation, transportation, treatment, storage, and disposal of hazardous

chemicals,³ Congress created the Hazardous Substance Response Trust Fund, commonly known as the "Superfund,"⁴ to finance the cleanup of the nation's worst hazardous waste sites.⁵ CERCLA permits an action to be brought in federal court for recovery of amounts disbursed from the Superfund against, *inter alia*, any person who arranges for treatment or disposal of wastes at a site, typically the generator of the hazardous wastes.⁶ In addition, the government may seek injunctive relief in federal court to abate an "imminent and substantial endangerment" prior to the expenditure of Superfund monies.⁷

CERCLA's enforcement provisions contain numerous ambiguities and apparent inconsistencies on issues that directly affect the potential liability of CERCLA's defendants. Many of the inadequacies probably can be traced to the last-minute compromise which led to the passage of the statute.⁸ The Act's checkered legislative history has led one court to remark:

CERCLA was created in a unique attempt by Congress to mitigate some of the problems caused by inactive hazardous waste sites. It was hastily, and, therefore inadequately drafted. Even the legislative history must be read with caution since last minute changes in the bill were inserted with little or no explanation. Because of the haste with which CERCLA was enacted, Congress

wastes. See 40 C.F.R. §§ 260-265 (1983). Section 7003 of RCRA, 42 U.S.C. § 6973 (Supp. V 1981), authorizes the government to bring suit to restrain persons contributing to activities which "may present an imminent and substantial endangerment to health or the environment." Courts have ruled that this provision does not reach off-site generators of abandoned waste. See *infra* notes 125-31 and accompanying text. Congress later enacted CERCLA in an attempt to allow the inclusion of this group within the scope of government enforcement actions See *United States v. Price*, 577 F. Supp. 1103, 1109, 114 n.12a (D.N.J. 1983).

³ CERCLA § 211 (codified at 26 U.S.C. §§ 4611-4662 (Supp. V 1981)).

⁴ 42 U.S.C. § 9631 (Supp. V 1981). Congress also authorized direct annual appropriations of \$33 million for each of the first five years of the Superfund program. *Id.* § 9631(b)(2). The final component of the Superfund consists of funds which had been previously committed to a spill cleanup fund created as part of the Federal Water Pollution Control Act, 33 U.S.C. § 1321 (1982). 42 U.S.C. § 9631(b)(3)(Supp. V 1981).

⁵ The government is authorized to respond to the actual or threatened release of a hazardous substance pursuant to § 104 of CERCLA, 42 U.S.C. § 9604 (Supp. V 1981). See *infra* notes 11-22 and accompanying text.

⁶ 42 U.S.C. § 9607 (Supp. V 1981). See *infra* notes 45-52 and accompanying text.

⁷ 42 U.S.C. § 9606 (Supp. V 1981). See *infra* notes 111-116 and accompanying text.

⁸ The final version of CERCLA was passed by Congress on December 3, 1980. H.R. 7020, 96th Cong., 2d Sess., 126 CONG. REC. H11,802 (daily ed. Dec. 3, 1980). It was primarily the product of three different Superfund bills: (1) H.R. 7020, 96th Cong., 2d Sess. (1980); (2) H.R. 85, 96th Cong., 1st Sess. (1979); (3) S. 1480, 96th Cong., 1st Sess., 125 CONG. REC. 17989-94 (1979). For a discussion of Congress' consideration of these bills and the genesis of the law as enacted, see Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982).

was not able to provide a clarifying committee report, thereby making it extremely difficult to pinpoint the intended scope of the legislation.⁹

The net effect of inadequate drafting and consideration of Superfund legislation is that the task of forging meaningful standards for liability under the final product is left largely to the courts.

This Article discusses the significant legal issues which arise in government enforcement actions regarding the imposition of liability under CERCLA, and examines the role that courts have played in developing applicable standards of liability. This Article also examines the state of the law in the context of two common scenarios: (a) actions under section 107 of CERCLA for recovery of costs of response at a hazardous waste site; and (b) actions under section 106 of CERCLA for injunctive relief. Finally this Article addresses: (1) who may be held liable; (2) under what conditions liability may arise; (3) what standard for liability exists; and (4) the extent of potential liability.¹⁰

⁹ *United States v. Price*, 577 F. Supp. 1103, 1109 (D.N.J. 1983) (citations omitted).

Nearly every major CERCLA decision to date contains similar comments. For example, the district court in *United States v. Wade*, 577 F. Supp. 1326 (E.D. Pa. 1983), stated:

[CERCLA] leaves much to be desired from a syntactical standpoint, perhaps a reflection of the hasty compromises which were reached as the bill was pushed through Congress just before the close of its 96th Session. Any attempt to divine the legislative intent behind many of its provisions will inevitably involve a resort to the Act's legislative history. Unfortunately, the legislative history is unusually riddled by self-serving and contradictory statements.

Id. at 1331. See also *United States v. Northeastern Pharmaceutical and Chem. Co.*, 579 F. Supp. 823, 838 n.15 (W.D. Mo. 1984) ("CERCLA is in fact a hastily drawn piece of compromise legislation, marred by vague terminology and deleted provisions."); *United States v. A & F Materials Co.*, 578 F. Supp. 1249, 1253 (S.D. Ill. 1984) ("The final version of the Act was conceived by an ad hoc committee of Senators who fashioned a last minute compromise which enabled the Act to pass. As a result, the statute was hastily and inadequately drafted." (footnote omitted)); *Ohio ex rel. Brown v. Georgeoff*, 562 F. Supp. 1300, 1310 n.12 (N.D. Ohio 1983) ("CERCLA was rushed through a lame duck session of Congress, and therefore, might not have received adequate drafting. In fact, during the final House debates, a number of Congressmen identified over forty drafting errors in the bill which became CERCLA."); *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1111 (D. Minn. 1982) ("Due to the legislative history of the act, the Committee Reports must be read with some caution."); *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1142 (E.D. Pa. 1982) ("The statute itself is vague and its legislative history indefinite. . . . What was enacted and signed into law is a severely diminished piece of compromise legislation from which a number of significant features were deleted.").

¹⁰ The issue of relative liabilities among "off-site generators" and other defendants in CERCLA cases is beyond the scope of this Article and is discussed elsewhere in this Issue. See Moore, *When is One Generator Liable for Another's Waste?*, 33 CLEV. ST. L. REV. (1984).

II. GENERAL STATUTORY FRAMEWORK

Generally, section 104 of CERCLA¹¹ authorizes the President or his designee¹² to undertake response action¹³ using monies from the Superfund whenever there is an actual or a threatened release¹⁴ of a hazardous substance¹⁵ into the environment.¹⁶ The response actions may include investigation of a hazardous waste site, emergency removal of haz-

¹¹ 42 U.S.C. § 9604 (Supp. V 1981).

¹² Section 115 of CERCLA, 42 U.S.C. § 9615 (Supp. V 1981), authorizes the President to delegate any powers granted to him under the Act. Pursuant to the section, President Reagan issued Order No. 12316 on August 14, 1981 to delegate these powers to various government agencies. 46 Fed. Reg. 42,237 (1981). The bulk of those powers, including cleanup authority under § 104 of the Act, were delegated to the Administrator of the Environmental Protection Agency (EPA). *Id.* at 42,237-40. Section 8(g) of this Order revoked previous Exec. Order No. 12286, 46 Fed. Reg. 9,901 (1981), which had been issued by President Carter shortly before he left office. *Id.* at 42,240.

¹³ Response actions are divided into "removal" and "remedial action." 42 U.S.C. § 9601(25)(Supp. V 1981). Removal relates primarily to the cleanup of hazardous substances released into the environment and includes evaluation of the threat or extent of a release. *Id.* § 9601(23). Remedial action relates to permanent measures taken in response to a release or threatened release. *Id.* § 9601(24).

¹⁴ "Release" is defined by § 101(22) of the Act to include "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment." 42 U.S.C. § 9601(22)(Supp. V 1981).

¹⁵ Hazardous substances under CERCLA include a broad range of substances identified under other federal environment laws including: (1) any substance designated pursuant to § 311(b)(2)(A) of the Federal Water Pollution Act, 33 U.S.C. § 1321(b)(2)(A)(1982); (2) any waste listed as a hazardous waste or having the characteristics of a hazardous waste identified under § 3001 of the Solid Waste Disposal Act, 42 U.S.C. § 6921 (Supp. V 1981); (3) any toxic pollutant listed under § 307(a) of the Federal Water Pollution Control Act, 33 U.S.C. § 1317(a)(1982); (4) any hazardous air pollutant listed under § 112 of the Clean Air Act, 42 U.S.C. § 7412 (Supp. V 1981); and (5) any imminently hazardous chemical substance or mixture with respect to which EPA has taken action pursuant to § 7 of the Toxic Substances Control Act, 15 U.S.C. § 2606 (1982). 42 U.S.C. § 9601(14)(Supp. V 1981). Identification of these substances has and will be provided. Regulations identifying these substances has been promulgated at: (1) 40 C.F.R. § 116.4 (1983) (designating hazardous substances under §311(b)(2)(A) of Federal Water Pollution Control Act); (2) 40 C.F.R. §§ 261.20-.24, .30-.33 (1983) (designating certain solid wastes as hazardous wastes); (3) 40 C.F.R. § 401.15 (1983) (toxic pollutants designated under Federal Water Pollution Control Act); and (4) 40 C.F.R. § 61 (1983) (designating hazardous air pollutants). Section 102 of CERCLA, 42 U.S.C. § 9602 (Supp. V 1981), authorizes EPA to identify as additional hazardous substances "such elements, compounds, mixtures, solutions, and substances which, when released into the environment may present substantial danger to the public health or welfare of the environment." In addition, courts have contributed additional interpretations of the term. For example, in *United States v. Wade*, 577 F. Supp. 1326, 1340 (E.D. Pa. 1983), the court ruled that a waste is hazardous if it contains any quantity of substances designated as hazardous or toxic under the statutes specified in the definition of "hazardous substance."

¹⁶ "Environment" generally includes navigable waters and "any other surface water, ground water, drinking water, drinking water supply, land surface or subsurface strata, or ambient air." *Id.* § 9601(8).

ardous materials, and implementation of an appropriate permanent remedial action plan.¹⁷ Any remedial action must be both “cost-effective”¹⁸ and, to the greatest extent practicable, consistent with the National Oil and Hazardous Substance Pollution Contingency Plan¹⁹ (the “National Contingency Plan” or “NCP”).²⁰ Moreover, implementation of permanent remedial action generally requires a cooperative agreement with the state in which the site is located.²¹ This agreement ought to provide, *inter alia*, that the state will pay ten percent of the costs of response action.²²

Section 105 of the Act²³ requires the President to revise and republish a National Contingency Plan to reflect and effectuate the responsibilities and powers created by CERCLA.²⁴ The Plan must establish procedures and standards for responding to releases of hazardous substances, including assurances that “remedial action measures are cost-effective.”²⁵ Response and remedial actions regarding the release of hazardous substances must be compatible with the provisions of the Plan “to the greatest extent possible.”²⁶

Section 107²⁷ authorizes the government to maintain an action in federal court to recover monies expended from the Superfund for response and remedial actions taken pursuant to section 104.²⁸ The parties liable

¹⁷ See *supra* note 13 and *infra* notes 75-91 and accompanying text.

¹⁸ 42 U.S.C. § 9605(7)(Supp. V 1981); see *infra* 92-98 and accompanying text.

¹⁹ 42 U.S.C. § 9604(c)(4)(Supp. V 1981).

²⁰ 40 C.F.R. § 300 (1983); see *infra* notes 23-26 and accompanying text.

²¹ See *infra* note 88.

²² 42 U.S.C. § 9604(c)(3)(Supp. V 1981). If the site at which response occurs was owned at the time of any disposal of hazardous substances by the state or any political subdivision, the state is required to provide 50% of the response costs. *Id.*

²³ *Id.* § 9605.

²⁴ The National Contingency Plan was promulgated on July 16, 1982 and is codified at 40 C.F.R. § 300 (1983). It replaced an earlier plan promulgated under § 311(c) of the Federal Water Pollution Control Act, 33 U.S.C. § 1321(c)(1982). 40 C.F.R. § 300.1-.2 (1983).

²⁵ 42 U.S.C. § 9605(7) (Supp. V 1981).

²⁶ *Id.* § 9605.

²⁷ *Id.* § 9607.

²⁸ Actual expenditures of money from the Superfund is governed by § 111 of the Act, 42 U.S.C. § 9611 (Supp. V 1981). That section authorizes payment for governmental response costs incurred under § 104 as well as payment of “any claim for necessary response costs incurred by any other person as a result of carrying out the national contingency plan.” *Id.* § 9611(a)(1) and (2). Liability under the Act includes, however, “all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan” and “any other necessary costs of response incurred by any other person consistent with the national contingency plan.” *Id.* § 9607(a)(4)(A), (B). The Act also imposes liability for any damages caused to natural resources. *Id.* § 9607(a)(4)(C). Before payment from the Superfund can occur, there must be compliance with the claims procedure outlined in § 112 of CERCLA. *Id.* § 9612. According to that section, claims which may be asserted against the Superfund must first be presented to persons who may be liable under § 107. If the claim remains unsatisfied, the claimant may either file suit

in such an action²⁹ may include the present and certain past owners and operators of a site, transporters of hazardous substances, and persons who arranged for the treatment, storage, or disposal of hazardous substances which they owned or possessed³⁰ at a site from which there has been a release of hazardous substance.³¹ Section 107(b) delineates a limited number of statutory defenses.³² The statute does not establish a dollar limit for the amount of response costs for which a responsible party can be held liable.³³

In addition to cost recovery actions under section 107, a federal action also may be brought by the government under section 106. "If there is an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility,"³⁴ the court is empowered "to grant such relief as the public interest and the equities of the case may require."³⁵ However, the Act is silent as to the parties from whom such relief may be obtained.³⁶

III. GOVERNMENT ENFORCEMENT ACTIONS UNDER CERCLA

There are 546 sites on the National Priority List (NPL) that is promulgated as part of the National Contingency Plan.³⁷ Typically, the sites ap-

against the potentially responsible party or present the claim for payment from the Superfund. *Id.* Once presented to the Superfund, the claim is processed in accordance with the procedures established under § 112. If the claim is then paid, the government acquires by subrogation the rights of the claimant to recover the amount of the claim "from the person responsible or liable for such release." *Id.* § 9612(c)(1).

²⁹ The extent of liability generally consists of the cost of response and remedial action. *See supra* note 28.

³⁰ Generally, this particular description of potentially responsible parties includes the generators of hazardous substances. *United States v. Northeastern Pharmaceutical and Chem. Co.*, 579 F. Supp. 823, 846-47 (W.D. Mo. 1984); *Ohio ex rel. Brown v. Georgeoff*, 562 F. Supp. 1300, 1310 (N.D. Ohio 1983).

³¹ 42 U.S.C. § 9607(a) (Supp. V 1981).

³² *Id.* § 9607(b); *see infra* notes 66-67 and accompanying text.

³³ *See* 42 U.S.C. § 9607(c)(1)(D) (Supp. V 1981). However, there is a limit upon response cost liability for releases from vessels and an absolute limit of \$50 million upon liability for damages to natural resources. *Id.* § 9607(c)(1)(A)-(C). Limits upon liability are waived if the release was the result of willful misconduct or negligence, or if the primary cause of the release was the result of a knowing violation of an applicable standard or regulation. *Id.* § 9607(c)(2). Finally, punitive treble damages may be recovered if any liable party fails without sufficient cause to properly provide removal or remedial action upon an order issued by the President pursuant to §§ 104 or 106 of the Act. *Id.* § 9607(c)(3).

³⁴ 42 U.S.C. § 9606(a) (Supp. V 1981).

³⁵ *Id.* Section 106 also authorizes the Administrator of the EPA, as the designee of the President, to take other action including "issuing such orders as may be necessary to protect public health and welfare and the environment." *Id.* *See infra* note 113.

³⁶ *See infra* notes 120-140 and accompanying text.

³⁷ The NCP is to include criteria for determining priorities among releases "based upon relative risk or danger to public health or welfare or the environment." 42 U.S.C.

pearing on the NPL are hazardous waste dumps, often abandoned after years of indiscriminate use. Frequently, the hazardous wastes were transported to the sites by firms hired to dispose of chemical wastes generated by various industrial and manufacturing operations.

After identifying a site for which response action may be necessary, the Environmental Protection Agency (EPA) generally initiates an investigation to identify the parties potentially responsible.³⁸ Because current and former owners of abandoned sites, as well as the disposal firms, are often without significant assets, it is not unusual for the EPA to focus its enforcement efforts upon the industrial and manufacturing operations that generate the waste.³⁹ The EPA generally informs the generators of their potential liability and invites them to participate in both the formation and implementation of a remedial action plan.⁴⁰ If the potentially responsible party refuses to cooperate with the government at this stage,⁴¹ the EPA will either seek injunctive relief under section 106,⁴² or proceed with its own remedial action program at the site and seek reimbursement in a subsequent section 107 action.⁴³

§ 9605(8)(A) (Supp. V 1981). In light of these criteria, the plan lists the priorities among the known or threatened releases. *Id.* § 9605(8)(B). In order to list releases by priority, the Plan utilizes the Hazard Ranking System (HRS), a uniform method used to identify those releases of hazardous substances that pose the greatest hazard to humans or the environment. 40 C.F.R. § 300, app. A (1983). The HRS measures the potential for harm to humans or the environment from: (a) migration of a hazardous substance away from a facility by ground water, surface water or air; (b) substances that can explode or cause fires; and (c) direct contact with hazardous substances at the facility itself. *Id.* § 1.0. States seeking to include a particular release site on the NPL must use the HRS because the EPA will review the state submissions to ensure compliance. If the state submission complies with the HRS, the EPA will add the release as well as any additional priority releases known to it to the NPL. 40 C.F.R. § 300.66(e) (1983). The NPL will be codified at 40 C.F.R. § 300, app. B. 48 Fed. Reg. 40,670 (1983).

³⁸ See 40 C.F.R. § 300.33(b)(2) (1983).

³⁹ See, e.g., *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983); *United States v. Seymour Recycling Corp.*, 554 F. Supp. 1334 (S.D. Ind. 1982).

⁴⁰ Guidelines for Using the Imminent Hazard, Enforcement and Emergency Response Authorities of Superfund and Other Statutes, 47 Fed. Reg. 20,664, 20,666 (1982). Under § 104, response action cannot be taken if it is determined that such action "will be done properly by the owner or operator of the vessel or facility from which the release or threat of release emanates, or by any other responsible party". 42 U.S.C. § 9604(a)(1) (Supp. V 1981). See 40 C.F.R. §§ 300.61(b), 300.64(c)(5) (1983). The NCP directs those overseeing government action to conserve Superfund money by encouraging private party cleanup. 40 C.F.R. § 300.61(c)(2) (1983). It also instructs the agency leading the action to base assessments of its need upon, *inter alia*, the existence of parties ready, willing and able to undertake a proper response. *Id.* § 300.64(a)(3).

⁴¹ For a discussion of pre-enforcement involvement by potentially responsible parties in developing and implementing remedial actions plans, see [generally this issue].

⁴² See, e.g., *United States v. Westinghouse Elec. Corp.*, No. IP-83-9-C (S.D. Ind., June 29, 1983).

⁴³ See cases cited *supra* note 39.

A. Liability Under Section 107

Thus far, recovery by the EPA of its response costs under section 107 has been erratic due to slow investigation of hazardous waste sites and subsequent development and implementation of appropriate remedial action plans.⁴⁴ While most complaints filed by the government under CERCLA include a section 107 claim, few cases involve a situation where the EPA has completed all response actions and is seeking recovery for its total costs. Consequently, initial court decisions interpreting the section have focused on identifying the level of conduct necessary to create liability for response costs and have left the complicated questions relating to the extent of such liability for future resolution.

1. Persons Liable

Liability under section 107 is triggered by a release, or a threatened release, of a hazardous substance from a facility that causes the government to incur response costs.⁴⁵ Parties subject to liability under this section include four classes of individuals having some relationship to the facility and/or the hazardous substances present there.⁴⁶ Although the statutory language is somewhat diffuse, there is little doubt that Congress intended to impose liability for appropriate response costs upon present and certain former owners of the facility, generators of the hazardous substances found at the facility, and transporters of the hazardous substances.⁴⁷ While questions as to whether particular defendants actually

⁴⁴ In an attempt to overcome the slow pace in cleaning up known hazardous waste sites, the CERCLA reauthorization bill, introduced by Representative James J. Florio, includes a mandatory cleanup schedule. It calls for the completion of remedial action of all current sites on the NPL within five years of enactment of the bill. H.R. 4813, 98th Cong., 2d Sess. § 101 (1984).

⁴⁵ In *United States v. Hardage*, No. CIV-80-1031-W, slip op. at 19-21 (W.D. Okla. Dec. 13, 1982), the court ruled that a clear reading of § 104(a) of CERCLA indicates that the government can respond, and liability arises, whenever there is a release or threatened release of a hazardous substance even though the situation does not constitute an "imminent and substantial endangerment." However, if the released substance does not constitute a hazardous substance as defined by CERCLA, there must be an imminent and substantial endangerment. 42 U.S.C. § 9604(a)(1)(B) (Supp. V 1981).

⁴⁶ U.S.C. § 9607(a) (Supp. V 1981). By definition, the term "person" as used in the Act refers to individuals, corporations, and other business organizations, as well as governmental entities. *Id.* § 9601(21).

⁴⁷ In defining the classes, section 107(a) of the Act, 42 U.S.C. § 9607(a) provides: Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

- (1) the owner and operator of a vessel (otherwise subject to the jurisdiction of the United States) or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment,

fall within one of the four classes have arisen,⁴⁸ the classes as such have not been narrowed.⁴⁹ The government has instead successfully maintained a section 107 action against the corporate officers of an off-site generator,⁵⁰ has overcome the argument that only generators who actually

of hazardous substances owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substance, and

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

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

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

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.

⁴⁸ For example, in *United States v. Price*, 577 Supp. 1103 (D.N.J. 1983), the generator alleged in a motion for summary judgement that it was not liable because the government had failed to implicate it to the site. Although the court noted that it was unclear whether loading tickets connecting the generator to the site would be admissible and that testimony of the purported transporter of the generator's waste "was far from dispositive," it denied the motion. *Id.* at 1116 n.13, 1117. See also *United States v. Wade*, 577 F. Supp. 1326, 1331 (E.D. Pa. 1983) (affidavit of disposal company president was "adequate to survive defendants' motions for summary judgment; however, because [the president's] credibility as a convicted felon and a defendant in this case, is seriously contested, his affidavit does not suffice to establish the fact of dumping by the defendants.").

At least one court has articulated the type of evidence sufficient to establish a connection between the generator and a hazardous waste site. Noting the costs that may be associated with attempting to identify waste types at a particular site through analytical means, the court in *United States v. South Carolina Recycling and Disposal, Inc.*, No. 80-1274-6 (D.S.C. Feb 23, 1984), apparently would relieve a § 107 plaintiff from presenting scientific proof that a defendant's wastes were connected to the site. Instead, "less resource exhaustive means of showing that a generator's waste or similar wastes are at a site, such as by identification of a generator's drum at the site during cleanup or by way of documentary or circumstantial proof that the wastes were hauled to the site absent proof that they were subsequently taken away, should also be sufficient to satisfy this element of proof." *Id.*, slip op. at 11 n.6.

⁴⁹ One governmental entity has successfully argued against inclusion among the classes of liable parties under CERCLA. The Commonwealth of Pennsylvania in *United States v. Union Gas Co.*, 575 F. Supp. 949 (E.D. Pa. 1983), asserted that even though it owned and operated a hazardous waste site, it could not be included as a third-party defendant under § 107. The court held that the state was not liable because the eleventh amendment established state immunity which Congress did not intend to abrogate when it passed CERCLA. *Id.* at 952-53. A past owner of a site has also been excluded from those liable under CERCLA because no disposal of wastes occurred during the period of its ownership. *Cadillac Fairview/California, Inc. v. Dow Chem. Co.*, 14 ENVTL. L. REP. (ENVTL. L. INST.) 20376, 20378 (C.D. Cal. March 5, 1984).

⁵⁰ *United States v. Northeastern Pharmaceutical and Chem. Co.*, 579 F. Supp. 823 (W.D. Mo. 1984). In *Northeastern Pharmaceutical*, the court held two corporate officers of a waste generator personally liable under § 107. However, at least part of the court's reasoning is

select and designate a particular disposal site may be held liable under this section⁶¹ and has been allowed to proceed against a generator who

arguably based on misreadings of CERCLA, which is understandable given the diffuse language of § 107. In imposing liability upon one Lee, vice president and supervisor of the generator's plant, the court cited his involvement in arranging for the disposal of the hazardous substance at a local farm as a basis for liability under § 107(a)(3). The court observed that the section clearly states that the person arranging for the disposal is not required to actually own or possess the hazardous waste or the facility from which it is moved for disposition." *Id.* 847. In reaching this conclusion, the court read the phrase "by any other party or entity" as a modifier of the phrase "hazardous substances owned or possessed." Disregarding its syntactical difficulties, the court's reading precludes any need whatsoever for the statute to specify particular ownership. A more logical interpretation of the provision would associate "by any other party or entity" with the act of disposal or treatment.

The court also imposed liability upon Lee, as well as Michaels, president of the corporate-generator, because their positions made them owners and operators of Northeastern Pharmaceutical's plant. As a result, the court held both individuals liable under § 107(a)(1). *Id.* at 848-49. However, that provision, when read in its entirety, imposes liability upon the owner or operator of the facility from which the release occurs, not the facility at which the hazardous substance was generated.

The court in *United States v. Wade* 577 F. Supp. 1326 (E.D. Pa. 1983), took a more reasoned approach to the question of individual liability of a corporate officer. Relying on common law theory, the court ruled that "a corporate officer may be held liable if he personally participates in the wrongful, injury-producing act." *Id.* at 1341. However, neither mere placement of drums at the site nor mere negotiation of a waste disposal agreement constituted acts sufficient to establish individual liability. *Id.* at 1341-42.

⁶¹ See, e.g., *United States v. Wade*, 577 F. Supp. 1326, 1333 n.3 (E.D. Pa. 1983).

There has been some discussion about whether a party potentially liable under § 107 may also recover its response costs under the same section. In *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135 (E.D. Pa. 1982), the city sought to recover its costs for cleaning up a city-owned site at which hazardous waste had been disposed without its knowledge or permission. The generator-defendants sought to dismiss the city's claim under § 107 because, as the owner of the facility, the city was also potentially liable for response costs. *Id.* at 1141. In the opinion of the generator-defendants, to allow one responsible party to recover its response costs from another responsible party would have created inconsistencies in the claims provision of CERCLA. *Id.* The main inconsistency cited by the defendants arises from the government's acquired subrogation rights whenever it paid a claim from the Superfund. See *supra* note 28. Thus, the defendants raised the spectre of a "merry go round of litigation with the government suing a responsible person which in turn could sue other responsible persons which in turn could claim against the fund and so forth." *Id.*

The court permitted the city's claim under the Act. It rejected defendants' fears as hypothetical because no other entity had yet incurred response costs which would support an action against the city. *Id.* at 1143. Because the city did not operate the site as a hazardous waste facility or give its permission for the placement of the hazardous substances on its property, the court did not prevent the city from proceeding under § 107. To do so would frustrate a primary purpose of CERCLA by failing to place the ultimate cost upon those primarily responsible for creating the hazard. *Id.* at 1142-43.

The district court later certified for appeal its ruling in this regard pursuant to 28 U.S.C. § 1292(b) (1982). *City of Philadelphia v. Stepan Chem. Co.*, 14 ENVTL. L. REP. (ENVTL. L. INSTR.) 20007 (E.D. Pa. Aug. 23, 1983).

A seemingly contradictory result was suggested in *D'Imperio v. United States*, 575 F. Supp. 248 (D.N.J. 1983). In *D'Imperio*, the current owners of a hazardous waste site sought

actually sold its waste material to the disposer.⁶²

With the possible exception of corporate officers,⁶³ there does not seem to exist much disagreement over who is included within the terms of section 107. Rather, attention has focused on the standard of liability to be applied to the persons who are, in fact, included.

2. Standards of Liability

Illustrative of the compromise leading to the passage of CERCLA was the deletion from section 107 of any reference to a standard of liability to be imposed in actions against potentially responsible parties.⁶⁴ Rather than including language which specifically establishes a negligence or strict liability standard,⁶⁵ the definitional section of CERCLA merely states that "liable" or "liability" as used in the Act "shall be construed to be the standard of liability which obtains under section 311 of the Federal Water Pollution Control Act" ("Clean Water Act" or "CWA").⁶⁶

The policy decisions that Congress hoped to avoid by adopting this compromise language have merely been deferred to the courts where the judicial decision-making process focuses upon both the legislative history of the Act and the policy arguments made in Congress. Armed with the precedent of CWA section 311, which holds owners and operators of vessels and facilities strictly liable for the cleanup of spills into navigable

a declaratory judgment that they could not be held liable for costs of cleaning up the site and that any money they might contribute to future clean up efforts would be reimbursable under § 107. The court stated that the case was premature because the government had not yet initiated an action against the owners who, in turn, had not yet spent any money to clean up the site. *Id.* at 251-253. *Accord* Cadillac Fairview/California Inc. v. Dow Chem. Co., 14 ENVTL. L. REP. (ENVTL. L. INST. 20376, 20380-81 (C.D. Cal. March 5, 1984). Because the plaintiffs were unable to establish their lack of liability for response costs, they were ineligible for reimbursement. In order to recover these costs, a party must prove that he himself is not liable for such costs. *Id.* at 253.

Section 107 does not explicitly establish the prerequisite which the *D'Imperio* court would impose upon parties seeking recovery of response costs. Indeed, the court did not explain its holding that "[i]n order to seek recovery under [§ 107], it is necessary for the plaintiff to prove that he himself is not liable for these costs." *Id.* One may infer that the court may have been persuaded by the potential difficulties posited by the defendants in *Stepan Chemical*.

⁶² United States v. A & F Materials Co., 582 F. Supp. 842 (S.D. Ill. 1984).

⁶³ See *supra* note 50 and accompanying text.

⁶⁴ In reporting the final Senate amendments to CERCLA to the House of Representatives, Rep. James Florio noted: "The liability provisions of this bill do not refer to the terms strict, joint and several liability, terms which were contained in the version of H.R. 7020 passed earlier by this body." 126 CONG. REC. H11787 (daily ed. Dec. 3, 1980)(statement of Rep. Florio).

⁶⁵ See, e.g., S. 1480, 96th Cong., 1st Sess. § 4(a) (1979).

⁶⁶ 42 U.S.C. § 9601(32) (Supp. V 1981). Section 311 of the Federal Water Pollution Control Act is codified at 33 U.S.C. § 1321 (1982).

waters,⁵⁷ the government has successfully argued for a standard of strict liability in section 107 cost recovery actions. Indeed, courts which have directly ruled on the question often have resolved the issue by reference to the cases decided under CWA section 311.⁵⁸

The section 311 strict liability standard does not necessarily extend to section 107 cost recovery actions, or at least those against off-site generators. The standard of liability "which obtains under [CWA section 311]" applies only to present owners and operators of vessels and facilities⁵⁹ and thus on its face does not impose liability upon as broad a class of persons as that encompassed by CERCLA section 107. In addition, factors which favor the imposition of a strict liability standard upon the owners and operators of a facility at the time a release occurs—their direct control over and responsibility for operating practices of the facility—arguably do not apply to persons such as off-site generators who have effectively relinquished control of the wastes to presumably responsible third parties.⁶⁰

The unquestioning adoption of the strict liability standard for off-site generators has been accompanied by an apparent weakening of the traditional standards of causation. In *United States v. Wade*,⁶¹ the court held that the government need not establish a causal relationship between the waste associated with a particular party and the incurrence of cleanup costs resulting from an actual or threatened release of a hazardous substance. While imposing liability under section 107 upon an off-site generator of wastes, the court stated that "the only required nexus between the

⁵⁷ See *United States v. M/V Big Sam*, 681 F.2d 432 (5th Cir. 1982), cert. denied, _____ U.S. _____, 103 S. Ct. 3112 (1983); *United States v. LeBeouf Bros. Towing Co.*, 621 F.2d 787 (5th Cir. 1980); *Steuart Transp. Co. v. Allied Towing Corp.*, 596 F.2d 609 (4th Cir. 1979); *United States v. Tex-Tow, Inc.*, 589 F.2d 1310 (7th Cir. 1978); *Burgess v. M/V Tamano*, 564 F.2d 964 (1st Cir. 1977).

⁵⁸ *Northeastern Pharmaceutical and Chem. Co.*, 579 F. Supp. 823, 844 (W.D. Mo. 1984); *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1140 n.4 (E.D. Pa. 1982). In *United States v. Price*, 577 F. Supp. 1103, 1113-1114 (D.N.J. 1983), the court held that § 107 imposes a standard of strict liability without referring to CWA § 311 or the precedent thereunder, but instead relied upon an examination of the legislative history and policy arguments. See also *United States v. South Carolina Recycling and Disposal, Inc.*, No. 80-1274-6, slip op. at 7 n.2 (D.S.C. Feb. 23, 1984) (referring to standard of liability under § 107 as strict liability).

⁵⁹ 33 U.S.C. § 1321(f) (1982).

⁶⁰ *But see United States v. Price*, 577 F. Supp. 1103, 1114 (D.N.J. 1983), where the court stated:

The fulfillment of these Congressional goals [cost spreading and assurance that responsible parties bear the cost of cleanup] is more likely to be effectuated if the defendants who allegedly contributed to the environmental mess are now held to a very stringent standard of liability. Though strict liability may impose harsh results on certain defendants, it is the most equitable solution in view of the alternative—forcing those who bear no responsibility for causing the damage, the taxpayers, to shoulder the full cost of the clean up.

⁶¹ *Id.* (footnote omitted). 577 F. Supp. 1326 (E.D. Pa. 1983).

defendant and the site is that the defendant has dumped his waste there and that the hazardous substances found in the defendant's waste are also found at the site."⁶² The court found that requiring the government to "fingerprint" a released waste as that of a particular generator would "eviscerate the statute" inasmuch as the government admitted that it was technically incapable of identifying with any certainty the generator of specific waste.⁶³ Based upon an examination of the statutory language⁶⁴ and legislative history,⁶⁵ the court also concluded that the traditional tort concept of proximate causation was not a necessary element of the strict liability standard applicable under section 107.⁶⁶

3. Defenses to Liability and Elements of Recovery

Section 107 (b) delineates three affirmative defenses available to a party who is otherwise liable for response costs. In general, the party can defend on the ground that the release or threatened release of a hazardous substance and the resulting damages were caused solely by an act of

⁶² *Id.* at 1333. This holding was expressly adopted in *United States v. South Carolina Recycling and Disposal, Inc.*, No. 80-1274-6, slip op. at 10 (D.S.C. Feb. 23, 1984). That court, without referring to any particular statutory provisions or citing any specific legislative history, remarked that CERCLA "takes into account the synergistic potential of improperly managed hazardous substances and essentially presumes a contributory 'casual' relationship between each of the hazardous substances disposed of at a site and the hazardous conditions existing at the site." *Id.*, slip op. at 10 n.5.

⁶³ *United States v. Wade*, 577 F. Supp. at 1332. The court did not address the issue of causation where the defendant can establish that its wastes were not responsible for a release requiring Superfund expenditures or the government develops the capability to fingerprint wastes. The factual issues involved in such circumstances are very similar to those which may arise when defendants in a multi-generator situation try to defeat the imposition of joint and several liability. See generally *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 810-811 (S.D. Ohio 1983) (respecting defendants', generators' and transporters' allegations that they could not be found jointly and severally liable under CERCLA).

⁶⁴ 577 F. Supp. at 1332-33. The court noted in passing "the lack of precision with which the statute was drafted." *Id.* at 1332.

⁶⁵ The Wade court felt it significant that, during consideration of Superfund legislation, Congress had dropped from the legislation language which imposed liability on "any person who caused or contributed to the release." *Id.* at 1333 (quoting H.R. 7020, 96th Cong., 2d Sess., § 3071(a)(1), 126 CONG. REC. H9459 (daily ed. Sept. 23, 1980)). See also *United States v. Price*, 577 F. Supp. 1103, 1114 n.11 ("Congress eliminated any language [in § 107] requiring plaintiff to prove proximate cause.").

⁶⁶ 577 F. Supp. at 1333-34. See *United States v. Tex-Tow, Inc.*, 589 F.2d 1310 (7th Cir. 1978) (causation is a necessary element in a case seeking recovery of cleanup costs under § 311 of the Federal Water Pollution Control Act); cf. *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1143 n.10 (E.D. Pa. 1982) (court notes the "persuasive argument" that "where an entity falls within the technical description of a responsible party but has little or no connection with the creation of the hazardous condition, the imposition of CERCLA liability may be unwarranted."). *Contra Ohio ex rel. Brown v. Georgeoff*, 562 F. Supp. 1300, 1306 (N.D. Ohio 1983) (describing causation as "an element of the [§ 107] cause of action").

God, an act of war, or an act of an unrelated third party.⁶⁷ Only the act of an unrelated third party, which is similar to the traditional defense of intervening cause, is likely to have any general application.⁶⁸

In light of these limited and specific affirmative defenses, potentially responsible parties have argued that the government's failure to comply with the technical response and recovery provisions of CERCLA precludes the imposition of liability. To date, these arguments have been generally unsuccessful.⁶⁹

The court in *United States v. Reilly Tar & Chemical Corp.*⁷⁰ ruled that the government's failure to enter into a cooperative agreement with the state in accordance with section 104(c)(3) of CERCLA⁷¹ did not bar an action under section 107 for recovery of response costs.⁷² Relying on the "subject only to the defenses set forth in subsection (b)" clause of section 107(a), the court concluded that "Congress did not intend that the courts engage in the complex inquiry and statutory tracing of the various sec-

⁶⁷ Section 107(b), 42 U.S.C. § 9607(b)(Supp. V 1981), states:

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by —

- (1) an act of God;
- (2) an act of war;
- (3) an act or omission of a third person other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant established by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or
- (4) any combination of the foregoing paragraphs.

⁶⁸ This defense is somewhat narrower than that available under § 311(f) of the CWA, which excuses an owner or operator from liability if the discharge was caused by, *inter alia*, "an act or omission of a third party without regard to whether any such act or omission was or was not negligent." 33 U.S.C. § 1321(f) (1982). At least one court has cited the inclusion of the "due care" defense under § 107(b)(3) as grounds for applying a strict liability standard under § 107. *See United States v. Price*, 577 F. Supp. 1103, 114 (D.N.J. 1983).

⁶⁹ *See infra* notes 69-81 and accompanying text.

⁷⁰ 546 F. Supp. 1100 (D. Minn. 1982).

⁷¹ 42 U.S.C. § 9604(c)(3) (Supp. V 1981); *see infra* note 88 and accompanying text (discussing relationship between the requirements of § 104(c)(3) and § 107 liability).

⁷² The court held: "Whether there should be a cooperative agreement between the President and Minnesota as provided by section 104(c)(3) is not material in determining Reilly Tar's potential liability under section 107(a)." 546 F. Supp. at 1118. The court had earlier ruled similarly that the government's recovery action was not barred by the lack of a revised national contingency plan at the time the government initiated response activities. *Id.* at 1115-16.

tions" of CERCLA.⁷³ Thus "liability under section 107(a) is independent of the authorized uses of the Fund under section 111 and of the cooperative agreement called for by section 104(c)(3)."⁷⁴ Instead, "liability for the specified response costs under section 107(a) is absolute."⁷⁵

Other courts have wrestled with the relationship between liability under section 107 and the detailed response provisions of CERCLA, but the basic issue of what elements are required for the government's case for recovery of response costs is far from settled. In *United States v. Northeastern Pharmaceutical and Chemical Co.*,⁷⁶ the court found that compliance with section 104 was not essential to an action by the government under section 107.⁷⁷ The court also held that the government did not have the burden of proving as a part of its *prima facie* case that its response actions were consistent with the NCP. Instead the double negative, "not inconsistent" contained in section 107(a), placed that burden on the defendants.⁷⁸ Similarly, the court in *Ohio ex rel. Brown v. George-off*⁷⁹ held that the government need not enter into a cooperative agreement with the state before it would be entitled to recovery under section 107 because sections 107 and 104 are not coterminous. Thus, "a [section 107] action might be brought where Superfund response authority does not exist under [section 104]."⁸⁰ However, in *J.V. Peters & Co. v. Ruckelshaus*,⁸¹ the court found a direct relationship between the two sections. It ruled that upon a showing that the EPA did not act in accordance with section 104(a), as well as the National Contingency Plan, a party would not be held liable under section 107 for the costs of the government's response actions.⁸²

⁷³ *Id.* at 1118.

⁷⁴ *Id.*

⁷⁵ *Id.* (emphasis added). This statement merely begs the question of the relationship between § 107 and other provisions of CERCLA. The court failed to attribute any meaning whatsoever to the phrase "not inconsistent with the national contingency plan" which is one of the specifications of § 107.

⁷⁶ 579 F. Supp. 823 (W.D. Mo. 1984).

⁷⁷ *Id.* at 850.

⁷⁸ *Id.* The court contrasted this language with the language of § 107(a)(4)(B) which states that responsible parties are liable for "any other costs of response incurred by any other person consistent with the national contingency plan." *Id.* (quoting 42 U.S.C. § 9607(a)(4)(B)). Thus, it concluded that a different standard applied to private parties who "must affirmatively show that their actions were consistent." *Id.* In order to demonstrate such consistency and have a valid claim for response costs assertable against the Superfund under § 111(a)(2), a nongovernmental party must have received approval before taking any specific response action. 42 U.S.C. § 9611(a)(2) (Supp. V 1981); 40 C.F.R. § 300.25(d) (1983).

⁷⁹ 562 F. Supp. 1300, 1315 (N.D. Ohio 1983).

⁸⁰ *Id.*

⁸¹ No. C 83-4436 (N.D. Ohio Feb. 17, 1984) (available May 27, 1984, on WESTLAW, District Courts database).

⁸² *Id.*, slip op. at 9. In *J.V. Peters*, the current and former owners of a hazardous waste

Reilly Tar, Northeastern Pharmaceutical and *Georgeoff* may reflect an unduly narrow reading of the statute. The requirement of section 104(c)(3) that the government enter into a cooperative agreement with the state where the release took place is incorporated into the National Contingency Plan.⁸³ Since section 107(a)(4)(B) imposes liability only for costs of removal or remedial action incurred by the government "not inconsistent with the national contingency plan," the absence of a state cooperative agreement would presumably be inconsistent with the Plan and would bar an action under section 107.

The *Northeastern Pharmaceutical* court's reliance on the particular choice of words in section 107 is perilous in light of the last-minute compromises that resulted in the fractured language of the statute.⁸⁴ References to government response activity in terms of the National Contingency Plan contain varying terminology throughout the statute. In response to the actual or threatened releases of hazardous substances, the government is authorized only "to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance."⁸⁵ Had Congress intended defendants in a section 107 action to prove the government's noncompliance with the NCP as an affirmative defense, presumably it would have stated its intent with at least a minimal degree of clarity.⁸⁶

It is difficult to reconcile the failure of these courts to recognize the interrelationship of the Act's statutory provisions with the language of section 107 or with the overall framework of CERCLA. However poorly drafted, CERCLA does attempt to implement a comprehensive and inter-related program in which enforcement actions play a major role.⁸⁷ Section

site sought to prevent the EPA from undertaking response action at the site. Citing the complaint's "merely conclusory allegations," the court dismissed the action for failure to state a claim. *Id.*, slip op at 8. Such a claim would be proper "if the owner or operator of a waste facility averred that the EPA had absolutely no rational basis for undertaking a response action and that no preliminary assessment [of the threat to the environment present at the site] had been made." *Id.*, slip op. at 7.

⁸³ 40 C.F.R. § 300.62(c)(1) (1983).

⁸⁴ See *supra* notes 8-9 and accompanying text.

⁸⁵ 42 U.S.C. § 9604(a)(1) (Supp. V 1981) (emphasis added). See also *id.* § 9604(c)(4) ("The President shall select appropriate remedial actions determined to be necessary to carry out this section which are to the extent practicable in accordance with the national contingency plan . . ."); *id.* § 9605 ("Following publication of the revised national contingency plan, the response to and actions to minimize damage from hazardous substances releases shall, to the greatest extent possible, be in accordance with the provisions of the plan.").

⁸⁶ That Congress was capable of achieving such clarity is evident from § 111(h)(2) where Congress states that any government assessment of damages to natural resources "shall have the force and effect of a rebuttable presumption on behalf of any claimant." 42 U.S.C. § 9611(h)(2) (Supp. V 1981).

⁸⁷ Both §§ 104 and 112 rely upon concepts embodied in § 107. For example, pursuant to § 104, the government may undertake response actions unless it determines that a "respon-

104, in conjunction with the National Contingency Plan, establishes an orderly process for responding to actual or potential releases from hazardous waste sites. Limitations on this process consist of the following requirements: (1) that permanent remedial action be determined only after consultation with affected states;⁸⁸ (2) that implementation of permanent remedial action occur only after the federal and state governments have entered into a state cooperative agreement;⁸⁹ (3) that there be a detailed development and analysis of remedial alternatives;⁹⁰ and (4) that response actions be cost-effective.⁹¹ Failure to effectuate these limitations within the context of section 107 enforcement actions removes a major incentive for the government to comply with the congressionally ordered procedure.⁹²

4. Recovery of Particular Response Costs

A major limitation on governmental response actions under the National Contingency Plan is the requirement that they be cost-effective.⁹³ Thus, even though a responsible party may be liable under section 107 for government response costs for actions consistent with the National Contingency Plan,⁹⁴ this liability should cover only those response activities which are cost-effective. The NCP defines the "cost-effective" remedial alternative as "the lowest cost alternative that is technologically feasible and reliable and which effectively mitigates and minimizes damage to and provides adequate protection of public health, welfare, or the environ-

sible party" will initiate proper removal and remedial action. 42 U.S.C. § 9604(a) (Supp. V 1981). See 40 C.F.R. §§ 300.61(b), .64(c)(5) (1983). A "responsible party" undoubtedly is a party as described in § 107. Similarly, § 112 states that a claim for reimbursement from the Superfund for response costs pursuant to § 111 must in the first instance be presented to any person "who may be liable under § 107." 42 U.S.C. § 9612(a) (Supp. V 1981). If the claim remains unsatisfied, the claimant may then institute a lawsuit against such person. *Id.*

⁸⁸ 42 U.S.C. § 9604(c)(2) (Supp. V 1981); 40 C.F.R. § 300.62(f) (1983).

⁸⁹ 42 U.S.C. § 9604(c)(3) (Supp. V 1981); 40 C.F.R. § 300.62(c)(1) (1983). The cooperative agreement must contain certain provisions: (1) that the state will assure all future maintenance of the removal and remedial actions; (2) that the state will assure the availability of a hazardous waste disposal facility for any necessary off-site treatment, storage, or disposal; and (3) that the state will pay 10% of the costs of remedial action (50% if hazardous waste site is government owned). 42 U.S.C. § 9604(c)(3) (Supp. V 1981).

⁹⁰ 40 C.F.R. § 300.68 (1983).

⁹¹ 42 U.S.C. § 9604(c)(4) (Supp. V 1981); 40 C.F.R. § 300.68(j) (1983). See 42 U.S.C. § 9605(7) (Supp. V 1981) (NCP to include "means of assuring that remedial action measures are cost-effective over the period of potential exposure to the hazardous substances or contaminated materials.")

⁹² Ensuring compliance with the provisions of CERCLA, including its governmental response procedure requirements, will not in any way remove the ultimate liability from those identified by Congress as responsible parties.

⁹³ 42 U.S.C. §§ 9604(c)(4), 9605(7) (Supp. V 1981); 40 C.F.R. § 300.68(j) (1983).

⁹⁴ See *supra* notes 69-91 and accompanying text.

ment"⁹⁶ Identification of the cost-effective remedy is made after the development,⁹⁶ screening,⁹⁷ and detailed analysis⁹⁸ of possible alternatives. To date, the courts have not determined whether remedies either implemented or sought by the government are cost-effective. Further, there are no indications of how rigorous the courts' attention will be to the detailed provisions of the National Contingency Plan on remedial alternatives.⁹⁹

Those preliminary questions receiving some degree of attention from the courts relate to the appropriate time for bringing a cost-recovery action. In *United States v. Wade*,¹⁰⁰ the court addressed the question of whether a cost-recovery action was premature when the government had not yet incurred costs recoverable under section 107. The court held that the government could institute an action against a potentially responsible

⁹⁶ 40 C.F.R. § 300.68(j) (1983). In the preamble to the NCP, the EPA explained in more detail the importance of cost-effectiveness in selecting a remedy. According to the EPA, "Although cost does play an important role in selection of remedies, it does not take precedence over protection of public health, welfare and the environment." 47 Fed Reg. 31,185 (1982). The Agency specifically pointed out that the procedure for assessing alternative remedies outlined in the NCP "explicitly requires remedies that provide the requisite protection of public health while still meeting statutory requirements for analysis of costs and cost-effectiveness. Cost alone may not control these decisions." *Id.*

⁹⁷ Under 40 C.F.R. § 300.68(g) (1983), the development of remedial alternatives ought to take place in conjunction with a remedial investigation in order to determine whether source control or off-site remedial actions are appropriate. It also should include consideration of numerous factors relating to the nature of the hazardous substances involved and to the physical conditions and environs of the site. *See id.* § 300.68(e)-(f). The NCP specifically permits consideration of a no-action alternative "when response action may cause a greater environmental or health danger than no action." *Id.* § 300.68(g).

⁹⁸ Initial screening of remedial alternatives involves consideration of three general criteria: cost, effects of the alternative, and acceptable engineering practices. 40 C.F.R. § 300.68(h) (1983) The NCP excludes alternatives from further consideration if: (1) the cost of an alternative far exceeds the cost of other alternatives without providing substantially greater benefits to public health or the environment; (2) an alternative has significant adverse effects; or (3) an alternative is not feasible or reliable given the location and conditions of the release of the hazardous substance. *Id.*

⁹⁹ Remedial alternatives remaining after the initial screening are to be subjected to a detailed analysis of the following factors: (1) specification of the alternative emphasizing established technology; (2) cost estimation; (3) constructability; (4) effectiveness in mitigating and minimizing damage from the release; and (5) methods for and costs of mitigating any adverse environmental impacts. *Id.* § 300.68(i). The NCP does not establish priorities or relative degrees of importance among these factors.

¹⁰⁰ The decision in *Northeastern Pharmaceutical and Chem. Co.*, 579 F. Supp. 823, 851 (W.D. Mo. 1984), states that "a review of the remedial and removal actions taken by the government leads this Court to conclude that such actions were consistent with the national contingency plan." Although the court did not so state, this review presumably included consideration of the cost-effectiveness of the actions. *Cf. United States v. A. & F Materials Co.*, 578 F. Supp. 1249, 1259 (S.D. Ill. 1984) (conclusory allegations that costs incurred to date by the government are consistent with the NCP sufficient to withstand motion to dismiss).

¹⁰⁰ 577 F. Supp. 1326 (E.D. Pa. 1983).

party after emergency measures had been undertaken but before the cleanup had been completed.¹⁰¹ Yet, in *United States v. Price*,¹⁰² the court concluded that the government must first begin the cleanup and incur some expense before it can initiate an action.¹⁰³

Finally, in *Ohio ex rel. Brown v. Georgeoff*,¹⁰⁴ the defendants argued that settlement funds received from other generators exceeded response costs incurred by the government, thus denying any basis for a cost-recovery action. The court, however, rejected this argument and concluded that "the previously committed funds should not be applied to reimburse Ohio's previously incurred response costs and that Ohio has sufficiently pled a claim for previously incurred response costs pursuant to section 9607 (a)(4)(A)."¹⁰⁵

These rulings suggest a larger issue: can the government seek recovery of future costs from a potentially responsible party? In *United States v. Northeastern Pharmaceutical and Chemical Co.*,¹⁰⁶ the government sought a declaratory judgment for future response costs. The court held that, while it could not award costs until they were incurred, liability for future costs could be imposed upon the defendants.¹⁰⁷ In contrast, the *Price* court suggested that costs incurred subsequent to the filing of the complaint but before the conclusion of litigation did not constitute "costs incurred" under section 107.¹⁰⁸

The time at which the government chooses to seek recovery of its response costs may affect a court's ability to determine whether particular response actions were cost-effective, and thus recoverable, under CERCLA. Theoretically, a court cannot find that a particular expenditure is cost-effective unless the expenditure is evaluated in the context of an overall remedial action plan, developed in accordance with the National Contingency Plan. It therefore follows that the government should not be

¹⁰¹ *Id.* at 1335. *Accord* *United States v. South Carolina Recycling and Disposal Inc.*, No. 80-1274-6 slip op. at 25 (D.S.C. Feb. 23, 1984)(dictum); *United States v. A & F Materials Co.*, 578 F. Supp. 1249, 1259 (S.D. Ill. 1984). The *Wade* court resolved additional time-related issues in ruling that while the government can not recover response costs incurred prior to the enactment of CERCLA, it may recover costs pre-dating promulgation of the NCP. *United States v. Wade*, 14 ENVTL. L. REP. (ENVTL. L. INST.) 20437 (E.D. Pa. Mar. 22, 1984).

¹⁰² 577 F. Supp. 103 (D.N.J. 1983).

¹⁰³ *Id.* at 110. The *Price* court ruled that a general allegation that "the United States has incurred and will continue to incur response costs" was not sufficient to establish a cause of action under section 107. *Id.* at 110 n.5 (quoting government's complaint). The court thus would require some specification of the costs.

¹⁰⁴ 562 F. Supp. 1300 (N.D. Ohio 1983).

¹⁰⁵ *Id.* at 1316. The state had argued that the settlement funds were to be applied to future response costs. *Id.* at 1315.

¹⁰⁶ 579 F. Supp. 823 (W.D. Mo. 1984).

¹⁰⁷ *Id.* at 852-53. *Accord* *Ohio ex. rel. Brown v. Georgeoff*, 562 F. Supp. 1300, 1316 (N.D. Ohio 1983).

¹⁰⁸ *United States v. Price*, 577 F. Supp. 1103, 1110 n.5 (D.N.J. 1983).

able to recover response costs under section 107 without first outlining its overall remedial action plan and without demonstrating the necessity of the particular component for which it seeks recovery.¹⁰⁹

B. Actions For Injunctive Relief Under Section 106

As originally formulated, the Superfund made \$1.6 billion available for the government to clean-up abandoned hazardous waste sites.¹¹⁰ Faced with a current total of 546 sites appearing on the National Priority List¹¹¹ and response costs averaging in the millions of dollars per site, the government is naturally concerned about the adequacy of the Superfund. Consequently, in addition to seeking recovery of its response costs under section 107, the government also seeks injunctive relief under section 106 of CERCLA.¹¹² Section 106(a) specifically permits an action to be brought in federal court for such injunctive relief "as may be necessary to abate" an "imminent and substantial endangerment to the public health or welfare of the environment."¹¹³ The court may grant "such relief as the pub-

¹⁰⁹ Admittedly, there may be some allowable distinction in this regard between costs associated with immediate removal activity and those incurred as part of an overall remedial action plan.

¹¹⁰ 42 U.S.C. § 9631 (Supp. V 1981). *See, e.g.*, *United States v. Wade*, 577 F. Supp. 1326, 1330 (E.D. Pa. 1983).

¹¹¹ 48 Fed. Reg. 40, 674 (1983) (to be codified at 40 C.F.R. § 300).

¹¹² The government clearly believes that the enforcement authorities created under §§ 106 and 107 are complementary and interchangeable. *See generally* Guidelines for Using the Imminent Hazard, Enforcement and Emergency Response Authorities of Superfund and Other Statutes, 47 Fed. Reg. 20,664 (1982) (describing relationship between government response activities and various enforcement mechanisms).

However, judicial response to that view has varied. In *United States v. Wade*, 546 F. Supp. 785 (E.D. Pa. 1982), *appeal dismissed*, 713 F.2d 49 (3d Cir. 1983), the court apparently rejected the government's position by refusing to grant relief under § 106 against non-negligent off-site generators. The court noted that relief against such parties would be proper under § 107 and was "astonished" at the government's choice to ignore that provision. 546 F. Supp. at 787. In *United States v. Stringfellow*, 14 ENVTL. L. REP. (ENVTL. L. INST.) 20385, 20387 (C.D. Cal. April 5, 1984), the court found "no compelling parallelism" between §§ 106 and 107 and concluded that "it is eminently reasonable to assign to section 106 and 107 distinct functions in CERCLA." Other courts have allowed the government more latitude in selecting enforcement mechanisms. *See, e.g.*, *United States v. Price*, 577 F. Supp. 1103, 1112 (D.N.J. 1983) ("Congress envisioned possible problems with the government funding numerous clean ups and drafted § 106(a) as a viable alternative or concurrent means of achieving the same goal.") (footnote omitted); *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 110, 1114 (D. Minn. 1982) ("While section 106(a) should not become a substitute for other reasonably available response mechanisms, the availability of other response authorities for dealing with chronic and recurring pollution problems does not preclude the simultaneous invocation of the imminent hazard provision of section 106.").

¹¹³ 42 U.S.C. § 9606(a) (Supp. V 1981). An action under this section can be maintained only by the government because it does not create an implied private cause of action. *Cadillac Fairview/California, Inc. v. Dow Chem. Co.*, 14 ENVTL. L. REP. (ENVTL. L. INST.) 20376, 20380 (C.D. Cal. March 5, 1984).

lic interest and the equities of the case may require."¹¹⁴ However, this section, like section 107, leaves the burden of developing meaningful standards of liability to the courts. Furthermore, it provides significantly less guidance in this regard than section 107.¹¹⁵ Not surprisingly, cases arising under section 106 have focused upon whether and under what circumstances subsection (a) imposes liability for remedial measures upon owners and operators of hazardous waste sites as well as off-site generators of wastes. Those issues, and the meaning of terms such as "imminent and substantial endangerment"¹¹⁶ will undoubtedly provide the gist for further controversy, particularly if the EPA perceives a section 106 action as interchangeable with the remedies available under sections 104 and 107.¹¹⁷

Prior to the enactment of CERCLA, section 7003 of the Resource Con-

¹¹⁴ 42 U.S.C. § 9606(a) (Supp. V 1981). This section also authorizes the government to issue administrative orders "as may be necessary to protect public health and welfare and the environment." *Id.* § 106(b) imposes a fine of up to \$5,000 for each day of a willful violation of, or refusal to comply with such an order. *Id.* § 9606(b). To date, the government has not made extensive use of its power to issue administrative orders.

A possible response to such orders is found in *City and County of Denver v. Ruckelshaus*, No. 83-JM-1043 (D. Colo. filed June 10, 1983). There, a municipality sought to enjoin the enforcement of an administrative order requiring the city to formulate and implement a remedial action plan regarding a city-owned site. The city and county alleged that the EPA did not include all the generators and transporters within the terms of the order and did not afford the city an opportunity to be heard. Complaint at 6-8, *City and County of Denver v. Ruckelshaus*, No. 83-JM-1043 (D. Colo. filed June 10, 1983).

¹¹⁵ See e.g., *United States v. Outboard Marine Corp.*, 556 F. Supp. 54, 55 (N.D. Ill. 1982) ("Read plainly, Section 106(a) does not appear to create liability in any party. It authorizes lawsuits and injunctions, but it does not specify what one must do to be subject to suit or injunction."). The *Outboard Marine* court concluded that those liable under § 107 were also liable under § 106. *Id.* at 57.

¹¹⁶ The term "imminent and substantial endangerment" is not defined in either CERCLA or RCRA. The same term is likewise present, but left undefined, in other federal environmental statutes. See *Clean Water Act*, § 504(a), 33 U.S.C. § 1364(a) (1982); *Safe Drinking Water Act*, § 143(a), 42 U.S.C. § 300i(a) (1976); *Clean Air Act*, § 303(a), 42 U.S.C. § 7603(a) (Supp. V 1981). Moreover, the EPA has declined to provide any guidance as to exactly what constitutes an "imminent and substantial endangerment." See 47 Fed. Reg. 31,180, 31,201 (1982) ("The term is a legal term of art which the courts have interpreted through a series of cases, and thus, is beyond the scope of the NCP.").

Judicial interpretation of the phrase has been provided in the following: the court in *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100 (D. Minn. 1982), looked to the legislative history of the *Safe Drinking Water Act* in concluding that the risks associated with the presence of carcinogens and toxic chemicals in groundwater used as a municipal water supply constituted an imminent and substantial endangerment. *Id.* at 1109-10; in *United States v. Northeastern Pharmaceutical and Chem. Co.*, 579 F. Supp. 823 (W.D. Mo. 1984), "a substantial likelihood of human and environmental exposure [to dioxin]" was held to present an imminent and substantial endangerment under CERCLA § 106. *Id.* at 846. See also *United States v. Vertac Chem. Corp.*, 489 F. Supp. 870, 885 (E.D. Ark. 1980) (Dioxin escaping from a plant site met the RCRA § 7003 imminent and substantial endangerment standard.).

¹¹⁷ See *supra* note 111.

servation and Recovery Act of 1976 (RCRA) constituted the principal jurisdictional basis for hazardous waste enforcement actions.¹¹⁸ This section permits the EPA to institute an action for injunctive relief where the "handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment."¹¹⁹ The injunction immediately may require any person "contributing to" such activities "to stop [the contributory action] or to take such other action as may be necessary."¹²⁰ At the present time, section 7003 plays only a secondary enforcement role to the broader provisions of section 106.

1. Persons Liable

On its face, section 106 of CERCLA does not identify the parties who may come within its scope.¹²¹ RCRA section 7003, though not a model of clarity, does provide certain guidelines for determining the extent of potential liability by identifying persons "contributing to" certain activities as subjects of the enforcement action. However, according to the courts' interpretations, section 106 affects a broader range of parties than does section 7003.

Courts have allowed actions under RCRA section 7003 against the current or past owners of hazardous waste sites. In *United States v. Diamond Shamrock Corp.*,¹²² the section was construed as permitting an action for an injunction against a current site owner even though disposal of wastes at the site had ended in 1972, four years prior to the passage of RCRA. In *United States v. Price*¹²³ and *United States v. Reilly Tar & Chemical Corp.*,¹²⁴ section 7003 was also held applicable to former owners

¹¹⁸ See *supra* note 2. That section is codified at 42 U.S.C. § 6973 (Supp. V 1981) and has been interpreted in numerous decisions. See, e.g., *United States v. Solvents Recovery Services*, 496 F. Supp. 1127 (D. Conn. 1980); *United States v. Midwest Solvent Recovery, Inc.*, 484 F. Supp. 138 (N.D. Ind. 1980).

Later cases decided under § 7003 held that the provision also created substantive standards by which liability could be determined. See, e.g., *United States v. Diamond Shamrock Corp.*, 17 Env't Rep. Cas. (BNA) 1329 (N.D. Ohio 1981). Similarly, § 106 of CERCLA has been determined to be a substantive liability creating provision. See, e.g., *United States v. Outboard Marine Corp.*, 556 F. Supp. 54 (N.D. Ill. 1982).

¹¹⁹ 42 U.S.C. § 6973(a) (Supp. V 1981). Like § 106 of CERCLA, this provision also authorizes the issuance of administrative orders "as may be necessary to protect public health and the environment." *Id.*

¹²⁰ *Id.*

¹²¹ See *supra* note 114 and accompanying text.

¹²² 17 Env't Rep. Cas. (BNA) 1329, 1334 (N.D. Ohio 1981).

¹²³ 523 F. Supp. 1055, 1072 (D.N.J. 1981), *aff'd*, 688 F.2d 204 (3d Cir. 1982).

¹²⁴ 546 F. Supp. 1100, 1109 (D. Minn. 1982). In *Reilly Tar*, the court also held that § 106 of CERCLA could be invoked against prior owners of disposal sites. *Id.* at 1113. Other courts ruling that § 106 applies to the same group of individuals as § 107 imply the same result. See *infra* notes 129-36 and accompanying text.

of hazardous waste sites. Recently, in *United States v. Waste Industries Inc.*,¹²⁵ the court reversed a lower court decision¹²⁶ that section 7003 was not applicable to the operator of an abandoned waste site, although it did note that CERCLA applied to inactive hazardous waste sites.¹²⁷

Imposing liability under either CERCLA section 106 or RCRA section 7003 on past off-site generators of hazardous wastes requires a more expansive interpretation of these provisions, particularly where the injunctive relief would only compel an off-site generator to finance remedial efforts otherwise payable from the Superfund. Judicial response to the argument that these sections provide for liability of past off-site generators has varied. In *United States v. Wade*,¹²⁸ the government sought an injunction under CERCLA section 106(a) and RCRA section 7003(a) to impose liability upon six off-site generators for expenses incurred and to be incurred in the cleanup of a site where their wastes had been disposed. The court held that neither section 106 nor section 7003 could be used to confer liability on non negligent past off-site generators of hazardous wastes.¹²⁹ To have held otherwise, at least as to section 7003, would have allowed "no logical limit, given the breadth of the statutory language" to the number and types of persons upon whom liability might be imposed.¹³⁰ The court noted its astonishment about the fact that the government had ignored CERCLA sections 104 and 107 which would have allowed remedial action at the site and subsequent recovery of costs.¹³¹

The ruling in *Wade* which protects nonnegligent off-site generators from liability under RCRA section 7003 and CERCLA section 106 has not been followed by other courts. While the court in *United States v. North-eastern Pharmaceutical & Chemical Co.*¹³² found that section 7003 does not apply to past nonnegligent off-site generators and transporters,¹³³ it proceeded to hold that section 106(a) does apply to inactive waste disposal sites and imposes liability upon the same persons who may be held

¹²⁵ No. 83-1320 (4th Cir. May 16, 1984).

¹²⁶ *United States v. Waste Indus., Inc.* 556 F. Supp. 1301 (E.D.N.C. 1982), *rev'd*, No. 83-1320 (4th Cir. May 16, 1984).

¹²⁷ The district court had noted that CERCLA applied to inactive hazardous waste sites. *Id.* at 1316. *See also*, *United States v. A & F Materials Co.*, 578 F. Supp. 1249, 1257 (S.D. Ill. 1984) (holding that CERCLA § 106 applies to releases from active and inactive waste sites).

¹²⁸ 546 F. Supp. 785 (E.D. Pa. 1982), *appeal dismissed*, 713 F.2d 49 (3d Cir. 1983).

¹²⁹ 546 F. Supp. at 788.

¹³⁰ *Id.* at 790.

¹³¹ *Id.* at 787. *Compare id.* (indicating that liability under §§ 106 and 7003 is mutually exclusive of liability provided by other provisions of CERCLA and RCRA) with *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1110-11, 1114 (D. Minn. 1982) (implying that liability under various provisions of CERCLA and RCRA is not mutually exclusive).

¹³² 579 F. Supp. 823.

¹³³ *Id.* at 833-37.

liable under section 107.¹³⁴ The court reasoned that "to read section 104, 106(a) and 107(a) otherwise would be to emasculate the purpose of CERCLA and the intent of Congress."¹³⁵ Apparently on the same rationale, the court in *United States v. Outboard Marine Corp.*¹³⁶ allowed an action under CERCLA section 106 to continue against a company which had allegedly created an imminent and substantial endangerment by its past discharges of polychlorinated biphenyls (PCBs) into Lake Michigan.¹³⁷ Consistent with this trend, *United States v. A & F Materials Co.*¹³⁸ and *United States v. Price*¹³⁹ both held that section 106 is applicable to off-site generators, finding that the liability provisions of section 107 apply to section 106.¹⁴⁰

These recent cases have clearly perceived section 107 as the type of "logical limit" sought by the court in *Wade*. However, Congress provided no express link between section 106 and section 107. From the statutory language it is not clear that a section 106 action, which is similar to an action to abate a nuisance,¹⁴¹ necessarily would reach persons who had not actively created the hazard.¹⁴² Furthermore, there is no indication that there exists any legislative history suggesting that result. Rather, section 107 is a convenient point of reference, which appears to be the benchmark for determining who may be held liable under section 106.¹⁴³

¹³⁴ *Id.* at 839.

¹³⁵ *Id.* (citation and footnote omitted).

¹³⁶ 556 F. Supp. 54, 57 (N.D. Ill. 1982).

¹³⁷ The court noted that "wherever the source of the substantive law to be applied in a 106(a) action, it is most probable that those who would be liable under Section 107 were intended to be liable in an action under 106(a) for injunctive relief." *Id.* at 57.

¹³⁸ 578 F. Supp. 1249 (S.D. Ill. 1984). The court did rule, however, that RCRA § 7003 did not extend to off-site generators. *Id.* at 1258.

¹³⁹ 577 F. Supp. 1103 (D.N.J. 1983).

¹⁴⁰ *A & F Materials*, 578 F. Supp. at 1257-58; *Price*, 577 F. Supp. at 1113. In *Price* the court expressly disagreed with the *Wade* holding noting that "the language of § 106(a) suggests that liability may arise when a party is shown to be responsible for an ongoing hazard, even though the site may not be in use." *Id.* at 1111-12.

¹⁴¹ In fact, § 106 is captioned "Abatement Action". 42 U.S.C. § 9606 (Supp. V 1981). It allows an action "to secure such relief as may be necessary to abate such danger or threat." *Id.* Unlike the broader terms "removal" and "remedial action," the terms "abate" and "abatement" are not defined in the statute. See *id.* § 9601 (definitional section of CERCLA).

¹⁴² At common law, the person who actually creates a nuisance may be held liable regardless of where it occurs. Also, one who, either by negligence or design, furnishes means and facilities for the commission of any injury to another which could not have been done without them is equally responsible in nuisance with the immediate wrongdoer. 66 C.J.S. *Nuisances* §§ 83, 87 (1950).

¹⁴³ One court has specifically held that a party which does not fall within the classes established under § 107 can not be held liable for injunctive relieve under section 106. *Cadillac Fairview/California Inc. v. Dow Chem. Co.*, 14 ENVTL. L. REP. (ENVTL. L. INST.) 20376, 20378 (C.D. Cal. March 5, 1984).

2. Standards of Liability

Just as section 106 fails to identify the parties against whom injunctive relief may be sought, it also fails to specify what standard of liability the courts should apply.¹⁴⁴ The latter is also true for section 7003.¹⁴⁵ Absent any clear instruction in this regard, the courts initially focused on whether either section 106 or section 7003 was intended to create substantive liabilities themselves or were merely jurisdictional in nature, i.e., authorizing remedies and proceedings but relying upon other sources of law for their standards.¹⁴⁶ For example, the court in *United States v. Outboard Marine Corp.*,¹⁴⁷ questioned whether the federal common law provided a basis for liability under section 106 because of the apparent preemption of the federal common law by RCRA.¹⁴⁸ The court denied a motion to dismiss, finding that the standard of strict liability under section 107 most likely is also applicable to section 106.¹⁴⁹

In subsequent decisions, the courts in *United States v. Price*¹⁵⁰ and *United States v. Northeastern Pharmaceutical and Chemical Co.*¹⁵¹ held that the standard under section 106 was the same strict liability standard applicable to section 107, notwithstanding defendant's argument that a specific strict liability provision contained in the original Senate bill had been deleted from the statute as enacted. A strict liability standard has been held *not* to apply in the case of RCRA section 7003, however. The *Northeastern Pharmaceutical* court concluded that section 7003 did not apply to past "nonnegligent" generators or transporters of hazardous wastes and thus retained an apparently different standard for that statute.¹⁵²

The application of sections 106 and 7003 to an owner or operator of a hazardous waste site, or an abandoned site through section 106, is consistent with statutory language that is phrased in terms of orders "to abate"

¹⁴⁴ See 42 U.S.C. § 9606 (Supp. V 1981); see also *United States v. Price*, 577 F. Supp. 1103, 113 ("Section 106(a) . . . is quite vague and does not discuss any independent standards of liability with respect to those parties coming within its coverage.").

¹⁴⁵ See 42 U.S.C. § 6973 (Supp. V 1981).

¹⁴⁶ See, e.g., *United States v. Outboard Marine Corp.*, 556 F. Supp. 54 (N.D. Ill. 1982) (§ 106); *United States v. Diamond Shamrock Corp.*, 17 Env't Rep. Cas. (BNA) 1329 (N.D. Ohio 1981) (§ 7003); *United States v. Midwest Solvent Recovery, Inc.*, 484 F. Supp. 138 (N.D. Ind. 1980) (§ 7003); *United States v. Solvent Recovery Services*, 496 F. Supp. 1127 (D. Conn. 1980) (§ 7003).

¹⁴⁷ 556 F. Supp. 54 (N.D. Ill. 1982).

¹⁴⁸ 556 F. Supp. at 55-56. See *Milwaukee v. Illinois*, 451 U.S. 304 (1981) (discussing preemption of federal common law by federal statutes).

¹⁴⁹ 556 F. Supp. at 57.

¹⁵⁰ 577 F. Supp. 1103, 1113.

¹⁵¹ 579 F. Supp. 823, 843-44 (W.D. Mo. 1984).

¹⁵² *Id.* at 833-37. The *Wade* court also employed the term "nonnegligent" in limiting generator liability under § 7003. 546 F. Supp. 785, 790 (E.D. Pa. 1982), *appeal dismissed*, 713 F.2d 49 (3d Cir. 1983).

conditions¹⁶³ or "to stop" activities.¹⁶⁴ Identifying the applicable substantive law in such circumstances may have little bearing upon the result, since the owner or operator of a facility who has created or allowed an imminent and substantial endangerment is unlikely to prevail under any standard. The issue is not as clear, however, in the case of off-site generators of hazardous wastes where fault may be a genuine issue. That issue may perhaps be resolved in the context of what "the public interest and the equities of the case may require."¹⁶⁵ In any event, the statute is sufficiently vague that the answer in the case of off-site generators should not be automatically strict liability.

3. Scope of Injunctive Relief

Section 106 allows an injunction "to abate" an imminent and substantial endangerment, and the court has "jurisdiction to grant such relief as the public interest and the equities of the case may require."¹⁶⁶ Similarly, RCRA section 7003 allows an order "to immediately restrain" or "to stop" waste disposal and other activities, "or to take such other action as may be necessary."¹⁶⁷ Thus far, decisions concerning the scope of relief available under these provisions indicate that they are viewed as providing the courts with far-reaching equitable authority.

In *United States v. Price*,¹⁶⁸ the Third Circuit Court of Appeals held that section 7003 was sufficiently broad to allow an injunction requiring defendants to fund a diagnostic study of the hazards associated with a hazardous waste site, and to provide an alternative drinking-water supply to nearby residents. After considering the statutory language and the relevant legislative history of the section, the court concluded that Congress clearly intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risks posed by toxic wastes.¹⁶⁹

In a later ruling in the same litigation, the trial court considered the

¹⁶³ CERCLA § 106, 42 U.S.C. § 9606(a) (Supp. V 1981).

¹⁶⁴ RCRA § 7003, 42 U.S.C. § 6973(a) (Supp. V 1981).

¹⁶⁵ 42 U.S.C. § 9606(a) (Supp. V 1981); *cf.* *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1113 (D. Minn. 1982) (court cites equities of the case in applying § 106 to former owners of hazardous waste site).

¹⁶⁶ 42 U.S.C. § 9606(a) (Supp. V 1981).

¹⁶⁷ *Id.* § 6973(a).

¹⁶⁸ 688 F.2d 204 (3d Cir. 1982).

¹⁶⁹ *Id.* at 214. In reaching this conclusion, the court disagreed with the trial court's decision that the relief sought by the government was not an appropriate form of preliminary injunctive relief under § 7003. In the trial court's view, such relief was essentially a claim for damages and thus inappropriate in an equitable action. See *United States v. Price*, 523 F. Supp. 1055, 1067-68 (D.N.J. 1981). The appeals court, however, affirmed the decision of the trial court because an injunction at that stage of the proceedings would be "impractical and unfair" in that it would require only a few of the 35 defendants to bear the cost of the relief. 688 F.2d at 214.

scope of relief available under section 106 and allowed the government to seek cleanup of a site from off-site generators.¹⁶⁰ Citing the lack of money allocated to the Superfund to be used in cleaning up sites, the court stated that section 106 was "a viable alternative or concurrent means of achieving the same goal."¹⁶¹ Thus "Congress structured section 106(a) in such a broad fashion as to allow the EPA to at least have a judicial remedy against potentially responsible parties prior to spending taxpayer money."¹⁶²

The court in *United States v. A & F Materials Co.*,¹⁶³ when discussing injunctive relief under CERCLA, identified "two limitations in the otherwise expansive grant of equitable authority to federal courts."¹⁶⁴ First, the authority can be exercised only when there is an imminent and substantial endangerment.¹⁶⁵ The court did not discuss specifically how this limitation would apply in particular cases.¹⁶⁶ Second, the court observed that in formulating relief under section 106, it is to be guided by the "equities of the case."¹⁶⁷ The court recognized that section 106 authorizes mandatory injunctive relief, but characterized such relief as "a harsh remedy that must not be granted lightly."¹⁶⁸ Thus, in structuring equitable relief under this section, "a court must balance the interests of the parties while remaining cognizant of the practical problems surrounding an order."¹⁶⁹

Remedial action ordered under section 106 presumably must also be cost-effective. This seems implicit in the language of the section that authorizes "such relief as the public interest and the equities of the case may require."¹⁷⁰ In addition to whatever limits may be placed upon remedies under section 106 by its own language, such remedies must nonetheless be consistent with the National Contingency Plan. Section 105 of CERCLA provides that the purpose of the Plan is "to reflect and effectu-

¹⁶⁰ *United States v. Price*, 577 F. Supp. 1103, 1112-13 (D.N.J. 1983). Section 106 became implicated in the litigation when two days before the trial court's decision on the motion requesting a preliminary injunction under RCRA § 7003, the government amended its complaint by adding claims under § 106. *Id.* at 1106.

¹⁶¹ *Id.* at 1112 (footnote omitted).

¹⁶² *Id.* at 1112 n.9.

¹⁶³ 578 F. Supp. 1249 (S.D. Ill. 1984).

¹⁶⁴ *Id.* at 1258.

¹⁶⁵ *Id.*

¹⁶⁶ See *supra* note 114 (discussing interpretation of that phrase). Referring to the abatement language of § 106, one might argue that the presence of an imminent and substantial endangerment, not only is a prerequisite to granting equitable relief under § 106, but also defines the extent of the remedy to be awarded. Thus a liable party might be ordered to clean up a site only to the point where an "imminent and substantial endangerment" no longer exists, rather than to perform a full cleanup of a site.

¹⁶⁷ 578 F. Supp. at 1258.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ 42 U.S.C. § 9606(a) (Supp. V 1981).

ate the responsibilities and powers created by this Act," including those created under section 106.¹⁷¹ Moreover, Subpart F of the Plan, revised and republished as required by section 105, expressly

establishes methods and criteria for determining the appropriate extent of response authorized by CERCLA when . . . there is a release or substantial threat of a release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare.¹⁷²

As discussed previously,¹⁷³ one of the criteria established under the NCP is that response actions should be cost-effective.¹⁷⁴

IV. CONCLUSION

Judging by the number of candidates on the National Priority List and the continuing interest of Congress, it is clear that the courts have not seen the last of enforcement actions under CERCLA and RCRA. The cases discussed in this Article, though providing direction for the future, typically have involved hazardous waste sites ranked at or near the top of the List due to perceived risks to both human health and the environment. Arguments of statutory construction have not fared well in these cases, particularly when the hazards to human health and the environment were directly traceable to the actions of individual defendants.

Both the poor crafting of the statutes and the difficulty in discerning congressional intent will insure additional judicial scrutiny, particularly in the area of liability.¹⁷⁵ Development of standards for liability under CERCLA will be a continuing process occurring in a wide range of factual contexts. Future enforcement actions presumably will involve significant numbers of off-site waste generators who may validly argue absence of fault. The perceived risks to health and the environment in future cases may be far from clear and often hotly contested. Narrow interpretations of statutory language as to strict liability, joint and several liability, and the need for cost-effective remedies may produce unexpectedly harsh results.

Some of the significant issues may ultimately be resolved by Congress. In the meantime, CERCLA and the RCRA enforcement actions will continue to be a major subject of litigation in the federal courts.

¹⁷¹ *Id.* § 9605.

¹⁷² 40 C.F.R. § 300.61(a) (1983). The parallelism between the language of this provision and that of § 106 points to the applicability of the NCP to cleanups under § 106.

¹⁷³ See *supra* notes 92-98 and accompanying text.

¹⁷⁴ There appears to be no such cost-effectiveness limitation upon remedies granted under RCRA § 7003.

¹⁷⁵ See *supra* note 9.