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The Butler Mine Tunnel: A Case Study on the Superfund's Shortcomings

Patrick J. Doyle*

I. Introduction

Pollution caused by mine drainage is a serious threat to natural sources of water throughout the United States. It has become a particularly severe problem in the Commonwealth of Pennsylvania, due to the state's once flourishing coal mining industry.¹ Such pollution infects the water supply to communities, deters recreational and commercial use of waterways and can potentially cause sickness or death in the neighboring citizenry. The Butler Mine Tunnel disasters of 1979 and 1985 embody the exact peril that mine drainage pollution causes to the environment, the community, and the government.

This comment will analyze the state and federal governments' response to the Butler Mine Tunnel Disasters. More specifically, it will examine the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (hereinafter CERCLA),² commonly known as the Superfund,³ and its implementation and shortcomings with respect to

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1. Forty-five of Pennsylvania's sixty-seven counties are effected by abandoned mine drainage. Abandoned mine drainage pollutes over 3,000 miles of waterways statewide, and the estimated cost of completely alleviating this problem is \$15 billion. SHAMOKIN CREEK RIVER ALLIANCE, ABANDONED MINE DRAINAGE, http://www.newsitem.com/scra/html/what_s_a.m.d..html (last visited Apr. 15, 2006); *see also* Pennsylvania Dept. of Environmental Protection, Coal Mine Drainage Prediction and Pollution Prevention in Pennsylvania, <http://www.dep.state.pa.us/dep/deputate/minres/districts/CMDP/main.htm>.

2. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 et seq. (1997).

3. Congress began the Superfund Program in 1980 in an effort to clean up the nation's uncontrolled hazardous waste sites. Under the Superfund program, abandoned mines, or illegally dumped hazardous waste that pose a current or future threat to human health or the environment are cleaned up. The EPA works closely with communities, Potentially Responsible Parties (PRPs), scientists, researchers, and state, local, and Federal authorities to identify hazardous waste sites, test the conditions of the sites,

the Butler Mine Tunnel project. Further, the use of joint and several liability to apportion responsibility in CERCLA litigation and its effects on litigants in the cases corresponding to the Butler Mine Tunnel will be addressed. Finally, this comment will provide recommendations regarding how to improve the Superfund program, in an effort to avoid future mishandlings and legal disparities arising from episodes similar to the Butler Mine Tunnel disasters.

II. Background

The Butler Mine Tunnel is located in the Pittston Township, Luzerne County, Pennsylvania.⁴ Luzerne County is positioned in the northeastern section of the state and was once home to a thriving anthracite coal mining industry. Prior to the 1930's, the Butler Mine Tunnel was constructed to serve as a drainage mechanism for several underground coal mines.⁵ The tunnel stretches 7,500 feet and drains approximately five square miles of mines.⁶ For almost 80 years, the tunnel has continued to discharge acid mine water contaminated with sulfur, iron, magnesium, and other hazardous chemicals directly into the Susquehanna River.⁷

The environmental harm caused by the uninterrupted acid mine water seepage was intensified by individuals and companies pouring residential and commercial waste products into boreholes.⁸ Such boreholes were intermittently drilled into the surface above the mine to serve as air vents.⁹ This intentional and uncontrolled pollution compounded an already serious problem and led to disastrous consequences.

In 1979, the Butler Mine Tunnel experienced its first of two flushouts.¹⁰ When the water level rises inside a mine tunnel, due to increased rainfall and drainage, the oil and waste inside the tunnel rise on top of the water.¹¹ A flushout occurs when the oil is forced to the

formulate cleanup plans, and clean up the sites. See Environmental Protection Agency, Superfund Frequently Asked Questions, http://epa.custhelp.com/cgi-bin/epa.cfg/php/enduser/std_alp.php (last visited Apr. 15, 2006).

4. Upper Susquehanna-Lackawanna Watershed, Acid Mine Drainage Abatement Projects, <http://paheritageriver.org/workplan/wp32.html> (last visited Apr. 15, 2006).

5. U.S. ENVTL. PROT. AGENCY [EPA], EPA SUPERFUND RECORD OF DECISION: BUTLER MINE TUNNEL 1 (July 15, 1996).

6. Act of October 18, 1998, 30 Pa. B. 5855.

7. U.S. EPA, *supra* note 5, at 1.

8. *Id.* at 5.

9. *Id.*

10. National Priorities List for Uncontrolled Hazardous Waste Sites, 52 Fed. Reg. 27,620 (July 22, 1987).

11. U.S. EPA, *supra* note 5, at 5.

tunnel's discharge point, in this case the bank of the Susquehanna River.¹² Thousands of gallons of water and a thick, oily substance spewed from the tunnel and covered the banks of the river for nearly a sixty mile stretch.¹³ The oil extract contained chemicals known to cause cancer and birth defects and extended to a portion of the Susquehanna that served as the only source of water for Danville, Pennsylvania.¹⁴

The Environmental Protection Agency (hereinafter EPA), in collaboration with Pennsylvania's Department of Environmental Resources (now known as the Department of Environmental Protection), staged an effort to clean up the river under § 311 of the Clean Water Act, which allows for immediate clean up of oil discharge into navigable water.¹⁵ A monitoring device was placed at the tunnel's discharge point to track the release of harmful substances and an application was submitted to include the Butler Mine Tunnel on the National Priorities List (hereinafter NPL).¹⁶ The EPA denied the request citing that no further remedial measures were necessary.¹⁷ Thus, the Butler Mine Tunnel was left unfixed and prime for another disastrous discharge.

In 1985, the EPA's assessment was proven drastically wrong. The tunnel experienced its second flushout in six years due to sudden, heavy rains caused by Hurricane Gloria.¹⁸ This time, between 276,000 and 400,000 gallons of oil were released in the Susquehanna River.¹⁹ The discharge was determined to have been contaminated by wastes deposited into the tunnel in the late 1970's.²⁰ The EPA approximated that a total between 1,500,000 and 2,700,000 gallons of liquid wastes were disposed into the mines during that period.²¹ The oil content of these wastes ranged between 330,000 to 490,000 gallons.²²

The EPA spent \$735,000 to clean the river for a second time and subsequently decided to include the Butler Mine Tunnel on the NPL in 1987.²³ Approximately 25,000 citizens live within a five mile radius of the tunnel and 1,400 residences are encapsulated within the tunnel's boundaries.²⁴ The flushout's injurious effects on the people of the region

12. *Id.*

13. Michael A. Staub, *The Environmental Crimes Section: a historical perspective . . .* (2003), available at <http://www.attorneygeneral.gov/crime.aspx?id=201>.

14. *Id.*

15. Federal Water Pollution Control Act Amendments, 33 U.S.C. § 1321 (1997).

16. U.S. EPA, *supra* note 5, at 1.

17. *Id.*

18. *Id.*

19. *Id.*

20. *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 256 (3d Cir. 1992).

21. U.S. EPA, *supra* note 5, at 3.

22. *Id.*

23. *Id.*

24. Environmental Protection Agency, Current Site Information, Butler Mine

pronounced the need for a definitive solution to a recurring problem.

III. EPA Superfund Remedy

After the second flushout in six years, the EPA classified the Butler Mine Tunnel as a national Superfund site.²⁵ The purpose of the Superfund program “is to identify the nation’s hazardous waste dumps as well as determine the parties responsible for the dumps, establish a fund (“Superfund”) for corrective action where it is not immediately possible to establish responsibility and finally see that corrective action is taken.”²⁶ A Superfund site is land determined by the EPA to be hazardous to the health of citizens or the well-being of the environment and that needs instant attention.²⁷ The EPA, therefore, took greater notice to the situation at the Butler Mine Tunnel, after it was put on the NPL and designated as a Superfund site. Five courses of action were contemplated to address the problem.

The first proposal was to do nothing.²⁸ This proposal was rejected because flushouts will continue to occur in the future, especially after periods of heavy rainfall.²⁹ No response would have left the area unprotected from future flushouts and the site unmonitored. Thus, this proposal would not give government agencies or the citizenry proper warning of another potential disaster.

Secondly, the EPA proposed creating an Administrative Center, in an effort to track increases in rainfall and the amount of water flowing through the tunnel.³⁰ The Center would not be permanently staffed and would only operate for ten years.³¹ While this seemed to be an adequate way to predict the next flushout, it did nothing to prepare or prevent it from occurring. Moreover, this proposal did not offer any response apparatus in the event of another flushout. Its only benefit was that it would put the government on notice of an impending flushout. The estimated cost of the project over the ten year period was \$1,750,000.³²

The third proposal took the institutional approach of the second

Tunnel, <http://www.epa.gov/reg3hwmd/npl/PAD980508451.htm> (last visited Apr. 15, 2006).

25. National Priorities List, *supra* note 10.

26. Arnold & Porter Legislative History: P.L. 99-499, 101 (Aug. 13, 1983).

27. Environmental Protection Agency, Frequently Asked Questions and Comment Submission, http://epa.custhelp.com/cgi-bin/epa.cfg/php/enduser/std_alp.php (follow link for “What is a Superfund site”).

28. U.S. EPA, *supra* note 5, at 14.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 15.

option and added a remedial plan.³³ In the event of a flushout, a containment boom³⁴ would be deployed, in an effort to contain the discharge.³⁵ Also, additional booms, skimmers, cleanup materials, and support equipment would be purchased and stored as part of the preparedness plan.³⁶ The plan included the purchase of a boat and other equipment for use in the case of a flushout.³⁷ Furthermore, a public information program about the potential risks of contact with the hazardous wastes and the proper disposal of them would be implemented.³⁸ The estimated cost of this proposal was \$3,700,000.³⁹

While proactive remedial measures, namely the deployable booms and suitable equipment, are a necessary elements of a proper plan, the purchase of a boat and other superfluous equipment is not a sound financial investment. On balance, this plans addressed one facet of a solution without addressing the real problem: preventing another flushout.

The fourth proposal combined the institutional response action of the second proposal with multi-port outfall technology.⁴⁰ This alternative would involve constructing a large pipe from the mouth of the discharge point and running it to the bottom of the river.⁴¹ At this location, the discharge would be constantly released into the river and diluted by the water's current.⁴² While this alternative would suffice if here was never to be another flushout, if one did occur, the multi-port outfall would have no effect on the quantity of hazardous chemicals and oil into the river.⁴³ Under this proposal, the result of a flushout would unequivocally have the same effect as if it had occurred from the original discharge point. The fact that the release would occur at the bottom of the river may actually have a negative effect on response time, because there would be no visible evidence of the flushout until the discharge had

33. *Id.*

34. An oil boom is a floating barrier used to cleaning up oil on the surface of the water. Containment booming is the process of preventing the spread of an oil spill by confining the oil to the area in which it has been discharged. The purpose of containment is not only to localize the spill and thus minimize pollution but to assist in the removal of the oil by trying to concentrate it in thick layers on the surface of the water. See The Maritime, Emergency Response to Marine Oil Spills, <http://www.webcom.com/~maritime/response/boom.html> (last visited Apr. 15, 2006).

35. U.S. EPA, *supra* note 5, at 15.

36. *Id.* at 16.

37. *Id.* at 16.

38. *Id.* at 16.

39. *Id.* at 17.

40. *Id.* at 17.

41. *Id.* at 17.

42. *Id.* at 18.

43. *Id.* at 20.

reached the water's surface or banks of the river. The cost of this proposal was \$3,250,000.⁴⁴

The final proposal was to stop water from entering the mines via surface reclamation.⁴⁵ The surface of approximately ten to fifteen acres would be regraded to reduce the amount of water that enters the mines.⁴⁶ This proposal seemed optimal; however, the necessary area for regrading was limited because it was already developed.⁴⁷ If only the available land was regraded, the amount of water entering the mines would be reduced by fifty percent.⁴⁸ The cost of the proposal was \$2,450,000.⁴⁹ This proposal did not include any of the monitoring capabilities of the second alternative nor did it include a response plan, as put forward in the third alternative. Unlike the other alternatives, the fifth approach addressed the critical issue of prevention, yet remained imperfect due to its lack of a response strategy.

The EPA decided to implement the third alternative.⁵⁰ CERCLA requires that the remedial response be cost effective and that permanent solutions be implemented to the maximum extent practicable.⁵¹ The chosen response did neither. Not only was the selected remedy the most expensive of the five alternatives, but it did not permanently rectify the situation. While the absorbent booms have the ability to partially contain another flushout, nothing was done to prevent such a flushout from occurring.

Combining options three and five would have been a more appropriate alternative. The grading process proposed in the fifth alternative would decrease the amount of water entering the tunnel by approximately fifty percent. Moreover, the response mechanism tendered in the third alternative would have the capability of containing the discharge in the event that another flushout takes place. This combination of ideas is as near permanent as possible and addresses both the remedial and preventative concerns.

Additionally, this proposal is cost effective. The estimated costs of future clean-up in option three were \$1,400,000,⁵² and when added to the

44. *Id.* at 18.

45. *Id.* at 18.

46. *Id.* at 18.

47. *Id.* at 18.

48. *Id.* at 18.

49. *Id.* at 24.

50. *Id.* at 28.

51. *See* 42 U.S.C. § 9621 (2002). Cost, Long-term effectiveness and permanence, reduction of toxicity, mobility, or volume through treatment, and short-term effectiveness are among the criteria to select an appropriate remedy. National Oil and Hazardous Substance Pollution Contingency Plan, 40 C.F.R. § 300.430 (current through Jan. 19, 2005).

52. U.S. EPA, *supra* note 5, at 14. The amount that would be spent for on capital

cost of option five, which was \$2,450,000,⁵³ the total cost of the project is only slightly higher than the total cost of option three, as it was implemented.⁵⁴ This newly devised alternative does not include a center to track the flow of water, but the risk of a flushout is drastically reduced by decreasing the level of rainwater draining into the tunnel. Therefore, the tracking mechanism is not needed because sudden influxes in rainwater are less likely to occur.

In a town hall meeting held after the second flushout, an EPA official predicted that it would take a twenty-five year or fifty year storm to cause another flushout.⁵⁵ The apparent unlikelihood is undermined by historical facts. The Butler Mine Tunnel experienced two flushouts in six years and has been percolating for the past twenty years, awaiting its next dramatic entrance into the lives of the citizens of Luzerne County. The current plan is temporary, as it was set to expire after ten years.

Using the theorized combination plan, when the momentous storm necessary to instigate another flushout arrives, EPA officials can be put on notice and will still have the resources available to contain the discharge. If a twenty-five or fifty year storm is in fact the only trigger of another discharge, such a storm can be predicted in time enough to notify EPA officials.⁵⁶ Furthermore, the surface reclamation will even further postpone any discharge, because half of the rainfall which would previously have reached the mine would be forced to drain into other locations, such as the river or another natural waterway.⁵⁷ The plan chosen by the EPA was neither permanent nor practical but could have been for a few hundred thousand dollars.

IV. Analysis: Protection of Potentially Responsible Parties and the Use of Joint and Several Liability

The culpability for damage caused as a result of the Butler Mine Tunnel flushouts was initially remedied criminally. In *Commonwealth v.*

costs, annual operation and maintenance, and the present-worth cost were subtracted from the total cost, leaving only \$1,400,000 for flushout remediation.

53. *Id.* at 17.

54. *Id.* The total cost of Alternative five was \$3,700,000. Therefore, the cost of the new proposal, which combines a portion of Alternative three with Alternative five would only another \$150,000.

55. *Id.* at 40.

56. The recent earthquake induced tsunami in Indonesia and the surrounding countries would lead one to believe that even the most outrageous of natural disasters is undetectable by today's technology; however, hurricanes greatly differ from earthquakes in that they are not nearly as spontaneous, as they can be seen forming the oceans. See National Weather Center, Tropical Prediction Center, <http://www.nhc.noaa.gov/> (last visited Apr. 15, 2006).

57. U.S. EPA, *supra* note 5, at 18.

Scantena, the Commonwealth of Pennsylvania charged Elmo Scantena, Gerard Scantena, and Louis Scantena, the co-owners of Highway Auto Services, with violations of the Clean Streams Law,⁵⁸ public nuisance,⁵⁹ and risking catastrophe.⁶⁰ ⁶¹ The father and sons operated a business that discharged thousands of gallons of untreated industrial and chemical wastes, including 66,000 gallons of untreated cyanide, into a borehole on the Highway Auto Services site from August 1978 to July 1979.⁶²

All three men were convicted of the crimes by the Luzerne County Court of Common Pleas, but upon appeal were acquitted of the charge for risking catastrophe.⁶³ The Pennsylvania Supreme Court reversed the Superior Court's decision to acquit after interpreting the statute differently, stating that "the risk proscribed by this legislation is the use of dangerous means by one who 'consciously disregards a substantial and justifiable risk' and thereby unnecessarily exposes society to an extraordinary disaster."⁶⁴ Hence, the Scantena's were found guilty of a felony of the third degree.

While only the Scantena's were charged criminally for the Butler Mine Tunnel disasters, numerous parties were charge civilly by the federal government. On November 24, 1989, the United States filed a complaint to recover the costs incurred as a result of the release of hazardous materials in 1985, pursuant to CERCLA.⁶⁵ Along with its complaint, the United States filed a consent decree,⁶⁶ which named

58. The Clean Streams Law, 35 P.S. §§ 691.301, 307 (1970).

59. 18 Pa. C.S. § 6504.

60. Section § 3302 of the Pennsylvania Crimes Code provides:

(a) Causing catastrophe—A person who causes a catastrophe by explosion, fire, flood, avalanche, collapse of building, release of poison gas, radioactive material or other harmful or destructive force or substance, or by any other means of causing potentially widespread injury or damage, including selling, dealing in or otherwise providing licenses or permits to transport hazardous materials in violation of 75 Pa.C.S. Ch. 83 (relating to hazardous materials transportation), commits a felony of the first degree if he does so intentionally or knowingly, or a felony of the second degree if he does so recklessly.

(b) Risking catastrophe—A person is guilty of a felony of the third degree if he recklessly creates a risk of catastrophe in the employment of fire, explosives or other dangerous means listed in subsection (a) of this section.

18 Pa. C.S. § 3302. The superior court determined that because the appellants could not through their conduct alone have caused the flushout that they were not guilty of the crime as proscribed in the statute.

61. *Commonwealth v. Scantena*, 498 A.2d 1314, 1315 (Pa. 1985).

62. *Id.*

63. *Id.* at 1316-17.

64. *Id.* at 1317 (quoting *Commonwealth v. Hughes*, 364 A.2d 306, 311 (Pa. 1976)).

65. *United States v. Alcan Aluminum Corp.*, No. 89-1657, 1990 WL 126267, at *1 (M.D. Pa. May 22, 1990).

66. A consent decree is a judicially approved document that must 1) "spring from and serve to resolve a dispute with in the court's subject matter jurisdiction;" 2) "come within the general scope of the case made by the pleadings;" and 3) "further the

twenty potentially responsible parties⁶⁷ (hereinafter PRPs). In response, seventeen of the twenty parties agreed to the consent decree, reimbursing the government for its clean-up costs.⁶⁸ Shortly thereafter, two of the remaining three non-signing parties entered into a second consent decree, leaving the Alcan Aluminum Corporation as the lone non-settling party.⁶⁹ The remainder of this section will analyze the deficiencies of CERCLA with regard to its handling of PRPs, particularly, non-settling parties, such as Alcan Aluminum.

The Third Circuit uses common law principles of joint and several liability⁷⁰ to balance the interests of the government and potentially responsible parties. Upon its refusal to sign the consent decree, Alcan Aluminum claimed that its contribution of the harmful wastes that ultimately contaminated the Susquehanna River could not unitarily have caused harm, and therefore, Alcan should be exempted from liability.⁷¹ Conversely, the Government reasoned that individual defendants must be held accountable for environmental injury caused as a result of their contribution, regardless of whether the contribution could have single-handedly caused the harm.⁷² The government argument continues that if this were not the standard, cases with multiple defendants would leave the environment and tax payers worse off, because liability can not be

objectives of the law upon which the complaint was based." See *Local 93, Int'l Ass'n of Fire Fighters v. City of Cleveland*, 478 U.S. 501, 525 (1986).

67. Section 107 of CERCLA provides that the following person(s) are potentially responsible parties:

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

42 U.S.C. § 9607 (2002). PRP are responsible for all cost associated with the clean-up of hazardous waste sites, including damages and the cost of health assessment studies. *Id.*

68. *Alcan Aluminum Corp.*, 964 F.2d at 257.

69. *Id.*

70. *Black's Law Dictionary* explains that joint and several liability is the apportionment of liability among two or more parties or to only one party. JAMES GARDNER, *BLACK'S LAW DICTIONARY* (8th ed. 2004). Under this method of apportionment a single party may be held solely liable for the entire obligation, but may have a right to contribution from the other parties. *Id.*

71. *Alcan Aluminum Corp.*, 964 F.2d at 967.

72. *Id.*

accurately assessed to a particular party.⁷³ Thus, the government would not be reimbursed for the cost of the initial clean up. Both arguments are viable, but neither provides a practical solution. No matter how the court decides, one party is harmed to a greater extent than is justifiable.

Ultimately, Alcan Aluminum was ordered to pay over thirty-five percent of the total cost of recovery, totaling \$473,790.18 of \$1,300,000.⁷⁴ The District Court ruled that Alcan Aluminum was jointly and severally liable, thus, it was responsible to pay to the government the cost of recovery not reimbursed by the nineteen other potentially responsible parties.⁷⁵ The District Court had received the case on remand from the Third Circuit, which instructed the District Court to determine whether the amount of harm caused by Alcan Aluminum's contribution of wastes could be deciphered.⁷⁶

In remanding the case, the Third Circuit utilized the Restatement (Second) of Torts⁷⁷ for guidance on joint and several liability.⁷⁸ It concluded that if a reasonable basis for dividing the harm caused by each responsible party exists, then each party should only be liable for its respective share.⁷⁹ However, the Circuit Court further deduced that in the instance where no reasonable means of divisibility exists the non-settling PRPs are liable for the entire harm.⁸⁰

This theory of divisibility articulated by the Third Circuit has been often mentioned by courts but seldom used because of its impracticality.⁸¹ It has become known as the divisibility doctrine.⁸² The

73. *Id.*

74. *United States v. Alcan Aluminum Corp.*, 892 F. Supp. 648, 652 (M.D. Pa. 1995), *aff'd*, 96 F.3d 1434 (3d Cir. 1996).

75. *Id.*

76. *Alcan Aluminum Corp.*, 964 F.2d at 268-69.

77. Restatement (Second) of Torts indicates that damages for harm are to be apportioned among two or more causes where there is a reasonable basis for determining the contribution of each cause to a single harm. Restatement (Second) of Torts § 433A.

78. *Alcan Aluminum Corp.*, 964 F.2d at 268.

79. *Id.* at 269.

80. *Id.* at 269. Other courts have ruled in the same way in similar cases. *See Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 673 (5th Cir. 1989); *United States v. Monsanto Co.*, 858 F.2d 160, 169-70 (4th Cir. 1988); *Colorado v. ASARCO, Inc.*, 608 F. Supp. 1484, 1486 (D. Colo. 1985).

81. *Id.*

82. *See United States v. Hercules, Inc.*, 247 F.3d 706, 717 (8th Cir. 2001). The court explained that it has the authority to use the divisibility doctrine and regularly considers the "Gore factors." These factors are founded in former Vice-President Al Gore's amendment, which he proposed during his time in the senate. The amendment was not passed but courts still use the factors as an aid in assessing liability. *See id.*; *Centerior Service Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 354 (6th Cir.1998). The factors include:

the ability of the parties to demonstrate that their contribution to a discharge, release, or disposal of a hazardous waste can be distinguished; (2) the amount

burden is on the non-settling defendant to definitively prove that his contribution to the environmental hazard can be distinguished from the other defendants' contributions. This burden of proof is rather cumbersome, especially when the contamination site is owned by a third party.⁸³ Further, CERCLA denies non-settling defendants access to evidence that would support their cases for divisibility.

In its unsuccessful bid to persuade the court that it should be completely released from liability in the present case, Alcan Aluminum relied solely on the fact that the metals contained in the emulsion that it deposited into the boreholes did not contain ambient levels of harmful substances.⁸⁴ Obviously, this argument was unsuccessful in convincing the court. If, however, Alcan was able to provide a volumetric comparison of the amount of waste it deposited or evidence that wastes of other PRPs was similar to its own, the District Court asserted that it would have been more inclined to apportion the costs more equitably.⁸⁵

Alcan Aluminum's attorneys' inability to make a feasible argument for divisibility may have been due in part to the lack of resources available to them. CERCLA assigns the President the power to determine non-binding preliminary allocations of responsibility.⁸⁶ "In developing these guidelines the President may include such factors as the President considers relevant, such as: volume, toxicity, mobility, strength of evidence, ability to pay, litigative risks, public interest considerations, precedential value, and inequities and aggravating factors."⁸⁷ The statute also allows the President to collect whatever information it deems necessary to his investigation, via subpoena of documents, reports, questions and answers, and witnesses.⁸⁸ Further, CERCLA permits PRPs to submit proposals to the President for financing the clean-up project.⁸⁹

Such extensive information is likely not available to a non-settling party, due to discovery limitations, the work product doctrine, attorney-

of hazardous waste involved; (3) the degree of toxicity of the hazardous waste involved; (4) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste; (5) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and (6) the degree of cooperation by the parties with Federal, State, or local officials to prevent any harm to the public health or the environment.

126 Cong. Rec. 26,779, 26,781 (1980).

83. Steven Ferry, *Allocation and Uncertainty in the Age of Superfund: A Critique of the Redistribution of CERCLA Liability*, 3 N.Y.U. ENVTL. L.J. 36, 56 (1994).

84. *Id.* at 658.

85. *Id.*

86. 42 U.S.C. § 9622 (e)(3)(A) (2002).

87. *Id.*

88. 42 U.S.C. § 9622(e)(3)(B).

89. 42 U.S.C. § 9622 (e)(2)(B).

client privilege, and other legalities and impracticalities of attaining such vast amounts of confidential information from other private parties. The inaccessibility of this information makes it nearly impossible for a non-settling PRP to meet the burden of proof necessary to utilize the divisibility doctrine.

Additionally, a party who refuses to agree to the final consent decree, such as Alcan Aluminum, is prohibited from using the President's proposed allocation as evidence at trial, pursuant to CERCLA.⁹⁰ Because joint and several liability is so often used in the determination of damages in CERCLA litigation, this prohibition of evidence places an increased burden on a non-settling party. It essentially eliminates an admission by the government from the trial record, as to the amount of financial harm actually caused by each PRP, and forces the non-settling party to provide the court less influential proof of its potential liability.

CERCLA even asserts that in the event that the United States seeks further liabilities from the settling parties, it will do so in accordance with the percentage of liability calculated in the preliminary assessment of responsibility.⁹¹ Strikingly, that document, which is the byproduct of the extensive discovery documents permitted for use only by the government, is not allowed to be seen as an admission or used by a non-settling party.⁹² In effect, CERCLA allows the government to utilize the preliminary assessment in future cases but prohibits private parties from similar use in cases against the government and other parties.

Regardless of how Alcan Aluminum's attorney's tried the case or of the evidentiary tools available to them, assessing CERCLA liability should not be accomplished by using joint and several liability. CERCLA never explicitly states that liability should be divisible jointly and severally in cases with multiple defendants.⁹³ In fact, both the House and Senate removed language, which would have mandated joint and

90. 42 U.S.C. § 9622 (e)(3)(C) explains that the "nonbinding preliminary allocation of responsibility shall not be admissible as evidence in any proceeding, and no court shall have jurisdiction to review the nonbinding preliminary allocation of responsibility. The nonbinding preliminary allocation of responsibility shall not constitute an apportionment or other statement on the divisibility of harm or causation." While this allocation is "non-binding," the terms become binding upon entering a consent decree, whether they are fair or not. The statute claims that the preliminary allocation of responsibility is not an apportionment or divisibility of harm; however, that is exactly what it is. If courts are allowed to assess financial damages based on a party's harmful environmental contribution, pursuant to the divisibility doctrine, the preliminary allocation of responsibility should be seen in the same light because its purpose and result are exactly the same as the court's.

91. 42 U.S.C. § 9622 (c)(1).

92. 42 U.S.C. § 9622 (e)(3).

93. *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 268 (3d Cir. 1992).

several liability, before the legislation's enactment.⁹⁴ The terms joint and several liability were deleted from the language of CERCLA to prevent a mandatory standard applicable in all cases, which may produce inequitable results in some cases.⁹⁵ Nevertheless, this means of levying liability in CERCLA cases persists.⁹⁶ Courts of other jurisdictions have made this the norm prior to the decision in *Alcan Aluminum Corp.*⁹⁷ Joint and several liability in CERCLA cases is used rampantly in an effort to induce settlements with the government and to avoid litigation.⁹⁸ In fact, the technique of disproportionate liability has been determined to be an integral part of the statutory plan.⁹⁹

The Superfund Amendments and Reauthorization Act (hereinafter SARA) of 1986 delineate the amount of liability that should be left to non-settling parties in actions brought by the government.¹⁰⁰ SARA instructs that the potential liability of non-settling parties is reduced by the amount of the settlement by the other PRPs.¹⁰¹ This standard is a "close cousin" of joint and several liability. While it excuses non-settling parties from the portion of liability already paid by the settling parties, it still leaves the non-settling party(s) with the remaining cost of liability, regardless of whether their conduct amounted to that portion.¹⁰² This standard only applies to settlements with the government, as no other instructive language exists within CERCLA for suits regarding contributions to private parties.

In contribution suits, the decision to use the *pro tanto* standard

94. *Id.*

95. *Alcan Aluminum Corp.*, 964 F. Supp. at 268 (citing 126 Cong. Rec. S14964, S15004, H11799).

96. ERIC HELLAND, THE EFFECT OF JOINT AND SEVERAL LIABILITY OF SETTLEMENTS: EVIDENCE FROM THE SUPERFUND LITIGATION (2004), available at www.ku.edu/pri/conferen/seminars/Spring2004/Eric_Helland_Paper.pdf.

97. See *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 808 (S.D. Ohio 1983); *Folino v. Hampden Color & Chem. Co.*, 832 F. Supp. 757 (D. Vt. 1993); *ASARCO, Inc.*, 608 F. Supp. at 1489 (rejecting the argument that the deletion of the terms 'joint and several liability' from the CERCLA statute indicates that Congress did not intend for that method of apportionment of allocation to be used).

98. See *United States v. Union Gas Co.*, 743 F.Supp. 1144, 1152 (E.D.Pa. 1990); *In re Acushnet River & New Bedford Harbor*, 712 F.Supp. 1019, 1027 (D. Mass. 1989) (describing § 9613 as a "carrot and stick" provision because the EPA can offer settlers freedom from future contribution suits while still allowing them to sue non-settling parties for contribution).

99. *Cannons Engineering Corp.* 899 F.2d at 92.

100. Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. § 9613(f) (1997).

101. *Id.*

102. The process of assessing liability to non-settling parties equal to the difference of the total liability less the amount of the other parties' settlement was codified in the Uniform Contribution Among Tortfeasors Act (UCATA) of 1955 and is referred to as the "pro tanto" approach.

proposed in SARA or another equitable standard is left to the discretion of the courts.¹⁰³ Courts throughout the country have used either the *pro tanto* standard or a proportionality standard, as explained in the Uniform Comparative Fault Act (hereinafter UCFA) of 1977,¹⁰⁴ to determine a non-settling party's liability.¹⁰⁵ Under the UCFA approach, the court determines each party's percentage of liability at trial, regardless of whether the parties settled.¹⁰⁶ This is referred to as the *pro rata* approach. "Regardless of whether the settling party's payment is equal to its determined percentage, it is credited as having paid its determined percentage of fault."¹⁰⁷ The non-settling party is accordingly held liable only for that portion of the harm for which it caused.

This approach seems more sensible, in that parties who decide not to settle are not automatically made to embrace a potentially disproportionate amount of liability if unsuccessful at trial. However, CERCLA makes this approach impracticable by excluding evidence compiled by the government, as discussed previously. Thus, the *pro tanto* approach is typically used.

The court's continuous use of joint and several liability is not fair and obviates from this country's revered justice system. The government is able to coerce parties into settling because of each respective party's

103. Because the SARA amendments only require the UCATA approach to be used in cases brought by the government, courts are permitted to use their discretion in contributory actions between parties. See *Pneumo Abex Corp. v. Bessemer & Lake Erie R.R.*, 936 F.Supp. 1274 (E.D.Va.1996); *United States v. GenCorp, Inc.*, 935 F.Supp. 928 (N.D. Ohio 1996) (The court applied the UCFA approach to all claims other than that brought by the United States.); *Hillsborough Co. v. A & E Road Oiling Serv.*, 853 F.Supp. 1402 (M.D.Fla. 1994); *Atlantic Richfield Co. v. American Airlines, Inc.*, 836 F.Supp. 763 (N.D.Okla. 1993).

104. The UCFA § 6 provides that,

A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation[.]

Uniform Comparative Fault Act § 6.

105. Courts throughout the country have varied in their application of the UCATA or UCFA approach to apportion liability. See *Union Gas Co.*, 743 F.Supp. at 1152; *In re Acushnet River & New Bedford Harbor*, 712 F.Supp. at 1027; *Rohm & Haas Co.*, 721 F.Supp. 666, 675 (D.N.J. 1989); *O'Neil v. Picillo*, 682 F.Supp. 706, 730 (D.R.I. 1988), But see *American Cyanamid Co. v. Capuano*, 381 F.3d 6, 20 (1st Cir. 2004) (explaining that the court has discretion as to whether to use the UCATA or UCFA approach.); *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 85 C 1142, 1987 WL 27368, at *2 (N.D. Ill. Dec. 4, 1987) (holding that the non-settlers may reduce their liability by the settler's pro rata share of responsibility.).

106. *Hidden Lakes Development v. Allina Health System*, 02-406(JNE/JGL), 2004 WL 2203406, at *11 (D.Minn. 2004).

107. *Id.*

fear that its refusal to settle will result in its paying a disproportional amount of damages, as was the case for Alcan Aluminum. If a PRP feels that its contribution to the harm is divisible from the rest, it has the option to litigate the claim, but if other parties have already settled and it loses its battle in court, it will normally be accountable for the remaining recovery cost.¹⁰⁸ Further, CERCLA protects settling parties from claims for contribution by those parties who chose not to settle with the government.¹⁰⁹ Thus, CERCLA limits the non-settlers opportunity to seek retribution if made to pay an exorbitant portion of the recovery cost. The policy reason for granting such immunity is to facilitate early settlements;¹¹⁰ however, in doing so, the courts via the CERCLA statute have put non-settling parties in a “no win” situation.

In concert with this reasoning, Alcan Aluminum’s motion for equitable contribution was denied pursuant to § 9613.¹¹¹ The court decisively reasoned that the contribution protection offered by CERCLA may result in situations of disproportionate liability.¹¹² Joint and several liability in CERCLA cases essentially strips parties of their right to a fair outcome, because no recourse exists if unsuccessful in a divisibility claim against the government, due to the contribution protection offered by § 9613.¹¹³ This contribution protection is an incentive for companies to settle and has a beneficial purpose in providing for quick settlements. However, when coupled with the provisions which deny non-settlers the opportunity to use the preliminary assessment of responsibility and the frequent use of the *pro tanto* approach to assess liability, this once useful

108. See 42 U.S.C. § 9613 (f)(3). This portion of CERCLA defines the rights of parties who have decided to settle and those parties who decided not to settle. Section 9613 allows settling parties to sue non-settling parties for a portion of the relief. Further, it protects settling parties from any additional liability regarding the matters addressed in the settlement.

109. 42 U.S.C. § 9613(f)(2).

110. *Cannons Engineering Corp.*, 899 F.2d at 92; *Akzo Coatings of America, Inc. v. American Renovations*, 842 F.Supp. 267, 271 (E.D. Mich. 1993); *Union Gas Co.*, 743 F. Supp. at 1152.

111. *Alcan Aluminum v. Butler Aviation-Boston, Inc.*, 3:CV-02-0562, 2003 WL 22169273, at *3-4 (M.D. Pa. 2003).

112. *Id.*

113. In addition to the restrictions imposed on parties who do not settle with the government, CERCLA also imposes severe restrictions on parties conducting voluntary clean-ups. In the Supreme Court’s most recent decision with respect to CERCLA, it ruled that a private party conducting a voluntary clean up can not bring a contributory action against other PRPs. *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (U.S. 2004). The Court reasoned that a party was unable to bring a contribution suit under § 9613(f) unless that party has been already been sued under § 9607. *Id.* This ruling will have a significant impact on a party’s willingness to conduct a voluntary clean up, a practice that is highly encouraged by the EPA. Consequently, the government will be forced to conduct more clean ups, thus, resulting in less hazardous waste sites being addressed each year as well as increased litigation.

provision becomes the "straw that broke the camels back."

Joint and several liability in CERCLA litigation severely prejudices non-wealthy parties. Although § 9622 provides for an expedited settlement process for de minimus settlements,¹¹⁴ small businesses or independent land owners, which may only be accountable for a minor percentage of the environmental harm, are still essentially forced to settle because of the colossal financial burden that could ultimately be imposed if they chose not to settle. Conversely, larger businesses may be more able and willing to litigate Superfund cases because they likely would be held liable for a larger portion of the recovery costs even if they settled.¹¹⁵ Such parties are more willing to gamble on receiving a friendly jury verdict.¹¹⁶ The use of joint and several liability in CERCLA not only limits the parties' access to the judicial system but also preys on those who likely did the least harm to the environment. It allows the government to legally extort disproportionate sums of money from minimally responsible parties.

Finally, the use of joint and several liability actually slows down the clean up and recovery process. "As one might expect, when a company is faced with paying 100% of the costs at a site for which their true liability may be less than 10%, that company will delay, negotiate, and litigate at every stop of the process. That, unfortunately, is the well-documented history of Superfund."¹¹⁷ It is apparent that a more realistic, practical and environmentally friendly solution is needed to not only provide for expeditious treatment of hazardous waste sites but also for

114. 42 U.S.C. § 9622 (g)(1)(A) provides:

Whenever practicable and in the public interest, as determined by the President, the President shall as promptly as possible reach a final settlement with a potentially responsible party in an administrative or civil action under section 9606 or 9607 of this title if such settlement involves only a minor portion of the response costs at the facility concerned and, in the judgment of the President, the conditions in either of the following subparagraph (A) or (B) are met: (A) Both of the following are minimal in comparison to other hazardous substances at the facility: (i) The amount of the hazardous substances contributed by that party to the facility. (ii) The toxic or other hazardous effects of the substances contributed by that party to the facility. (B) The potentially responsible party—(i) is the owner of the real property on or in which the facility is located; (ii) did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility; and (iii) did not contribute to the release or threat of release of a hazardous substance at the facility through any action or omission.

115. See *United States v. Western Processing Co.*, 756 F. Supp. 1424, 1431 (W.D. Wash. 1990) (explaining that an advantage of using a proportionality approach to divide responsibility is that culpable parties are more likely to settle.).

116. *Id.*

117. Rep. Smith's Comments before the Committee on Environment and Public Works regarding the Superfund Program Completion Act of 1999. 145 Cong. Rec. S5739-02.

equal protection and justice in the process of getting there.

The typical contentious issues associated with joint and several liability stem from litigants seeking the deepest pocket and attempting to hold it liable for the complete amount of damages. Thirty-seven states have already passed legislation prohibiting or modifying the use of joint and several liability for that reason.¹¹⁸ CERCLA litigation, however, drastically differs from the typical deep pocket seeking situation in that the deep pocket, who is normally the most significant polluter, is not the party that is harmed. The use of joint and several liability with respect to CERCLA injures less wealthy, lesser contributing parties. Regardless, more tort reform is needed with respect to environmental torts to limit or improve circumstances in which joint and several liability is used to assess liability. Although CERCLA allows parties to attempt to litigate their case, it provides influential disincentives to doing so.

By applying the UCFA/*pro rata* approach to liability to all CERCLA cases, including suits brought by the government, all PRPs are protected from injustice, because settling parties are still protected from contributory actions and non-settling parties are not subject to disproportionate liability. Applying this lesser used approach may also create an incentive for more parties to settle quickly because wealthy polluter companies, who normally contest settlement offers, will still be held to their proportional share of the liability.¹¹⁹ Thus, the incentive to not agree to the settlement and take a chance in court is eliminated. Furthermore, the implementation of the UCFA approach in all CERCLA cases will eliminate the inconsistencies in the federal courts' rulings. Currently, the UCATA/*pro tanto* approach, as applied in SARA, is often used and the UCFA/*pro rata* is sparingly used, thus creating disparities and conflict among the district and circuit courts.¹²⁰ The implementation of UCFA will not only create a fair and equitable means of allocating debt but also generate more consistent decisions from the courts.

In order to make such a change, the necessary mechanism for success must be accessible. Courts must be able to review, analyze, and admit into evidence all documents gathered by the government in its assessment of the hazardous waste site, including the "preliminary assessment of responsibility." If courts have the proper evidentiary tools, reasonable, unbiased decisions can be made with respect to a non-settling party's liability.

118. National Association of Mutual Insurance Companies, Joint and Several Liability Reform States, <http://www.namic.org/reports/tortReform/JointAndSeveralLiability.asp> (last visited Apr. 15, 2006).

119. *Western Processing Co.*, 756 F.Supp. at 1431.

120.

V. Conclusion

CERCLA is a well intentioned act that has resulted major environmental improvement in the United States.¹²¹ Its benefit to this nation's environment can not be argued; however, the means by which it accomplishes its success are rightfully questioned. The manner by which the EPA decided to rectify the Butler Mine Tunnel problem was not suitable and did not meet the requirements provided by CERCLA.¹²² The approach selected was not permanent nor was it cost effective, at least when viewed in comparison to the proposed alternative provided by this comment.

Finally, the suggestions offered with respect to CERCLA are not intended to purport that the UCFA approach will alleviate all disproportionality with respect to liability allocation, but instead propose a context where there is an improved opportunity for the attainment of justice. If the UCFA approach were used and/or the government's preliminary assessment of liability was available to the court in *Alcan Aluminum*, Alcan likely would not have been held liable for 35% of the damages. The Court and Alcan's attorneys would have had a more realistic chance of applying the divisibility doctrine instead of forming an opinion based on a misconstrued, nonviable argument. Upon application of these suggestions, cases will still exist where liability is simply indivisible. In such cases, the court will have the guidance of the government's preliminary allocation report to aid in its assessment of liability. Some parties may have to accept an imbalanced share of liability, but at least they will be entitled to a day in court without trepidation of an impending financial disaster.

121. CERCLA has responded to thousands of releases in the past twenty-four years and continues to respond to over 300 releases per year. It has reduced human health risks to birth defects, cancer, lead poisoning and other potentially harmful illnesses that can result from contact with hazardous materials. Further, it has limited the negative ecological effects of releases of hazardous materials by protecting ground water, rivers, streams, wetlands, lakes, and grasslands from contamination. See OFFICE OF SUPERFUND REMEDIATION TECHNOLOGY INNOVATION, ENVIRONMENTAL PROTECTION AGENCY, SUPERFUND BENEFIT ANALYSIS (2005), available at <http://www.epa.gov/superfund/news/benefits.pdf>. (This report is a draft prepared by an independent, private entity for the EPA. The final EPA report will be published later this year.)

122. 42 U.S.C. § 9621.