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# THE FEDERAL GOVERNMENT'S SOVEREIGN IMMUNITY UNDER CERCLA AND ITS EFFECTS ON THE HAZARDOUS WASTE CLEANUP OF THE DISTRICT OF COLUMBIA'S WASHINGTON NAVY YARD

Nicole J. Waxman\*

The United States Supreme Court's weakening of the waiver of federal sovereign immunity under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or "the Act") is preventing federally-contaminated sites such as the Washington Navy Yard from being fully remediated. In 1998, the United States Environmental Protection Agency (EPA) designated the Navy Yard—a property with a lengthy history of hazardous waste contamination—as a priority for cleanup pursuant to CERCLA.<sup>1</sup> However, the hazardous waste currently contaminating the Navy Yard has not been remediated due to a lack of intra-governmental enforcement. This inaction leaves the people who live and work near the Navy Yard exposed to hazardous waste, which can have very severe health consequences.<sup>2</sup>

The Navy Yard consists of 71.5 acres of land in Southeastern Washington, D.C. that was set aside on presidential order and officially opened in 1799 to serve as a naval shipbuilding and repair facility.<sup>3</sup> The facility was re-designated as a Naval Gun Factory in 1886,<sup>4</sup> and factory operation lasted until the 1940s.<sup>5</sup> Remediation of the Navy Yard's hazardous waste contamination pursuant to CERCLA did not begin until 2016, which was eighteen years after the Navy Yard was designated as a priority site for remediation efforts.<sup>6</sup> The Washington Navy Yard is highly contaminated with toxic substances yet is located less than one mile from residential apartments, office buildings, and the Washington Nationals Baseball Stadium.<sup>7</sup> CERCLA was passed by Congress to address this exact issue; however, the length of time which has passed without meaningful remediation of this site suggests that there are issues with the enforcement of CERCLA cleanup for government actors.

Despite being listed on the NPL for twenty years, the Navy Yard remains contaminated and remediation measures have stalled.<sup>8</sup> In comparison, it takes between thirteen and fifteen years on average to clean up a contaminated site.<sup>9</sup> This delay may be due to the United States Navy's 2011 proposal to take no remedial action on one of the many hazardous waste sites located within the Navy Yard. This no-action decision was based on a summary of potential human health risks from the lead contamination at the site, but still allowed some residents, including children, to remain exposed.<sup>10</sup>

In 1980, Congress passed CERCLA to address the need to remediate, or clean up, hazardous waste sites across the country.<sup>11</sup> CERCLA provides for strict, retroactive, and joint and

several liability for *any* current or past owner or operator of a hazardous waste site, *any* person who arranged for the disposal of hazardous waste and *any* party who transported the hazardous waste.<sup>12</sup> Joint and several liability means that one responsible party can be held liable for the full extent of the damages caused, even if some of the damage was caused by other parties.<sup>13</sup> Under the CERCLA National Contingency Plan,<sup>14</sup> the EPA is required to designate the most serious hazardous waste sites on a list known colloquially as the National Priorities List (NPL).<sup>15</sup> A hazardous waste site is only eligible for federal funding if it is placed on the NPL.<sup>16</sup>

A potentially responsible party (PRP) can be held liable under CERCLA in one of two ways.<sup>17</sup> First, a party can be liable under section 107(a) of the Act, which states that a party that incurred cleanup costs may sue the PRP to recover these costs.<sup>18</sup> These cases are typically brought by the EPA, which sues a PRP to recover the cost of the EPA's cleanup of a hazardous waste site.<sup>19</sup> Second, a PRP may sue another PRP for contribution toward the clean-up costs under section 113(f)(1).<sup>20</sup>


Federal sovereign immunity is a legal doctrine that prevents the federal government from being sued by citizens.<sup>21</sup> The federal government can only be sued if a statute waives this sovereign immunity.<sup>22</sup> A provision of CERCLA states that "each department, agency, and instrumentality of the United States (including the executive, legislative and judicial branches of the government)" shall be held as liable as any other party and thereby waives sovereign immunity.<sup>23</sup> Historically, the Supreme Court has upheld the federal government's liability for sites that it contaminates.<sup>24</sup> The Navy is liable as an owner or operator, and according to the statute, does not have sovereign immunity.<sup>25</sup> The Supreme Court has held that holding the federal government liable under CERCLA section 107 only when the government owns or operates a facility where the release or threatened release occurs, is a reasonable interpretation of the statute.<sup>26</sup> The Court's narrow construction of federal liability under CERCLA prevents the federal government from being held liable to the full extent that a private party would be, namely as an arranger or transporter of hazardous waste.<sup>27</sup>

The Superfund Amendments and Reauthorization Act of 1986 (SARA) left CERCLA's waiver provision unchanged, but listed the provision under a "Federal Facilities" heading.<sup>28</sup>

\*J.D. Candidate, Washington College of Law 2019

This addition may be interpreted to only subject the federal government to liability for sites that it owns and operates, but not to sites that it regulates, such as “private parks or other private facilities.”<sup>29</sup> As a result, the federal government’s liability—in comparison to the liability of private parties who may also be liable as arrangers and transporters—is limited. The limited enforcement of federal liability under CERCLA has delayed the cleanup of the Washington Navy Yard, which is the only NPL site in the District of Columbia.<sup>30</sup> As a past operator, the Navy is liable for cleanup of the Navy Yard under CERCLA §107(a)

and therefore is responsible for full remediation costs—including damages to natural resources—despite its status as a government actor.<sup>31</sup>

The weakening of the federal waiver of sovereign immunity has prevented citizen suits from being brought by those who may suffer from this dangerous contamination. To address this issue, the Supreme Court should reinforce CERCLA’s waiver of sovereign immunity, and therefore hold the Navy liable for cleaning up the Washington Navy Yard’s hazardous waste contamination within a reasonable amount of time. 

## ENDNOTES

<sup>1</sup> U.S. ENVTL. PROT. AGENCY, NPL SITE NARRATIVE FOR WASHINGTON NAVY YARD (1998), <https://semsub.epa.gov/work/03/900232.pdf>.

<sup>2</sup> *Health and Ecological Hazards Caused by Hazardous Substances*, U.S. ENVTL. PROT. AGENCY (2017), <https://www.epa.gov/emergency-response/health-and-ecological-hazards-caused-hazardous-substances>.

<sup>3</sup> U.S. ENVTL. PROT. AGENCY, *supra* note 1.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> U.S. NAVY, PROPOSED PLAN SITE 17 AT THE WASHINGTON NAVY YARD, 1, 2 (May 2011), [https://www.navfac.navy.mil/niris/WASHINGTON/WASHINGTON\\_NAVY\\_YARD/N00171\\_001515.pdf](https://www.navfac.navy.mil/niris/WASHINGTON/WASHINGTON_NAVY_YARD/N00171_001515.pdf).

<sup>8</sup> *What is the Current Site Status? Washington Navy Yard, Washington, DC*, U.S. ENVTL. PROT. AGENCY, <https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.cleanup&id=0300031#Status>.

<sup>9</sup> Martha Ellen Wingfield et al., *Contamination and Climate Change: Examining the Relationship between Virginia’s Hazardous Waste Sites and Public Health*, ENVTL. STEWARDSHIP CONCEPTS (2009), [https://d10k7k7mywg42z.cloudfront.net/assets/4c7002fadabe9d45d3000029/water\\_resources\\_poster.pdf](https://d10k7k7mywg42z.cloudfront.net/assets/4c7002fadabe9d45d3000029/water_resources_poster.pdf).

<sup>10</sup> *Id.* at 8.

<sup>11</sup> *Superfund: CERCLA Overview*, U.S. ENVTL. PROT. AGENCY (2017), <https://www.epa.gov/superfund/superfund-cercla-overview>.

<sup>12</sup> Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9607(a)(1-4) (1980).

<sup>13</sup> RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 10 (AM. LAW INST. 2000).

<sup>14</sup> For information on the National Contingency Plan, visit the EPA’s overview of the National Oil and Hazardous Substances Pollution Contingency Plan Overview. See *National Oil and Hazardous Substances Pollution Contingency Plan (NCP) Overview*, U.S. ENVTL. PROT. AGENCY (2017), <https://www.epa.gov/emergency-response/national-oil-and-hazardous-substances-pollution-contingency-plan-ncp-overview> (explaining that the National Contingency Plan is the federal government’s “blueprint for responding to both oil spills and hazardous substance releases”).

<sup>15</sup> 42 U.S.C. § 9605(a)(8)(B).

<sup>16</sup> *EPA Updates the National Priorities List to Clean Up Contamination and Protect Communities*, U.S. ENVTL. PROT. AGENCY (2018), <https://www.epa.gov/newsreleases/epa-updates-national-priorities-list-clean-contamination-and-protect-communities>.

<sup>17</sup> 42 U.S.C. §§ 9607(a) (commonly known as section 107(a)); §9613(f)(1)).

<sup>18</sup> *Id.*

<sup>19</sup> See generally *United States v. Carolina Transformer Co.*, 978 F.2d 832, 835 (4th Cir. 2001).

<sup>20</sup> See 42 U.S.C. § 9613(f)(1) (1980); see generally *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1498 (6th Cir. 1989).

<sup>21</sup> Barry Breen, *Federal Supremacy and Sovereign Immunity Waivers in Federal Environmental Law*, 15 ENV. L. REV. 10326, 10327 (1985).

<sup>22</sup> *Id.*

<sup>23</sup> 42 U.S.C. § 9620(a)(1) (1980).

<sup>24</sup> See *FMC Corp. v. U.S. Dep’t of Commerce*, 29 F.3d 833, 849-50 (3d Cir. 1994) (en banc) (upholding the decision to hold the federal government liable for cleanup costs under CERCLA).

<sup>25</sup> 42 U.S.C. § 9620(a)(4).

<sup>26</sup> *FMC Corp.*, 29 F.3d at 849.

<sup>27</sup> 42 U.S.C. §9620(a)(4); *FMC Corp.* 29 F.3d at 847 (Sloviter, C.J., dissenting); *National Priorities List (NPL) Sites – by State*, U.S. ENVTL. PROT. AGENCY (2018), <https://www.epa.gov/superfund/national-priorities-list-npl-sites-state#DC>.

<sup>28</sup> Stephen G. Davison, *Governmental Liability Under CERCLA*, 25 B.C. ENVTL. AFF. L. REV. 47, 49 (1997), available at <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1270&context=ealr>.

<sup>29</sup> *FMC Corp.* 29 F.3d at 847 (Sloviter, C.J., dissenting).

<sup>30</sup> *National Priorities List (NPL) Sites – by State*, U.S. ENVTL. PROT. AGENCY (2018), <https://www.epa.gov/superfund/national-priorities-list-npl-sites-state#DC>.

<sup>31</sup> *Id.*