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MUNICIPAL RECOVERY OF NATURAL RESOURCE DAMAGES UNDER CERCLA

*Michael J. Wittke**

I. INTRODUCTION

Recent years have seen increased concern over the country's natural resources.¹ From the controversy over the spotted owl to the Exxon Valdez disaster, society is becoming more aware of the fragility of the environment and of the limited natural resources available for exploitation.² As this concern increases, society will turn to the country's environmental laws to protect what is left and restore what has been lost. Accordingly, litigation over the recovery for natural resource damages is, and will continue to be, an emerging area of environmental law.³ Future questions in these cases that need resolution include not only how to value the natural resource, but also who has standing to bring such an action.⁴

There are state environmental laws and common law claims such as nuisance and negligence under which natural resource damage actions can be brought.⁵ On the federal level there are three major

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¹ See, e.g., Terry Fox, *Natural Resource Damages: The New Frontier of Environmental Litigation*, 34 S. TEX. L.J. 521, 522 (1993).

² See *id.*

³ See *id.* at 521-22.

⁴ See Daniel S. Levy & David Friedman, *The Revenge of the Redwoods? Reconsidering Property Rights and the Economic Allocation of Natural Resources*, 61 U. CHI. L. REV. 493, 494 (1994); see also Jeffrey C. Dobbins, *The Pain and Suffering of Environmental Loss: Using Contingent Valuation To Estimate Nonuse Damages*, 43 DUKE L.J. 879, 881 (1994).

⁵ See, e.g., *Werlein v. United States*, 746 F. Supp. 887, 890 (D. Minn. 1990) (plaintiffs brought actions in nuisance, trespass, and other common law claims as well as under Minnesota state environmental laws).

environmental laws that provide for the recovery of natural resource damages: the Clean Water Act, the Oil Pollution Act of 1990, and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).⁶

Standing under these federal laws depends not only on the law but on which specific provision of the law is being utilized.⁷ The federal government and the states clearly have standing under these laws and, where the resource is publicly owned, usually the state or federal government brings suit.⁸ The standing of political subdivisions of states, such as municipalities,⁹ however, has been less clear. In most major federal environmental statutes, municipalities are considered "citizens" for the purposes of the citizen suit provisions contained in those statutes.¹⁰ For example, a municipality would be able to sue for an injunction against a violator of discharge limitations under the Clean Water Act.¹¹ Although municipalities have on occasion brought actions for natural resource damages as well, these actions usually are confined to common law claims.¹² Furthermore, in recent years natural resource damage claims under CERCLA have been limited to state and federal governments.¹³

This Comment examines the natural resource damages provision of CERCLA¹⁴ and, having discussed the ability of political subdivisions of a state to recover under CERCLA, argues that municipalities should not be denied standing. Section II provides a brief background

⁶ Respectively, the Clean Water Act, 33 U.S.C. § 1251 (1988); the Oil Pollution Act of 1990, 33 U.S.C. § 2701 (Supp. V 1993); CERCLA, 42 U.S.C. § 9601 (1988 & Supp. V 1993).

⁷ See *infra* notes 150-65 and accompanying text.

⁸ See, e.g., *Ohio v. United States Dep't of the Interior*, 880 F.2d 432, 438 (D.C. Cir. 1989); *Puerto Rico v. S.S. Zoe Colocotroni*, 628 F.2d 652, 659 (1st Cir. 1980), *cert. denied*, 450 U.S. 912 (1982).

⁹ The word "municipality" is intended to include cities, towns, townships, boroughs, and villages. BLACK'S LAW DICTIONARY 1018 (6th ed. 1990). The ideas presented, however, could be extended to include any political subdivision of a state.

¹⁰ See Clean Water Act, 33 U.S.C. § 1365 (1988); Safe Water Drinking Act, 42 U.S.C. §§ 300j-8(d) (1988); Noise Control Act of 1972, 42 U.S.C. § 4911 (1988); Energy Sources Development Act, 42 U.S.C. § 5851(e) (1988); Energy Policy and Conservation Act, 42 U.S.C. § 6305 (1988); Solid Waste Disposal Act, 42 U.S.C. § 6972 (1988); Clean Air Act, 42 U.S.C. § 7604 (1988); Power Plant and Industrial Fuel Act, 42 U.S.C. § 8435 (1988); Ocean Thermal Energy Conservation Act, 42 U.S.C. § 9124 (1988). *But see* *Warren County v. North Carolina*, 528 F. Supp. 276, 276 (E.D.N.C. 1981) (holding county did not have standing to sue under the citizen suit provision of the Toxic Substances Control Act, 15 U.S.C. § 2618(d) (1988)).

¹¹ 33 U.S.C. § 1365.

¹² See, e.g., *Davey Compressor Co. v. City of Delray Beach*, 639 So. 2d 595, 596 (Fla. 1994).

¹³ See, e.g., *City of Toledo v. Beazer Materials & Servs., Inc.*, 833 F. Supp. 646, 652 (N.D. Ohio 1993).

¹⁴ 42 U.S.C. § 9607(f).

of CERCLA. Section III examines the cases decided under CERCLA prior to the 1986 Superfund Amendments and Reauthorization Act (SARA). Section IV describes the language of the 1986 amendments as it pertains to natural resource damages and the relevant legislative history of the amendments. Section V analyzes the standing of municipalities to sue for natural resource damages after the 1986 amendments and how the courts interpreted the SARA amendments as changing the ability of municipalities to recover natural resource damages. Section VI describes how municipalities have been treated under other provisions of CERCLA as well as other federal environmental laws. Finally, Section VII compares the advantages and disadvantages of municipal recovery under, and enforcement of, the natural resource damages provisions of CERCLA. Section VII then recommends that municipalities have standing to recover natural resource damages on their own.

II. A BRIEF OVERVIEW OF CERCLA

Congress created CERCLA to deal with society's ever increasing problem of cleaning up hazardous waste.¹⁵ CERCLA commands that the Administrator of the United States Environmental Protection Agency (EPA) designate hazardous substances which, if released, present a "substantial danger" to the public or the environment.¹⁶ The EPA also must state the quantity at which a release of hazardous substances becomes a threat that requires reporting.¹⁷ Response and cleanup of a site where a release has occurred must be in accordance with the National Contingency Plan (NCP).¹⁸ The NCP calls for methods of discovering and investigating hazardous substance releases and disposal.¹⁹ The NCP also requires methods for evaluating and remedying releases, including the appropriate extent of the remedy used.²⁰ CERCLA evidences a desire favoring response actions that are cost effective and that implement permanent, rather than temporary, solutions.²¹

¹⁵ See 132 CONG. REC. S14909 (daily ed. Oct. 3, 1986) (statement of Sen. Bentsen).

¹⁶ CERCLA, 42 U.S.C. § 9602.

¹⁷ *Id.*

¹⁸ *Id.* § 9605.

¹⁹ *Id.*

²⁰ *Id.*

²¹ CERCLA, 42 U.S.C. §§ 9621(a)-(b)(1).

The NCP includes a system to prioritize hazardous sites across the country.²² Called the Hazard Ranking System (HRS), its purpose is to ensure that sites presenting the greatest threat to health or the environment are cleaned first.²³ Among other things, the HRS should take into account the size of the population at risk, the hazard potential of the substances released, the potential for contaminating groundwater used for drinking, and the potential for human contact with the hazardous substance.²⁴ Based on the HRS, a list of the sites that appear to be the most hazardous, called the National Priorities List (NPL), is compiled.²⁵ CERCLA called for an initial NPL of at least 400 sites with each state designating its highest priority site.²⁶

Where the government, or some other person, spends money to clean up a hazardous site, that party may draw on a fund established by CERCLA—commonly known as the Superfund.²⁷ Superfund money, however, can be used only to pay for cleanup costs that are consistent with the NCP.²⁸ As enacted, CERCLA provides that \$8.5 billion be placed in the Superfund.²⁹ Most of the money for the Superfund comes from a broad-based tax on large corporations and taxes on chemical feedstocks and oil.³⁰ The government also may try to recover money from potentially responsible parties (PRPs), who are thought to be responsible for the release of a hazardous substance.³¹

Under CERCLA's liability provision, PRPs include owners and operators of treatment, storage, and disposal facilities, transporters of hazardous substances, and generators of hazardous substances.³² Among other things, PRPs may be liable for the costs of removal, response, and health assessment studies required to cope with the hazardous release.³³ CERCLA also contains specified defenses a PRP may raise, for example, that the release was caused by an act of God.³⁴

²² *Id.* § 9605(a)(8)(A).

²³ *See id.*; *see also* 40 C.F.R. §§ 300.1–1105 App. A (1994).

²⁴ CERCLA, 42 U.S.C. § 9605(e)(2).

²⁵ *Id.* § 9605(a)(8)(B); *see also* 40 C.F.R. §§ 300.1–74 App. B.

²⁶ CERCLA, 42 U.S.C. § 9605.

²⁷ *Id.* § 9611(a).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *See* 132 CONG. REC. S14908–09 (daily ed. Oct. 3, 1986) (statement of Sen. Bentsen).

³¹ CERCLA, 42 U.S.C. § 9607.

³² *Id.* § 9607(a).

³³ *Id.* §§ 9607(a)(4)(A)–(D).

³⁴ *Id.* § 9607(b).

In addition to these potential costs, CERCLA includes mechanisms for restoring natural resources that have been destroyed as a result of hazardous waste dumping and discharges.³⁵ Subject to certain exemptions,³⁶ those responsible for destroying natural resources will be liable for the costs of replacing or restoring those resources.³⁷ CERCLA commands that money recovered for damages to natural resources be used only for restoring or replacing what was lost.³⁸ This Comment focuses on this natural resource damages provision of CERCLA.

III. STANDING OF MUNICIPALITIES UNDER CERCLA

Prior to 1986, when CERCLA was amended, the provision for actions involving damage to natural resources³⁹ provided that those responsible for the destruction of natural resources would be liable to the federal government and the government of the state in which the damage occurred.⁴⁰ On its face, this provision did not seem to permit political subdivisions of a state to bring an action for natural resource damages.⁴¹ The first court to consider whether a municipality could bring an action under this provision, however, decided that municipalities were not precluded from bringing suit.⁴² In *Mayor of Boonton v. Drew Chemical Corp.*, the United States District Court for the District of New Jersey allowed the town of Boonton to bring an action for natural resource damages originating from the chemical waste contamination of a town park.⁴³ The court began by examining the definition of "state" contained within CERCLA.⁴⁴ The court held that

³⁵ *Id.* § 9607.

³⁶ For example, where the person being charged demonstrated that the loss of natural resources were identified as an "irreversible and irretrievable commitment of natural resources in an environmental impact statement . . . and the decision to grant a permit or license authorizes such commitment . . . and the facility or project was otherwise operating within the terms of its permit or license. . . ." CERCLA, 42 U.S.C. § 9607(f)(1).

³⁷ *Id.*

³⁸ *Id.*

³⁹ CERCLA, 42 U.S.C. § 9607(f) (1983).

⁴⁰ CERCLA provides that, "[i]n the case of an injury to, destruction of, or loss of natural resources . . . liability shall be to the United States Government and to any State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State." *Id.*

⁴¹ *See id.*

⁴² *See Mayor of Boonton v. Drew Chem. Corp.*, 621 F. Supp. 663, 668 (D.N.J. 1985).

⁴³ *Id.*

⁴⁴ *Id.* at 666. The definition was, "United States and State include the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Marianas, and

because the definition was inclusive it did not follow that Congress necessarily intended to exclude municipalities.⁴⁵ That is, CERCLA declared that the word "state" shall "include" the entities listed in the definition.⁴⁶ The word "include" implies that other entities are includable in the definition even if not specifically listed.⁴⁷ Therefore, the list of entities in the definition of "state" was composed of illustrations and was not meant to be exhaustive.⁴⁸ The court concluded that reasonable expansions to the definition, such as allowing for municipalities, could be made.⁴⁹ The court supported its conclusion by pointing to other statutes where Congress has defined "state" to include political subdivisions of states, such as municipalities.⁵⁰

In a less textual and more policy-oriented discussion, the court stated that not allowing municipal recovery would frustrate CERCLA's broad remedial purpose.⁵¹ A holding against the municipality would mean that even though CERCLA expressly included natural resources owned by municipalities within the statute's protective scope,⁵² municipalities themselves could not bring suit to recover for damages to those resources.⁵³ As the court said:

[i]t would be anomalous for this far reaching remedial statute to give states a cause of action for damages to natural resources owned by the State but for it to exclude cities from access to such a cause of action while expressly including resources owned by local government's within the scope of the protected subject of [CERCLA].⁵⁴

any other territory or possession over which the United States has jurisdiction." CERCLA, 42 U.S.C. § 9601(27) (1983).

⁴⁵ See *Drew Chem.*, 621 F. Supp. at 666.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See *id.*

⁴⁹ See *id.*

⁵⁰ See *Drew Chem.*, 621 F. Supp. at 667.

⁵¹ See *id.*

⁵² See CERCLA, 42 U.S.C. § 9601(16). Natural resources are defined as,

[l]and, fish, wildlife, biota, air, water, groundwater, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States . . . any State or local government, any foreign government, any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe.

Id.

⁵³ See *Drew Chem.*, 621 F. Supp. at 666.

⁵⁴ *Id.*

Finally, the court supported its holding by noting that CERCLA § 9607(f)⁵⁵ provided that the President or authorized representative of the state would act as public trustee to recover for natural resource damages.⁵⁶ From this language, the court concluded that the municipality, which had been acting at the direction of the New Jersey Department of Environmental Protection, was acting as an authorized representative of the state and should have standing.⁵⁷

The only other reported pre-SARA case considering the issue of municipal standing under CERCLA's natural resource damages provision is *City of New York v. Exxon Corp. (Exxon I)*.⁵⁸ In *Exxon I*, the United States District Court for the Southern District of New York upheld New York City's standing to bring suit for the contamination of groundwater caused by illegal dumping into city landfills.⁵⁹ Like the *Drew Chemical* court, this court appealed to the overriding purposes of CERCLA, which the court described as the quick and effective cleanup of hazardous wastes and the restoration of environmental quality.⁶⁰ Relying on these purposes, the court rejected an "overly literal" reading of the natural resource damages section that would have excluded municipal governments from bringing the suit.⁶¹ The court also noted, as had the *Drew Chemical* court, that because CERCLA protected natural resources owned or controlled by local governments, it would be at least incongruous that those entrusted to manage the public resources could not bring actions to protect and restore them.⁶²

Therefore, prior to the 1986 amendments, municipalities were able to recover natural resource damages under CERCLA.⁶³ Although the language of CERCLA did not support this position explicitly, courts ruled that the purposes of CERCLA were served better by providing municipalities with standing.⁶⁴ Granting municipalities standing to recover the costs of destroyed natural resources furthers CERCLA's

⁵⁵ CERCLA § 107 provided in part: "[t]he President, or the authorized representative of any State, shall act on behalf of the public as trustee of such natural resources to recover for such damages." CERCLA, 42 U.S.C. § 9607(f)(1) (1982).

⁵⁶ See *Drew Chem.*, 621 F. Supp. at 667.

⁵⁷ See *id.* at 668.

⁵⁸ 633 F. Supp. 609 (S.D.N.Y. 1986) [hereinafter *Exxon I*].

⁵⁹ See *id.* at 618-19.

⁶⁰ See *id.* at 619.

⁶¹ See *id.*

⁶² See *id.*

⁶³ See *Exxon I*, 633 F. Supp. at 618-19; *Drew Chem.*, 621 F. Supp. at 666.

⁶⁴ See *Exxon I*, 633 F. Supp. at 619; *Drew Chem.*, 621 F. Supp. at 666.

purposes of restoring natural resources and remediating contaminated sites.⁶⁵

IV. SARA AND ITS LEGISLATIVE HISTORY

In 1986, Congress amended CERCLA and voted to continue the use of the Superfund in the SARA.⁶⁶ Up until then, CERCLA's future was in doubt and SARA was accompanied by much debate and the possibility of a veto from President Reagan.⁶⁷ For municipalities seeking to recover for natural resource damages under CERCLA, SARA would bring drastic change.⁶⁸

A. *The Language of SARA*

After the 1986 amendments, municipalities suddenly found themselves without standing to bring suit for natural resource damages⁶⁹ and for other provisions of CERCLA, such as recovering response costs.⁷⁰ The language of the new natural resource damages provision had not changed substantially.⁷¹ The definition of "state" had not changed at all from its original version.⁷² Moreover, the definition of "natural resources" continued to include those resources "belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by" local governments.⁷³

⁶⁵ See *Exxon I*, 633 F. Supp. at 619; *Drew Chem.*, 621 F. Supp. at 666.

⁶⁶ CERCLA, 42 U.S.C. §§ 9601-75.

⁶⁷ See 132 CONG. REC. S14911 (daily ed. Oct. 3, 1986) (statement of Sen. Lautenberg).

⁶⁸ See *infra* notes 99-104 and accompanying text.

⁶⁹ See, e.g., *City of Toledo v. Beazer Materials and Servs., Inc.*, 833 F. Supp. 646, 652 (N.D. Ohio 1993); *Mayor & Council of Rockaway v. Klockner & Klockner*, 811 F. Supp. 1039, 1049 (D.N.J. 1993); *Town of Bedford v. Raytheon Corp.*, 755 F. Supp. 469, 475 (D. Mass. 1991).

⁷⁰ See *Sherwin-Williams Co. v. City of Hamtramck*, 840 F. Supp. 470, 475 (E.D. Mich. 1993); *City of New York v. Chemical Waste Disposal Corp.*, 836 F. Supp. 968, 978 (E.D.N.Y. 1993); *City of Heath v. Ashland Oil, Inc.*, 834 F. Supp. 971, 977 (S.D. Ohio 1993); *City of Phila. v. Stepan Chem. Co.*, 713 F. Supp. 1484, 1488 (E.D. Pa. 1989).

⁷¹ Compare CERCLA, 42 U.S.C. § 9607(f)(1) (1988) with CERCLA, 42 U.S.C. § 9607(f)(1) (1982).

⁷² Compare CERCLA, 42 U.S.C. § 9601(27) (1982) with CERCLA, 42 U.S.C. § 9601(27) (1988). Under CERCLA, before and after SARA, "state" is defined to include, "the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Marianas, and any other territory or possession over which the United States has jurisdiction." CERCLA, 42 U.S.C. § 9601(27).

⁷³ CERCLA, 42 U.S.C. § 9601(16).

The 1986 amendments did, however, add a method for the state to designate public trustees to assess natural resource damages.⁷⁴ As originally enacted, CERCLA called for authorized representatives of the state to act as natural resource trustees but did not outline a procedure for appointing such trustees.⁷⁵ Under SARA, the governor of each state was charged with choosing an official to act on the public's behalf as trustee and to assess damage to natural resources.⁷⁶ As discussed in detail below, this change turned out to be significant to the courts dealing with standing for municipalities.⁷⁷ The courts interpreted this trustee-appointing mechanism to be the only way a municipality could be a natural resource trustee under CERCLA.⁷⁸

B. *Legislative History of SARA*

An examination of the legislative history of the 1986 amendments to CERCLA, although far from conclusive, may shed some light on Congress's intent regarding the standing of municipalities under the natural resource damages provision.⁷⁹ The House and Senate bills differed in their treatment of municipalities. Furthermore, comments from the Senate floor discussing the bill that emerged from the conference committee indicate the intent to include municipalities under CERCLA's natural resource damages provision.⁸⁰

Looking at the amendments as they developed in both houses of Congress, the House of Representatives' version would have changed the definition of "state" to exclude specifically municipalities and other political subdivisions of a state.⁸¹ This change would have had the effect of eliminating one of the rationales used by the courts in *Mayor*

⁷⁴ See *id.* § 9607(f)(2)(B). That § provides:

[t]he Governor of each State shall designate State officials who may act on behalf of the public as trustees for natural resources under this chapter . . . and shall notify the President of such designations. Such State officials shall assess damages to natural resources for the purposes of this chapter . . . for those natural resources under their trusteeship.

Id.

⁷⁵ See CERCLA, 42 U.S.C. § 9607(f) (1982).

⁷⁶ CERCLA, 42 U.S.C. § 9607(f)(2)(B).

⁷⁷ See, e.g., *Mayor & Council of Rockaway v. Klockner & Klockner*, 811 F. Supp. 1039, 1050 (D.N.J. 1993).

⁷⁸ See *infra* notes 105–12 and accompanying text.

⁷⁹ See *infra* notes 81–94 and accompanying text.

⁸⁰ See *infra* notes 86–94 and accompanying text.

⁸¹ H.R. 2817, 99th Cong., 1st Sess. (1985).

of *Boonton v. Drew Chemical Corp.* and in *Exxon I.*⁸² In those cases the courts had found that a nonexclusive definition of "state" left room for an expansion to include municipalities.⁸³ On the other hand, the Senate version of the amendments did not reflect this change and the definition was left as it stood under existing law.⁸⁴ The Conference Committee chose not to adopt the House version's more restrictive definition and explicitly left the matter of interpreting the provision to the courts.⁸⁵

The Congressional Record that accompanied the Conference Committee bill, reveals a consensus that involvement from many parties, including municipalities, was needed for an effective natural resource damages cleanup program.⁸⁶ As Senator Baucus (D-Mont.) stated, "[i]nvolvement of PRP's, and of local citizens, environmental organizations, State and local officials, and any other interested persons, is crucial to the success of any natural resource damage assessment procedure."⁸⁷ Senator Baucus went on to talk about the regulations governing the assessment of natural resource damages.⁸⁸ The regulations submitted would be inadequate, the Senator feared, because the "Interior Department has ignored the intent of Congress and repeatedly erected barriers to the recovery of damages to natural resources."⁸⁹ The Senator proclaimed: "[i]t is the intent of CERCLA that natural resource damage regulations facilitate natural resource damage claims, not block them."⁹⁰ These comments evidence a desire to allow greater access to CERCLA's natural resource damages provisions and do not support a more restrictive view of those provisions.⁹¹

⁸² See *Exxon I*, 633 F. Supp. 609, 613 (S.D.N.Y. 1986); *Mayor of Boonton v. Drew Chem. Corp.*, 621 F. Supp. 663, 666 (D.N.J. 1985).

⁸³ See *Exxon I*, 633 F. Supp. at 613; *Drew Chem.*, 621 F. Supp. at 666.

⁸⁴ See S.51, 99th Cong., 1st Sess. (1985).

⁸⁵ The statement of the Conference Committee explained:

Senate amendment—The Senate amendment contains no provision comparable to that of the House amendment. House amendment—The House amendment amends section 101(27) of CERCLA, which is the definition of "State," to exclude units of local government. Conference substitute—The Conference substitute does not include the House amendment to the definition of "State," leaving it to the court's interpretation of this provision.

H.R. CONF. REP. NO. 962, 99th Cong., 2d Sess. 185 (1986).

⁸⁶ See 132 CONG. REC. S14930 (daily ed. Oct. 3, 1986) (statement of Sen. Baucus).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ See 132 CONG. REC. S14930 (daily ed. Oct. 3, 1986) (statement of Senator Baucus).

Furthermore, there is evidence that at least some members of Congress thought that the SARA amendments retained the ability of municipalities to sue for natural resource damages.⁹² Senator Lautenberg (D-N.J.), author of several provisions that were included by the Conference Committee, stated that the Conference Committee bill would “[u]phold the *Boonton* [*Mayor of Boonton v. Drew Chemical Corp.*] decision allowing municipalities to sue for cost recovery under the same Superfund provisions available to States, and to serve as trustees for natural resource damages. This provision permits communities to move ahead with cleanup plans of their own.”⁹³ This statement is clear support for the *Drew Chemical* decision allowing municipalities to recover for natural resource damages and to engage in the cleanup of hazardous sites on their own.⁹⁴

Therefore, although the definition of “state” did not change under the 1986 amendments, there was a significant change to the natural resource damages provision.⁹⁵ As will be seen, the trustee-appointing procedure that was added by SARA has been interpreted by courts as the only avenue to standing a municipality has to sue for natural resource damages.⁹⁶ The legislative history of SARA however, argues against a restrictive vision of the natural resource damages provisions.⁹⁷ Congress chose not to change the definition of “state,” preferring instead to leave the interpretation to courts.⁹⁸

V. MUNICIPAL STANDING TO SUE FOR NATURAL RESOURCE DAMAGES AFTER SARA

As discussed above, before the 1986 amendments, courts allowed municipalities to serve as trustees for natural resources controlled by those municipalities.⁹⁹ The 1986 amendments contained a device through which the governor of each state could appoint natural resource trustees.¹⁰⁰ Thus, since the amendments, courts have interpreted that method of appointing trustees to be the sole method through which

⁹² See 132 CONG. REC. S14912 (daily ed. Oct. 3, 1986) (statement of Sen. Lautenberg).

⁹³ *Id.*

⁹⁴ See *id.*

⁹⁵ See *supra* notes 74–78 and accompanying text.

⁹⁶ See *infra* notes 106–11 and accompanying text.

⁹⁷ See *supra* notes 81–94 and accompanying text.

⁹⁸ See *supra* note 85.

⁹⁹ See *supra* notes 43–57 and accompanying text.

¹⁰⁰ See CERCLA, 42 U.S.C. § 9607(f)(2)(B).

an authorized representative of a state could be appointed.¹⁰¹ Therefore, municipalities could no longer be a natural resource trustee, or authorized representative, based solely on their being a municipality or having acted at the direction of the state.¹⁰² Courts also have stressed the lack of a change in the amended definition of "state" to allow for the inclusion for municipalities and local governments.¹⁰³ These factors have persuaded courts that Congress intended to deny local governments standing under the natural resource damages provision of CERCLA.¹⁰⁴

In the post-SARA cases, courts held that because none of the municipalities trying to recover natural resource damages had been appointed by the governor of their respective states, the cities did not have standing under CERCLA.¹⁰⁵ The greatest blow to municipalities came from United States District Judge Harold Ackerman, author of the *Mayor of Boonton v. Drew Chemical Corp.* decision, who reversed himself in *Mayor & Council of Rockaway v. Klockner & Klockner*.¹⁰⁶ In *Klockner & Klockner*, the borough of Rockaway attempted to recover under CERCLA for contamination to its water supply wells caused by chemicals leaking from underground storage tanks.¹⁰⁷ The borough argued that, by virtue of its public official status, it was an authorized representative of the state for purposes of CERCLA's natural resource damages provision.¹⁰⁸ The United States District Court for the District of New Jersey, in denying the borough standing, held that only a state official specifically appointed by the governor could qualify as an authorized representative.¹⁰⁹ Therefore, the court noted, only appointed state officials have standing to bring an action for damage to natural resources.¹¹⁰ Furthermore, the court continued, the new procedure of appointing an authorized representative

¹⁰¹ See, e.g., *Town of Bedford v. Raytheon Co.*, 755 F. Supp. 469, 473 (D. Mass. 1991).

¹⁰² See *id.*

¹⁰³ See *Mayor & Council of Rockaway v. Klockner & Klockner*, 811 F. Supp. 1039, 1049 (D.N.J. 1993); *Raytheon Co.*, 755 F. Supp. at 472. The amended definition of "state" appears at CERCLA, 42 U.S.C. § 9601(27).

¹⁰⁴ See *City of Toledo v. Beazer Materials & Servs., Inc.*, 833 F. Supp. 646, 652 (N.D. Ohio 1993); *Klockner & Klockner*, 811 F. Supp. at 1049; *Raytheon Co.*, 755 F. Supp. at 475.

¹⁰⁵ See *Beazer Materials*, 833 F. Supp. at 651-52; *Raytheon Co.*, 755 F. Supp. at 472.

¹⁰⁶ 811 F. Supp. at 1039.

¹⁰⁷ See *id.* at 1043.

¹⁰⁸ See *id.* at 1048.

¹⁰⁹ See *id.* at 1049.

¹¹⁰ See *id.* Cf. *City of New York v. Exxon Corp.*, 766 F. Supp. 177, 197 (S.D.N.Y. 1991) [hereinafter *Exxon III*] (New York City was allowed to proceed as an authorized representative of the state in a natural resource damages action. Although the city had not been appointed

expressed Congress's intent to centralize decisions regarding natural resource damages suits.¹¹¹ This desire to centralize natural resource decisions would seem to have outweighed the purpose of CERCLA to clean up and restore the environment.¹¹²

Other courts have echoed the reasoning set forth in *Klockner & Klockner*.¹¹³ For example, in *City of Toledo v. Beazer Materials and Services, Inc.*, Toledo had attempted to recover for natural resource damages stemming from hazardous chemical contamination of land.¹¹⁴ The United States District Court for the Northern District of Ohio held that the plain meaning of the word "state" under CERCLA did not include municipalities.¹¹⁵ The court also pointed out that Toledo had not used the trustee-appointing mechanism included in SARA to support its holding denying Toledo standing.¹¹⁶ The court reasoned that an expansive interpretation of the word "state" was needed prior to SARA because, since there was no trustee-appointing mechanism, that would be the only way a municipality could bring a natural resource damages action.¹¹⁷ Now that the trustee-appointing mechanism was in place however, municipalities could bring such actions, but only after being appointed by the Governor.¹¹⁸ Finally, the court stated that the legislative history of the 1986 amendments expressed Congress's concern with avoiding excessive cleanup activity.¹¹⁹ As the court stated, "while CERCLA is a 'far-reaching remedial statute,' its legislative history also suggests a concern on the part of Congress that unwise and excessive clean-up activity be restrained."¹²⁰

An interesting approach was taken by the United States District Court for the District of Minnesota in *Werlein v. United States*.¹²¹ In *Werlein*, the city of St. Anthony sought to recover under CERCLA's natural resource damages provision for damage to the aquifer from

directly by the governor, the city was appointed by the Commissioner of the New York State Department of Environmental Conservation who was designated trustee by the governor).

¹¹¹ See *Klockner & Klockner*, 811 F. Supp. at 1049.

¹¹² See *id.*

¹¹³ See, e.g., *City of Toledo v. Beazer Materials and Servs., Inc.*, 833 F. Supp. 646, 651-52 (N.D. Ohio 1993); *Fox River Grove v. Grayhill Inc.*, 806 F. Supp. 785, 793 (N.D. Ill. 1992); *Town of Bedford v. Raytheon Co.*, 755 F. Supp. 469, 472-73 (D. Mass. 1991).

¹¹⁴ *Beazer Materials*, 833 F. Supp. at 649.

¹¹⁵ *Id.* at 651.

¹¹⁶ *Id.* at 650.

¹¹⁷ *Id.* at 652; see also *Raytheon Co.*, 755 F. Supp. at 472.

¹¹⁸ *Beazer Materials*, 833 F. Supp. at 652; see also *Raytheon Co.*, 755 F. Supp. at 472.

¹¹⁹ *Beazer Materials*, 833 F. Supp. at 652.

¹²⁰ *Id.*

¹²¹ 746 F. Supp. 887 (D. Minn. 1990).

which the city obtained its drinking water.¹²² A variety of defendants, including corporations under contract with the United States Army, were alleged to have contaminated the aquifer with chemical discharges, mostly trichloroethylene.¹²³ The court examined the decisions in both *Mayor of Boonton v. Drew Chemical Corp.* and *Exxon I* but held that the city would not be able to recover for damages to the aquifer under CERCLA.¹²⁴ In reaching its decision, the court relied on the plain language of the natural resource damages provision, which “permits recovery only by the state.”¹²⁵ The court did note that the language had been broadened to include municipalities in both *Drew Chemical* and *Exxon I*.¹²⁶ However, the court distinguished the case before it on the grounds that St. Anthony neither owned nor controlled the natural resource involved.¹²⁷ As the court observed, “both the courts in *Exxon* and *Drew Chemical* relied on the fact that the municipality involved either owned or controlled the natural resource at issue.”¹²⁸ Because St. Anthony did not own or manage the aquifer, the court would not extend standing to the city.¹²⁹ This holding does, however, imply that had St. Anthony owned or been responsible for the management of the aquifer, the case might have come out differently.¹³⁰

In summary, after SARA, courts have stressed Congress’s addition of a trustee-appointing mechanism in the natural resource damages provision.¹³¹ Except for state or federal governments, the courts reasoned that the new method of appointing public trustees was the sole method under which a trustee could be appointed.¹³² Therefore, municipalities were denied status as per se public trustees.¹³³ Furthermore, courts noted that the plain language of SARA did not allow for inclusion of municipalities as “states.”¹³⁴ Thus, courts concluded that

¹²² *Id.* at 908.

¹²³ *Id.* at 890.

¹²⁴ *Id.* at 908–09.

¹²⁵ *Id.* at 910.

¹²⁶ *Werlein*, 746 F. Supp. at 910.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *See id.*

¹³¹ *See Mayor & Council of Rockaway v. Klockner & Klockner*, 811 F. Supp. 1039, 1049 (D.N.J. 1993); *Town of Bedford v. Raytheon Co.*, 755 F. Supp. 469, 472 (D. Mass 1991).

¹³² *See Klockner & Klockner*, 811 F. Supp. at 1049; *Raytheon Co.*, 755 F. Supp. at 472.

¹³³ *See Klockner & Klockner*, 811 F. Supp. at 1049; *Raytheon Co.*, 755 F. Supp. at 472.

¹³⁴ *See City of Toledo v. Beazer Materials & Servs., Inc.*, 833 F. Supp. 646, 651 (N.D. Ohio 1993); *Raytheon Co.*, 755 F. Supp. at 472.

cities were precluded from utilizing CERCLA's amended natural resource damages provision.¹³⁵

VI. THE STANDING OF MUNICIPALITIES UNDER OTHER CERCLA PROVISIONS AND ENVIRONMENTAL LAWS

The standing of municipalities under CERCLA provisions other than the natural resource damages provision has been mixed.¹³⁶ In attempts to recover response costs, municipalities generally have been denied standing to proceed as a "state."¹³⁷ However, courts have held that a city could proceed as a "state" for purposes of entering into a settlement under CERCLA.¹³⁸ Under other federal environmental laws, municipalities have figured most prominently under citizen suit provisions and generally have been granted standing.¹³⁹

A. *Municipalities and Other CERCLA Provisions*

The pattern in cases concerning municipal standing to proceed as a state for the purposes of recovering response costs under CERCLA matches the pattern in natural resource damages recovery cases.¹⁴⁰ Response costs are those costs incurred in removing hazardous wastes and repairing contaminated sites.¹⁴¹ Although the *Mayor of Boonton v. Drew Chemical Corp.* court held that municipalities could recover response costs as a "state" under CERCLA,¹⁴² after the 1986 amend-

¹³⁵ See *Klockner & Klockner*, 811 F. Supp. at 1049-50; *Raytheon Co.*, 755 F. Supp. at 472.

¹³⁶ See *infra* notes 150-65 and accompanying text.

¹³⁷ See *Sherwin-Williams Co. v. City of Hamtramck*, 840 F. Supp. 470, 474 (E.D. Mich. 1993); *City of Heath v. Ashland Oil, Inc.*, 834 F. Supp. 971, 977 (S.D. Ohio 1993); *City of Phila. v. Stepan Chem. Co.*, 713 F. Supp. 1484, 1489-90 (E.D. Pa. 1989).

¹³⁸ See *City of New York v. Exxon Corp.*, 697 F. Supp. 677, 686 (S.D.N.Y. 1988) [hereinafter *Exxon II*].

¹³⁹ See *infra* notes 176-83 and accompanying text.

¹⁴⁰ Compare *Mayor of Boonton v. Drew Chem. Corp.*, 621 F. Supp. 663, 668 (D.N.J. 1985) (municipality can proceed as a state for recovering response costs) with *City of Phila.*, 713 F. Supp. at 1490 (city is not a state for purposes of recovering response costs).

¹⁴¹ As defined in CERCLA, respond or response, "means remove, removal, remedy, and remedial action . . ." 42 U.S.C. § 9601(25). In turn "remedy" or "remedial action" are defined as: those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment.

Id. § 9601(24).

¹⁴² *Drew Chem.*, 621 F. Supp. at 668.

ments, courts have almost unanimously decided against municipalities.¹⁴³ The effect of denying a city authority to proceed as a "state" under the response costs provision does not, however, foreclose recovery entirely under CERCLA.¹⁴⁴ Municipalities still can recover response costs under CERCLA, if the municipality can prove that the steps taken were consistent with the NCP.¹⁴⁵ As stated earlier, the NCP is the plan promulgated by the EPA containing methods for evaluating hazardous substance releases and appropriate remedies.¹⁴⁶ CERCLA § 9607(a)(4) treats parties who take steps to clean up a hazardous site differently. If the state or federal government takes steps to clean up a site, they may sue to recover costs under § 9607(a)(4)(A).¹⁴⁷ The government's actions are presumed to be consistent with the NCP and the burden of proof is on the defendant to show that the government's actions were inconsistent with the NCP.¹⁴⁸ On the other hand, if anyone else takes steps to clean up a site, they do so under § 9607(a)(4)(B) and the burden of proof is on the party seeking to recover response costs to show the actions taken were consistent with the NCP, and therefore recoverable under CERCLA.¹⁴⁹

In the first case to take up the question of municipalities and response costs under § 9607(a)(4)(A), *City of Philadelphia v. Stepan Chemical Co.*, the United States District Court for the Eastern Dis-

¹⁴³ See *Sherwin-Williams Co. v. City of Hamtramck*, 840 F. Supp. 470, 474 (E.D. Mich. 1993); *City of New York v. Chem. Waste Disposal Corp.*, 836 F. Supp. 968, 978 (E.D. N.Y. 1993); *City of Heath v. Ashland Oil, Inc.*, 834 F. Supp. 971, 977 (S.D. Ohio 1993); *City of Phila.*, 713 F. Supp. at 1489-90.

¹⁴⁴ See, e.g., *Sherwin-Williams Co.*, 840 F. Supp. at 475.

¹⁴⁵ See, e.g., *id.*

¹⁴⁶ See *supra* notes 19-26 and accompanying text.

¹⁴⁷ CERCLA states:

[a]ny person who accepts or accepted any hazardous substances for transport . . . 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 or an Indian tribe not inconsistent with the national contingency plan.

42 U.S.C. § 9607(a)(4)(A).

¹⁴⁸ See, e.g., *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 746 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

¹⁴⁹ See, e.g., *id.* CERCLA provides:

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

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

42 U.S.C. § 9607(a)(4)(B).

trict of Pennsylvania held that municipalities must proceed as a private party and not as a "state."¹⁵⁰ The court in *Stepan Chemical* held that because "municipality" was not included in the definition of "state" it would be against the plain language of CERCLA to allow Philadelphia to proceed as a "state" in recovering response costs.¹⁵¹ Also, the court was unable to find any support in CERCLA's legislative history for the proposition that Congress intended to allow cities to recover response costs as "states."¹⁵² Finally, the court distinguished *Mayor of Boonton v. Drew Chemical Corp.* as dealing primarily with natural resource damages, however, natural resource damages were not an issue in this case.¹⁵³ Later cases dealing with the subject of response costs found the reasoning of *Stepan Chemical* to be persuasive.¹⁵⁴

The reasoning of *Drew Chemical* was utilized in *Exxon II*,¹⁵⁵ an action by the city to proceed as a "state" in entering into a settlement under CERCLA.¹⁵⁶ On its face, CERCLA's settlement provisions, §§ 9613(f)(2)-(3), deal with settlements involving the United States or a state.¹⁵⁷ A settling party under § 9613 is not liable for claims of contribution but may seek contribution from any non-settling party.¹⁵⁸ Also, if a settling party pays less than its proportionate share of the liability in the settlement, the non-settling parties will get stuck paying the difference.¹⁵⁹ Municipalities would want to take advantage of this provision because it is designed to bring defendants to the set-

¹⁵⁰ *City of Phila. v. Stepan Chem. Co.*, 713 F. Supp. 1484, 1488-90 (E.D. Pa. 1989).

¹⁵¹ *Id.* at 1488.

¹⁵² *Id.* at 1489.

¹⁵³ *Id.* at 1489 n.16.

¹⁵⁴ *See Sherwin-Williams Co. v. City of Hamtramck*, 840 F. Supp. 470, 474 (E.D. Mich. 1993); *City of Heath v. Ashland Oil, Inc.*, 834 F. Supp. 971, 977 (S.D. Ohio 1993).

¹⁵⁵ 697 F. Supp. 677 (S.D.N.Y. 1988).

¹⁵⁶ *See id.* at 684.

¹⁵⁷ That section provides:

[a] person who has resolved his liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims of contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

CERCLA, 42 U.S.C. § 9613.

¹⁵⁸ *Id.*

¹⁵⁹ *See Exxon II*, 697 F. Supp. at 681 n.5. CERCLA provides:

[i]f the United States or a State has obtained less than complete relief from a person who has resolved its liability to the United States or the State in an administrative or judicially approved settlement, the United States or the State may bring an action against any person who has not so resolved its liability.

42 U.S.C. § 9613(f)(3)(A).

tlement table and to make settlements easier to obtain.¹⁶⁰ On the other hand, defendants would rather keep unfavorable settlement powers as limited as possible.¹⁶¹

Harkening back to pre-SARA days, the United States District Court for the Southern District of New York held in *Exxon II* that the inclusionary definition of "state," as well as the overall purpose of CERCLA to protect and preserve public health and the environment, supported a broad reading of the statute.¹⁶² The court also supported its holding by pointing to provisions of CERCLA which give municipalities authority to enter into cleanup agreements with the EPA on a costsharing basis and provisions allowing Superfund money to be used to reimburse local governments for costs of emergency measures.¹⁶³ The same court, two years later, held that the City of New York could proceed as a "state" for the purposes of recovering response costs under CERCLA.¹⁶⁴ In so holding, the court relied entirely on its reasoning in *Exxon II*.¹⁶⁵

As the court in *Exxon II* pointed out, there are several other CERCLA provisions that provide directly for local government participation.¹⁶⁶ Therefore, CERCLA envisions a role for municipalities in the remediation of hazardous sites and this role supports the view that they be allowed to recover for natural resource damages.¹⁶⁷ For example, CERCLA calls for the NCP to include, "roles and responsibilities for the Federal, State, and local governments . . . in effectuating the plan."¹⁶⁸ Therefore, the NCP does envision some role for local governments.¹⁶⁹ In fact, the NCP counts on local governments, along with state governments, to participate in response actions and to take steps necessary to protect the public.¹⁷⁰ CERCLA also provides that federal agencies allow local officials to participate in the planning and selection of a remedial action where federal facilities are involved in a hazardous release.¹⁷¹ Furthermore, local governments can receive reimbursement for temporary emergency measures carried out after

¹⁶⁰ See *Exxon II*, 697 F. Supp. at 681.

¹⁶¹ See *id.* at 683.

¹⁶² See *id.* at 684-85.

¹⁶³ *Id.* at 685.

¹⁶⁴ *City of New York v. Exxon Corp.*, 112 B.R. 540, 545 (S.D.N.Y. 1990).

¹⁶⁵ *Id.*

¹⁶⁶ *Exxon II*, 697 F. Supp. at 685.

¹⁶⁷ See *id.*

¹⁶⁸ CERCLA, 42 U.S.C. § 9605(a)(4).

¹⁶⁹ See *id.*

¹⁷⁰ See 40 C.F.R. § 300.180(e) (1994).

¹⁷¹ See CERCLA, 42 U.S.C. § 9620(f).

a hazardous release.¹⁷² There is a \$25,000 maximum on what a local government can receive for any one response action.¹⁷³ Finally, local governments may contract or enter into cost-sharing agreements with the federal government to carry out any action in response to a hazardous substance release.¹⁷⁴ A local government that does contract with the federal government also would gain the enforcement powers necessary to carry out the response action.¹⁷⁵

B. *Citizen Suits*

Most federal environmental statutes, including CERCLA, provide for citizen enforcement through the use of citizen suits.¹⁷⁶ Citizen suits are designed to supplement the enforcement responsibilities of federal, state, and local governments.¹⁷⁷ That is, where the responsible governments fail to enforce the standards of an environmental law, a citizen may step in to make sure the law is enforced.¹⁷⁸ For example, a citizen may sue anyone, including the United States government, for violating National Pollutant Discharge Elimination System permits granted under the Clean Water Act.¹⁷⁹ Also, under citizen suit provisions a citizen may sue for the enforcement of emission standards under the Clean Air Act.¹⁸⁰ Similarly, a citizen may sue another

¹⁷² CERCLA provides: "[t]he President is authorized to reimburse local community authorities for expenses incurred . . . in carrying out temporary emergency measures necessary to prevent or mitigate injury to human health or the environment associated with the release or threatened release of any hazardous substance pollutant or contaminant." 42 U.S.C. § 9623(b)(1).

¹⁷³ *Id.* § 9623(c).

¹⁷⁴ *Id.* § 9604(d)(1)(A).

¹⁷⁵ *See id.* § 9604(e).

¹⁷⁶ *See id.* § 9659; Clean Water Act, 33 U.S.C. § 1365; Safe Water Drinking Act, 42 U.S.C. §§ 300j-8(d); Noise Control Act of 1972, 42 U.S.C. § 4911; Energy Sources Development Act, 42 U.S.C. § 5851(e); Energy Policy and Conservation Act, 42 U.S.C. § 6305; Solid Waste Disposal Act, 42 U.S.C. § 6972; Clean Air Act, 42 U.S.C. § 7604; Power Plant and Industrial Fuel Act, 42 U.S.C. § 8435; Ocean Thermal Energy Conservation Act, 42 U.S.C. § 9124.

¹⁷⁷ *See* Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 60 (1987).

¹⁷⁸ *See id.*

¹⁷⁹ 33 U.S.C. § 1365(a). That § provides in part:

[a]ny citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of

(A) an effluent standard or limitation under this chapter or

(B) an order issued by the Administrator or a State with respect to such a standard or limitation.

Id.

¹⁸⁰ 42 U.S.C. § 7604(a). That § provides in part:

[a]ny person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental

citizen or a governmental entity violating a standard or requirement of CERCLA.¹⁸¹ In general, municipalities are included as "citizens" under federal environmental laws and therefore can sue under the citizen suit provisions.¹⁸² Despite their power to bring suit under citizen suit provisions, however, municipalities rarely have done so.¹⁸³

C. *The Clean Water Act and The Oil Pollution Act of 1990*

As amended, the CERCLA natural resource damages provision provides that designated trustees may assess damages to natural resources under both CERCLA and the Clean Water Act.¹⁸⁴ Under the Clean Water Act § 1321, the President or the authorized representative of any state may act as public trustee of natural resources and recover the costs of replacing or restoring natural resources destroyed by a hazardous discharge.¹⁸⁵ To the extent a hazardous discharge is oil, the Oil Pollution Act of 1990 governs who may recover for natural resource damages.¹⁸⁶ The Oil Pollution Act utilizes a system of designating state trustees by the Governors similar to that used in CERCLA as amended.¹⁸⁷ Unlike CERCLA and the Clean

instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of

(A) an emission standard or limitation under this chapter or

(B) an order issued by the Administrator or a State with respect to such a standard or limitation.

Id.

¹⁸¹ 42 U.S.C. § 9659(a). That § provides in part:

[a]ny person may commence a civil action on his own behalf—

(1) against any person (including the United States, and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter.

Id.

¹⁸² For example, under CERCLA the term "person" is defined as an "individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. § 9601(21).

¹⁸³ *See, e.g., Atlantic City Mun. Utils. Auth. v. Regional Adm'r.*, 803 F.2d 96, 98 (3d Cir. 1986) (municipal authority brought action under Clean Water Act citizen suit to appeal denial of funding for purchase by municipality of sewage treatment facility); *Williams Pipe Line Co. v. City of Mounds View*, 651 F. Supp. 551, 560 (D. Minn. 1987) (city brought citizen's suit under Hazardous Liquid Pipeline Safety Act).

¹⁸⁴ CERCLA, 42 U.S.C. § 9607(f)(2)(B).

¹⁸⁵ Clean Water Act, 33 U.S.C. § 1321(f)(5).

¹⁸⁶ Oil Pollution Act of 1990, 33 U.S.C. § 2706 (Supp. V 1993).

¹⁸⁷ *Compare* Oil Pollution Act of 1990, 33 U.S.C. § 2706(b)(3) *with* CERCLA, 42 U.S.C. § 9607(f)(2)(B).

Water Act, however, the Oil Pollution Act specifically provides that liability is to the state for natural resource damages belonging to, managed by, controlled by, or appertaining to political subdivisions of a state.¹⁸⁸ The Oil Pollution Act does contemplate municipal involvement in the natural resources area, noting that state and local officials are to be designated as natural resource trustees.¹⁸⁹ Municipalities have not, in their own right, tried to recover natural resource damages under either the Clean Water Act or the Oil Pollution Act of 1990 and therefore there is no judicial interpretation as to whether municipalities may do so. In fact, the bulk of municipal action in the area of federal environmental law has been under the various provisions of CERCLA.¹⁹⁰ It is therefore reasonable to assume that courts would look to CERCLA cases in interpreting cases brought under the Clean Water Act or the Oil Pollution Act.¹⁹¹

In sum, the standing of municipalities under CERCLA provisions other than the natural resource damages provision has been mixed. Although the recent trend has been to deny municipalities standing to recover response costs as a "state," it has been held that municipalities could enter into settlements as a "state."¹⁹² Furthermore, CERCLA does grant municipalities power to carry out CERCLA's objectives in several aspects.¹⁹³ Also, municipalities would be able to sue for enforcement of environmental laws under citizen suit provisions.¹⁹⁴ Finally, while the Clean Water Act and the Oil Pollution Act of 1990 also provide for the recovery of natural resource damages, municipalities have not attempted recovery under those laws.¹⁹⁵

VII. FOR AND AGAINST MUNICIPAL STANDING

A. *The Case For Municipal Standing*

Despite the usual role of municipalities as defendants in environmental suits, there are distinct advantages to municipal enforcement of

¹⁸⁸ Oil Pollution Act of 1990, 33 U.S.C. § 2706(a)(2).

¹⁸⁹ See *id.* §§ 2706(b)(3)–(c)(2).

¹⁹⁰ See Peter H. Lehner, *Act Locally: Municipal Enforcement of Environmental Law*, 12 STAN. ENVTL. L.J. 50, 74 n.106 (1993).

¹⁹¹ This is so because CERCLA's natural resources provision provides that appointed trustees also may act for purposes of the Clean Water Act. See CERCLA 42 U.S.C. § 9607(f)(2)(B).

¹⁹² See *Exxon II*, 697 F. Supp. 677, 684 (S.D.N.Y. 1988).

¹⁹³ See *supra* notes 168–75.

¹⁹⁴ See *supra* notes 178–83 and accompanying text.

¹⁹⁵ See *supra* notes 190–91 and accompanying text.

environmental suits—particularly natural resource suits.¹⁹⁶ In many natural resource damages suits, the damage is localized.¹⁹⁷ Put another way, the damage may be solely within one city or one part of a city.¹⁹⁸ Similarly, concern over damage is likely to be localized.¹⁹⁹ It is the extraordinary case, such as the Exxon Valdez disaster, that warrants widespread notice and action.²⁰⁰ It only makes sense to allow those who live nearest a problem, and who have to breathe the air and drink the water, to take care of it.²⁰¹ Because local citizens are so close to the problem, they are apt to take action faster than would the more distant state and federal governments.²⁰² In fact, the NCP calls for local participation in response actions precisely because local citizens are so close to the problem and local officials are likely to be first on the scene in the event of a hazardous release.²⁰³ Additionally, the local government probably has fewer demands on its time than do the state and federal governments.

Another advantage of allowing municipal standing is that local governments will have increased knowledge of an affected area.²⁰⁴ A city is likely to have better knowledge of the history of a site, be more familiar with alleged violators, and therefore be in a better position to obtain a settlement.²⁰⁵ Although one court has held that a city could act as a “state” for purposes of settling a natural resource damages suit, the court held so mainly because the city was allowed to bring

¹⁹⁶ See Lehner, *supra* note 190, at 55.

¹⁹⁷ See, e.g., *Town of Bedford v. Raytheon Co.*, 755 F. Supp. 469, 469–70 (D. Mass 1991); *Mayor of Boonton v. Drew Chem. Corp.*, 621 F. Supp. 663, 664–65 (D.N.J. 1985).

¹⁹⁸ See, e.g., *City of Toledo v. Beazer Materials and Servs. Inc.*, 833 F. Supp. 646, 649 (N.D. Ohio 1993); *Raytheon Co.*, 755 F. Supp. at 469; *Drew Chem.*, 621 F. Supp. at 664–65.

¹⁹⁹ See, e.g., *Beazer Materials*, 833 F. Supp. at 649; *Raytheon Co.*, 755 F. Supp. at 469; *Drew Chem.*, 621 F. Supp. at 664–65.

²⁰⁰ 23 *Env't Rep.* (BNA) 10 (May 10, 1992) (damage assessment studies alone in the disaster cost over \$100 million).

²⁰¹ See Lehner, *supra* note 190, at 55.

²⁰² See *id.*

²⁰³ The NCP provides that:

[b]ecause state and local public safety organizations would normally be the first government representatives at the scene of a discharge or release they are expected to initiate public safety measures that are necessary to protect public health and welfare and that are consistent with containment and cleanup requirements in the NCP and are responsible for directing evacuations pursuant to existing state and local procedures.

40 C.F.R. § 300.180(e).

²⁰⁴ See Lehner, *supra* note 190, at 58.

²⁰⁵ See *id.*

the suit in the first place.²⁰⁶ Denying cities standing to bring suit takes the settlement advantage away from them and frustrates the intent of the SARA amendments to encourage settlements.²⁰⁷

Allowing municipalities standing also furthers society's desire for quick hazardous response and restoration. Instead of having to wait for state or federal governments to get around to bringing a natural resource damages suit, the local government could bring the suit itself and only have to wait on the court's docket.²⁰⁸ The quicker the municipality receives a damages award, the sooner the municipality can begin to restore the damage and render the site fit for use.²⁰⁹ The money recovered in such a suit must be used in or around the municipality where the damage occurred anyway, because CERCLA commands that the recovery from a natural resources suit be used to restore or replace the lost resources.²¹⁰

The CERCLA process moves slowly enough without the added delay of waiting for state or federal governments to bring natural resource damages suits.²¹¹ As an example, consider the facts of *Mayor & Council of Rockaway v. Klockner & Klockner*.²¹² In March, 1980, volatile organic compounds were discovered in the city's drinking supply wells and the borough of Rockaway built a treatment system to remedy the situation.²¹³ Almost three years later, the EPA placed the site on the NPL.²¹⁴ As explained, the NPL is a list of contaminated sites across the country that are ranked according to a system designed to ensure that more hazardous sites are cleaned up first.²¹⁵ The state conducted investigations until 1986, when the EPA indicated

²⁰⁶ See *Exxon II*, 697 F. Supp. 677, 685-86 (S.D.N.Y. 1988).

²⁰⁷ See, e.g., *United States v. BASF-Inmont Corp.*, 819 F. Supp. 601, 607 (E.D. Mich. 1993) ("However, the court believes there is a competing policy at work: the rapid settlement of extraordinarily lengthy and expensive CERCLA litigation."); see also *In re Achushnet River & New Bedford Harbor*, 712 F. Supp. 1019, 1027 (D. Mass. 1989).

²⁰⁸ This in itself could take years. See Lehner, *supra* note 190, at 55.

²⁰⁹ See *id.*

²¹⁰ See CERCLA, 42 U.S.C. § 9607(f)(1). That § provides that recovery under the natural resource provision "shall be available for use only to restore, replace, or acquire the equivalent of such natural resources. . . ."

²¹¹ See ZYGMUNT J.B. PLATER ET AL., *ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY* 885 (1992) (There is an average of over 10 years between the discovery and clean up of CERCLA sites).

²¹² 811 F. Supp. 1039 (D.N.J. 1993).

²¹³ *Id.* at 1043.

²¹⁴ *Id.*

²¹⁵ 40 C.F.R. §§ 300.1-1105 App. B.

that the treatment system built by the borough was the appropriate remedy.²¹⁶ In 1990, the EPA identified the sources of the pollution but did not file suit.²¹⁷ The next year, the borough filed suit for the recovery of natural resource damages and the case finally was heard in 1993.²¹⁸ It took a total of thirteen years from the discovery of the contamination to the actual disposition of the suit for an award of natural resource damages.²¹⁹ As of July, 1995, the Rockaway Borough Well Field remained on the NPL.²²⁰

In any case, it may be relatively easy for a municipality to be designated a natural resources trustee under CERCLA.²²¹ In *Exxon III*, the United States District Court for the District of New York held that the city was an authorized trustee because the city department of sanitation was delegated the power by the Commissioner of the New York State Department of Environmental Conservation who was designated trustee by the Governor of New York.²²² Therefore, it may be that as long as the natural resource trustee's power is derived in some way from the Governor of the state, that person is an authorized trustee under CERCLA.²²³

Even though the reasoning of *Mayor of Boonton v. Drew Chemical Corp.* and *Exxon I* has been all but abandoned, there still remains truth in what those decisions held.²²⁴ Granting a municipality standing to sue as a "state" furthers CERCLA's goal of restoring destroyed natural resources.²²⁵ As noted earlier, Congress explicitly chose not to change the definition of "state" when SARA was passed.²²⁶ Congress instead preferred to leave interpretation of that provision to courts.²²⁷ It merits consideration that at the time the 1986 amendments were being discussed, courts that had considered the question had been interpreting the natural resource damages provision to include cities

²¹⁶ *Klockner & Klockner*, 811 F. Supp. at 1043.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *See id.*

²²⁰ *See* 40 C.F.R. §§ 300.1-.1105 App. B.

²²¹ *See generally Exxon III*, 766 F. Supp. 177 (S.D.N.Y. 1991).

²²² *Id.* at 197.

²²³ *See id.*

²²⁴ *See Exxon I*, 633 F. Supp. 609, 613 (S.D.N.Y. 1986); *Mayor of Boonton v. Drew Chem. Corp.*, 621 F. Supp. 663, 667 (D.N.J. 1985).

²²⁵ *Drew Chem.*, 621 F. Supp. at 666.

²²⁶ *See* H.R. CONF. REP. No. 962, 99th Cong., 2d Sess. 185 (1986).

²²⁷ *See id.*

and municipalities.²²⁸ This could be taken as congressional approval of the interpretation being applied.²²⁹ The case becomes stronger when one considers the statements made on the Senate floor, favoring an expansion of natural resource damages suits and directly supporting the *Mayor of Boonton v. Drew Chemical Corp.* decision.²³⁰ Given the Conference Committee's comments accompanying the decision not to specifically exclude municipalities from the definition of "state," Congress's awareness of courts' interpretation, and the statements made on the Senate floor, it is evident that Congress intended to allow municipalities standing to sue for natural resource damages.²³¹

B. *The Case Against Municipal Standing*

Along with the fact that CERCLA's language does not directly support it, there are problems with municipal enforcement of the natural resource damages provision.²³² Familiarity is a double-edged sword, for although familiarity may facilitate settlements, it also can cause local governments to treat a violator leniently or to not file suit at all.²³³ This lesson is especially true because in many, if not most, natural resource damages cases the violator will be a local industry.²³⁴ A local government may be less enthusiastic about bringing a suit against a local industry.²³⁵ It is hard enough for some cities to attract industry without having a reputation for being quick to bring suit for natural resource damages. If the damages are large, the city threatens to shut the industry down or at least force the industry to lay off employees who are more likely than not from the area. This, in turn, also threatens the city's tax base. Also, there may be some question as to whether municipalities possess the resources necessary to bring the suit.²³⁶ In hard times, a city is more likely to use funding for necessities such as police, fire, and schools than to file lawsuits. Furthermore, the city may lack legal resources.²³⁷ That is, there could be a decided lack of expertise over environmental matters in the local

²²⁸ See *Exxon I*, 633 F. Supp. at 613; *Drew Chem.*, 621 F. Supp. at 667.

²²⁹ See generally H.R. CONF. REP. NO. 962, 99th Cong., 2d Sess. 185 (1986).

²³⁰ See *supra* notes 88–94 and accompanying text.

²³¹ See *Exxon I*, 633 F. Supp. at 618–19; *Drew Chem.*, 621 F. Supp. at 666–68.

²³² See *Town of Bedford v. Raytheon Co.*, 755 F. Supp. 469, 472–73 (D. Mass. 1991).

²³³ See Lehner, *supra* note 190, at 58.

²³⁴ See 132 CONG. REC. S14908 (daily ed. Oct. 3, 1986) (statement of Sen. Bentsen).

²³⁵ See Lehner, *supra* note 190, at 58.

²³⁶ See *Raytheon Co.*, 755 F. Supp. at 473.

²³⁷ See *id.* at 473 n.6.

governments.²³⁸ Some courts expressed concern that inconsistent approaches and results will develop in the natural resources area ad hoc and case-by-case, depending on the quality of a city's counsel.²³⁹ Unless a city is fairly large, the city likely would not have anyone specializing in environmental concerns who would be equipped to bring the suit.²⁴⁰ This lack of resources is in contrast to state and federal governments that have departments devoted entirely to environmental affairs.²⁴¹ The lack of expertise may force a municipality to hire outside counsel at an increased expense.²⁴² Faced with mounting costs, for which the municipality may not have funding, the municipality may decide to defer to the state or federal governments.²⁴³

In particular, courts have noted one disadvantage regarding municipal enforcement of natural resource damages under CERCLA: the lack of centralization municipal enforcement would involve.²⁴⁴ The concern is that natural resource damages claims will become subject to the "parochial views of a state's political subdivision" and a flood of actions will result.²⁴⁵ This fear ties into the concern with developing a consistent approach to natural resource damages because this area of litigation is still very much undefined and unsettled.²⁴⁶ Arguably, limiting standing to state and federal governments will lower the number of natural resource damages suits and will facilitate control of the development of this area of law.²⁴⁷

C. Recommendation

Municipalities have the incentive to bring suits for natural resource damages quickly.²⁴⁸ Allowing municipal suits could mean cutting down on the time it takes to restore sites lost to contamination.²⁴⁹ Muni-

²³⁸ See *id.*

²³⁹ See *id.*

²⁴⁰ See Lehner, *supra* note 190, at 52.

²⁴¹ For example, the State of Michigan Department of Attorney General has a division for Environmental Protection and a separate division for Natural Resources.

²⁴² See Lehner, *supra* note 190, at 52.

²⁴³ *Id.*

²⁴⁴ See *Mayor & Council of Rockaway v. Klockner & Klockner*, 811 F. Supp. 1039, 1049 (D.N.J. 1993); *Town of Bedford v. Raytheon Co.*, 755 F. Supp. 469, 473 (D. Mass. 1991).

²⁴⁵ See *Raytheon Co.*, 755 F. Supp. at 473.

²⁴⁶ See *id.*

²⁴⁷ See *id.*

²⁴⁸ See *supra* notes 196–202 and accompanying text.

²⁴⁹ See *supra* notes 211–20 and accompanying text.

palties also may be in a better position to obtain information concerning a contaminated site and to settle natural resource damages suits.²⁵⁰

Although municipalities may chose not to bring suit against local industry if to do so would hurt local employment, eventually the state or federal government would take action.²⁵¹ No one is arguing that only municipalities should be able to bring natural resource damages suits. There is also doubt as to whether municipalities possess the resources, monetary or legal, to bring natural resource damages suits.²⁵² However, those municipalities lacking resources could defer to the state or federal government. Some courts would limit standing in natural resource cases in order to develop a consistent approach to the issue of natural resource damages.²⁵³ This argument loses force when one realizes that anyone authorized by the Governor as a public trustee may bring suit and that there is no limit to the number of people or municipalities that can be so designated.²⁵⁴ Furthermore, it may be that a trustee need not directly be appointed by the Governor, but rather, can gain trustee status by having the power delegated by a directly appointed trustee.²⁵⁵ Courts also want to avoid a lack of centralization in natural resource damages cases.²⁵⁶ However, as stated above, natural resource damages cases may be a decidedly parochial concern.²⁵⁷ Municipal officials, who have to live with the contaminated site and deal with the citizens who want something done about it, should be given the option of repairing the site entirely, including restoring lost natural resources.²⁵⁸ Furthermore, the fear that allowing municipalities to recover for natural resource damages will lead to an uncontrollable flood of cases is undercut by the fact that even when courts granted municipalities standing, there were only two reported cases where municipalities brought suit.²⁵⁹ When one also takes into account the supportive legislative history of SARA, it is

²⁵⁰ See *supra* notes 204–07 and accompanying text.

²⁵¹ See *supra* notes 233–35 and accompanying text.

²⁵² See *supra* notes 236–40 and accompanying text.

²⁵³ See *supra* notes 244–47 and accompanying text.

²⁵⁴ See CERCLA, 42 U.S.C. § 9607(f)(2)(B).

²⁵⁵ *Exxon III*, 766 F. Supp. 177, 197 (S.D.N.Y. 1991).

²⁵⁶ See *Town of Bedford v. Raytheon Co.*, 755 F. Supp. 469, 473 (D. Mass 1991).

²⁵⁷ See *supra* notes 77–78 and accompanying text.

²⁵⁸ See generally Lehner, *supra* note 190.

²⁵⁹ See *Exxon I*, 633 F. Supp. 609, 613 (S.D.N.Y. 1986); *Mayor of Boonton v. Drew Chem. Corp.*, 621 F. Supp. 663, 667 (D.N.J. 1985).

clear that municipalities should be allowed to sue for natural resource damages in their own right.²⁶⁰

VIII. CONCLUSION

Prior to the enactment of the 1986 amendments, municipalities were able to recover under CERCLA's natural resource damages provisions. However, courts since have moved in the opposite direction and have denied standing to municipalities, relying on essentially the same language but with the addition of an avenue of appointing authorized representatives.²⁶¹ There is evidence, however, that Congress did not intend such a change. On the contrary, some members of Congress understood that municipalities would continue to be able to recover natural resource damages under CERCLA as amended in 1986.²⁶²

Should cities and municipalities be granted standing to bring natural resource damages suits they would have distinct advantages over their federal and state government counterparts.²⁶³ Local governments have the incentive to file suit as soon as practicable because local governments are the ones who have to deal with the problem on a daily basis. This would cut down on the time delay in getting a damaged area restored. Also, local governments would be more familiar with an area damaged and with the parties involved.

However, there are drawbacks to allowing local governments to file suit for natural resource damages under CERCLA.²⁶⁴ Most notable is the local government's lack of expertise in the field of environmental law. If the violator is a local industry, a municipality may be wary of bringing suit for fear of damaging its present and future tax base and employment opportunities. Also, the local government simply may not have the resources available to bring the suit. Finally, there is a general fear of a multitude of remedies and results in natural resource damages cases since this an area of law not yet fully defined.

In summary, the advantages of allowing municipalities to bring CERCLA natural resource damages claims outweigh the disadvantages. Municipalities could further the goals of CERCLA by quickly bringing natural resource damages suits and restoring sites damaged

²⁶⁰ See *supra* notes 81-94 and accompanying text.

²⁶¹ See *supra* notes 106-13 and accompanying text.

²⁶² See *supra* notes 92-94 and accompanying text.

²⁶³ See *supra* notes 197-210 and accompanying text.

²⁶⁴ See *supra* notes 232-47 and accompanying text.

by hazardous substance releases. Society is demonstrating an ever-increasing concern for the loss of natural resources, and stronger remedies are needed to address this concern. Allowing municipalities standing to recover for natural resource damages under CERCLA would be a beginning. There is little to lose and so much to gain.