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Kathryn E. Hand

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SOMEONE TO WATCH OVER ME: MEDICAL MONITORING COSTS UNDER CERCLA

*Kathryn E. Hand**

I. INTRODUCTION

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)¹ as a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste sites.² CERCLA's primary objectives are to facilitate prompt responses to hazardous substance releases, and to ensure their cleanup.³ Under CERCLA, these objectives are accomplished in one of two ways: where the government is able to ascertain the identity of the parties potentially responsible for the release of hazardous substances, it gives those parties the choice of managing the cleanup themselves, or of funding a cleanup by the government.⁴ Where the government is unable to determine the parties responsible for generating or disposing of hazardous wastes, cleanup costs are covered by the "Superfund" created under CERCLA.⁵

CERCLA's provisions, however, are broader than the term "cleanup" may indicate. Under section 107(a) of the Act, responsible parties⁶ shall be liable for *any* other necessary costs of response

* Managing Editor, 1993-1994, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.

¹ Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (1988).

² H.R. REP. No. 1016, 96th Cong., 2d Sess., pt. 1 at 17-18 (1980).

³ See *id.* at 17.

⁴ See Dan A. Tanenbaum, Note, *When Does Going to the Doctor Serve the Public Health?*, 59 U. CHI. L. REV. 925, 925 (1992).

⁵ See U.S.C. § 9607(a)(1)-(4) (1988).

⁶ Under this section, "responsible parties" include owners or operators of vessels or facilities producing or disposing of hazardous substances, any person who transports or arranges for the

incurred by any other person consistent with the National Contingency Plan.⁷ CERCLA's drafters neglected to define the phrase "any other necessary costs of response," and although they did define the term "response" as a "removal" or "remedial" action,⁸ the scope of this definition is also uncertain. The ambiguity of the definition of the term "response" combined with the uncertainty of its meaning when used in the phrase "any other necessary costs of response" make it difficult, if not impossible, to draw from the statute a coherent and applicable picture of just what CERCLA response actions cover.⁹ As a result of this confusion, a great deal of the responsibility of interpreting CERCLA has been left to the courts.

One of the areas impacted by the ambiguity in CERCLA's language is the question of whether to include medical monitoring costs in the CERCLA definition of response costs. This issue most often arises in cases considering awards to victims of exposure to hazardous substances who suffer from injuries they claim result from exposure to particular hazardous substances, or who fear that they will suffer such illness in the future.¹⁰ The question recently received its first appellate review, receiving an answer in the negative, with the Tenth Circuit Court of Appeals' decision in *Daigle v. Shell Oil Co.*¹¹ The frequency with which this issue comes to the attention of the state courts increases as the courts come to recognize the dangers of latent disease caused by the improper production, transport, disposal and even cleanup of hazardous substances.¹²

Recognizing that CERCLA was enacted as a means of redressing public, and not private wrongs,¹³ plaintiffs in medical monitoring suits point out that monitoring costs of varying kinds are sanctioned in the public health context under CERCLA's definitions for "removal" and "remedial actions."¹⁴ This approach, although unsuccessful in *Daigle*,

transport of such substances for another, and any person who selects a disposal site from which there is a release or threatened release occasioning response costs. 42 U.S.C. § 9607(a) (1988).

⁷ See 42 U.S.C. § 9607(a)(1)-(4) (1988). The NCP is an EPA-promulgated series of regulations regarding aspects of hazardous waste cleanups and cleanup plans.

⁸ *Id.* § 9601(25).

⁹ See *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1533-34 (10th Cir. 1992).

¹⁰ See, e.g., *id.* at 1532.

¹¹ See generally *id.*

¹² See *id.* at 1533.

¹³ See Tanenbaum, *supra* note 4, at 925.

¹⁴ Under § 9601(23), removal actions may include "such actions as may be necessary to monitor . . . the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare . . ." 42 U.S.C. § 9601(23) (1988). Similarly, under section 9601(24), remedial actions include "any monitoring reasonably required to assure

finds support in a number of lower court decisions.¹⁵ The majority of the courts ruling favorably on medical monitoring claims do so based on arguments like that in *Brewer v. Ravan*.¹⁶ In *Brewer*, the plaintiffs claimed that both "remedial" and "removal" costs include medical monitoring costs, provided the monitoring is conducted to safeguard public health by assessing the effect of the release or discharge on the public or identifying potential public health problems presented by the release.¹⁷

This Comment proposes that public health-oriented medical monitoring¹⁸ be instituted in all CERCLA response actions, either by standardizing judicial approaches to the question along *Brewer* lines,¹⁹ or by amending CERCLA itself to make statutory provision for medical monitoring. Either of these methods would be effective in furthering CERCLA's purposes of protecting the public and the environment²⁰ while dispensing with unnecessary litigation. Given the reluctance of most courts to create new law and the potential for abuse of a court-made system, however, the latter scheme is probably preferable.

Section II of this Comment examines medical monitoring, including its possible purposes, and its treatment by the courts in the context of CERCLA actions for recovery of response costs. Section III provides an overview of CERCLA and the Superfund Amendments and Reauthorization Act (SARA). It briefly outlines their enforcement schemes, private recovery standards, and the main functions of the Agency for Toxic Substance and Disease Registry (ATSDR) created under CERCLA section 9604(i). Section IV reviews CERCLA's legislative history, both generally and as it pertains to the controversy surrounding the medical monitoring issue. Section V concludes that medical monitoring is a "response cost" by CERCLA definitions, and advocates its recognition as a valuable tool for tracking the spread

that such actions protect the public health and welfare and the environment." *Id.* § 9601(24). See Daigle, 972 F.2d at 1534.

¹⁵ See, e.g., *Brewer v. Ravan*, 680 F. Supp. 1176 (M.D. Tenn. 1988); *Williams v. Allied Automotive*, 704 F. Supp. 782 (N.D. Ohio 1988); *Adams v. Republic Steel Corp.*, 621 F. Supp. 370 (W.D. Tenn. 1985).

¹⁶ 680 F. Supp. 1176 (M.D. Tenn. 1988).

¹⁷ See generally *Brewer*, 680 F. Supp. 1176 (M.D. Tenn. 1988).

¹⁸ The term public health-oriented medical monitoring is used to distinguish public-focus monitoring advocated in this Comment from more individualized diagnostic monitoring.

¹⁹ This would require courts to distinguish "acceptable" medical monitoring of communities or groups from unacceptably "private" treatment of individuals, and to understand this monitoring as a part of the cleanup process itself, and so fundable under CERCLA provisions.

²⁰ 42 U.S.C. § 9601(23)-(24).

and effects of hazardous substance contamination on the public. It further urges that such monitoring should, as a research strategy, be incorporated into every CERCLA action, either by a revamped ATSDR, or by a companion agency modelled after and operating in cooperation with the ATSDR to monitor smaller, but nonetheless important sites.

II. MEDICAL MONITORING

As its uneven success rate in the courts indicates, medical monitoring in the context of CERCLA cleanup actions is not an issue with which the courts are entirely comfortable.²¹ While nothing in CERCLA itself mandates a blanket prohibition against recovery of such monitoring costs,²² finding a way to incorporate these costs into CERCLA's already ambiguous text is difficult, and in the view of some courts, impossible.²³ There are at least two reasons for this: first, monitoring's proponents must show their efforts are legitimate in view of CERCLA's language and purposes, and are not merely attempts to disguise private suits in CERCLA clothing;²⁴ second, and possibly more problematic, medical monitoring itself suffers from a lack of clear and consistent definition.²⁵ Given this ambiguity, the courts are forced to consider a variety of actions under the same title. Medical monitoring cases include a spectrum of activities ranging from observations and diagnoses of individuals to examinations of health trends across populations as a means of tracking toxic contamination.²⁶ Predictably, the simple use of the term medical monitoring to characterize different kinds of observational actions has not magically enabled the courts to decide these cases consistently.²⁷

²¹ Jane E. Lein & Kevin M. Ward, *Private Party Cost Recovery Under CERCLA*, 21 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 10,322, 10,329-30 (1991).

²² See generally 42 U.S.C. §§ 9601-9675.

²³ See, e.g., *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1535 (10th Cir. 1992); *Wehner v. Syntex Corp.*, 681 F. Supp. 651, 653 (N.D. Cal. 1987).

²⁴ See *Daigle*, 972 F.2d at 1537.

²⁵ See, e.g., *Boyd v. Orkin Extermination Co.*, 381 S.E.2d 295, 298 (Ga. App. 1989) (mere exposure to toxic substances does not rise to the level of compensable injury); *Ayers v. Jackson Township*, 525 A.2d 287, 312 (N.J. 1987) (plaintiffs granted cost of monitoring reasonably required to detect warning signs of serious disease).

²⁶ See, e.g., *Daigle*, 972 F.2d at 1532-33 (plaintiff class members' longterm health monitoring used to detect and prevent chronic disease); *Hagerty v. L & L Marine Services*, 788 F.2d 315 (5th Cir. 1986) (plaintiff's periodic medical checkups included in medical monitoring claim).

²⁷ See cases cited at note 25. See *infra* note 95 and accompanying text.

III. OVERVIEW OF CERCLA

A. Generally

In 1980, Congress enacted CERCLA²⁸ as a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste sites.²⁹ Congress enacted the Resource Conservation and Recovery Act (RCRA) of 1976³⁰ to address the problem of monitoring and tracking hazardous wastes to fill the gaps in existing environmental protection measures for air and water.³¹ RCRA proved inadequate to deal with the increasing costs and personnel needs associated with the cleanup of abandoned hazardous waste sites.³² CERCLA was passed to remedy these deficiencies and to address the increasing health and environmental problems associated with existing hazardous wastes.³³

CERCLA's objectives are the prompt and efficient cleanup of hazardous waste sites and the placement of ultimate financial responsibility for that cleanup on those responsible for the waste.³⁴ Recognizing the conflict between the urgency of cleanup needs and the time-consuming process of ascertaining the responsible parties, CERCLA created the \$1.6 billion Hazardous Substance Response Trust Fund, known as the "Superfund."³⁵ Although the Superfund was origi-

²⁸ Pub. L. No. 96-510, 94 Stat. 2767 (1980).

²⁹ H.R. REP. NO. 1016, 96th Cong., 2d Sess., 17-18 (1980).

³⁰ For further discussion of RCRA, see CHARLES OPENCHOWSKI, A GUIDE TO ENVIRONMENTAL LAW IN WASHINGTON 9-14 (2d prt. 1991).

³¹ See 42 U.S.C. §§ 6901-6991(i). See *id.*; Allan Kanner, *Medical Monitoring: State and Federal Perspectives*, 2 TULANE ENVTL. L. J. 1, 5 (1989).

³² See *e.g.*, *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823, 836 n.10, 838-39 (W.D. Mo. 1984), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); *United States v. A & F Materials Co.*, 578 F. Supp. 1249, 1252 (S.D. Ill. 1984).

³³ See 126 CONG. REC. H11801 (daily ed., Dec. 3, 1980) ("... [T]his bill attempts to deal with the problem of who pays for cleaning up the environmental mess we have created.") (remarks by Rep. Brown); OPENCHOWSKI, *supra* note 30, at 14; Kristian E. Anderson, Note, *The Right to Response Costs Under CERCLA*, 60 NOTRE DAME L. REV. 345, 345 (1985).

³⁴ See *Brewer v. Ravan*, 680 F. Supp. 1176, 1178 (M.D. Tenn. 1988) (citing *Walls v. Waste Resource Corp.*, 761 F.2d 311, 318 (6th Cir. 1985)).

³⁵ See 42 U.S.C. § 9631 (1982) (establishing Superfund); 42 U.S.C. § 9611 (1988) (current provision for Superfund). Much of the funding for the original Superfund was derived from excise taxes imposed on hazardous feedstock chemicals, as well as on crude oil and imported petroleum products. See 26 U.S.C. §§ 4611, 4612, 4661, 4662, 4671 (1982) (Superfund revenue provisions amending Internal Revenue Code of 1954). General revenues provided the remainder of the necessary funding. See 42 U.S.C. § 9631(b)(2) (1982). For further discussion of sources of Superfund revenues, see Elizabeth F. Mason, Note, *Contribution, Contribution Protection, and*

nally effective for only five years,³⁶ Congressional amendments to CERCLA included the October, 1986 enactment of the Superfund Amendments and Reauthorization Act (SARA),³⁷ which simultaneously extended the life of the Superfund for another five years and increased its funding by \$8.5 billion.³⁸ While the EPA will, under some circumstances, allow responsible parties to conduct their own cleanups, the Superfund serves as interim funding for private or governmental cleanups.³⁹ Where responsible parties can be determined, monies expended in cleanup efforts are replaced through recovery actions against those parties.⁴⁰ Where this is not possible, however, cleanup costs are spread through the Superfund's reliance on tax income.⁴¹

B. Enforcement

Enforcement of CERCLA generally takes one of two statutory routes: injunctive relief under section 9606 in cases of imminent and substantial endangerment to the public health or welfare due to the actual or threatened release of a hazardous substance,⁴² and section 9607(a) cost recovery actions.⁴³ A cost recovery action arises when the EPA uses the Superfund to respond to actual or threatened "releases"⁴⁴ of "hazardous substances"⁴⁵ at a "facility."⁴⁶ The EPA also may conduct "removal" and "remedial" actions,⁴⁷ and any other response measures deemed necessary to protect the public health, welfare, and environment.⁴⁸

Once the EPA uses the Superfund to finance one of these actions, section 9607(a) permits the Agency to undertake an action against the

Nonsettlor Liability Under CERCLA: Following Laskin's Lead, 19 B.C. ENVTL. AFF. L. REV. 73, 79 n.34 (1991).

³⁶ See Mason, *supra* note 35, at 79.

³⁷ Pub. L. No. 99-499, 100 Stat. 1613 (primarily codified at 42 U.S.C. §§ 9601-9675 (1988)).

³⁸ See 42 U.S.C. § 9611; 26 U.S.C. § 9507; Mason, *supra* note 35, at 80, note 41.

³⁹ See Tanenbaum, *supra* note 4, at 934.

⁴⁰ See Leslie S. Gara, *Medical Surveillance Damages: Using Common Sense and the Common Law to Mitigate the Dangers Posed by Environmental Hazards*, 12 HARV. ENVTL. L. REV. 265, 279 (1988); *id.* at 932.

⁴¹ See *supra* note 35.

⁴² See 42 U.S.C. § 9606(a) (1988).

⁴³ See *id.* § 9607(a). Section 9604 describes the EPA's response authorization. See *id.* § 9604.

⁴⁴ See *id.* § 9601(22).

⁴⁵ *Id.* § 9601(14).

⁴⁶ *Id.* § 9601(9).

⁴⁷ 42 U.S.C. § 9601(23)-(24).

⁴⁸ *Id.* § 9607(a)(4)(B).

parties responsible for the contamination for recovery of response costs.⁴⁹

The scheme controlled by sections 9606 and 9607 is complicated, however, by ambiguities in CERCLA's language, particularly its failure to define the "necessary costs of response" recoverable under section 9607. Drafted as a last-minute compromise,⁵⁰ CERCLA is notorious for its lack of clarity,⁵¹ and section 9607—no exception to this rule—has required frequent judicial construction.⁵² With the increase in the dollar amounts of liability determinations at Superfund sites, however, and the escalating number of response actions initiated, the courts have given more attention to defining "response costs" in the section 9607 context.⁵³

Section 9601 defines the term "response," standing alone, as "remove, removal, remedy, and remedial action."⁵⁴ In turn, subsection (23) defines "remove" and "removal" as "cleanup or removal of released hazardous substances from the environment,"⁵⁵ which commentators generally interpret as encompassing short-term, or temporary elements of cleanup,⁵⁶ while "remedy" and "remedial" as defined in subsection (24) apply to long-term and permanent solutions.⁵⁷ In addition, although the statutory definitions in this section are admittedly "broadly drawn,"⁵⁸ both subsections specifically include monitoring conducted in the interests of public health and welfare in their lists of examples of removal or remedial actions.⁵⁹

⁴⁹ See *id.* § 9607(a).

⁵⁰ SUSAN M. COOKE, *THE LAW OF HAZARDOUS WASTE: MANAGEMENT, CLEANUP, LIABILITY AND LITIGATION* 14.01[1] 14-13 (1992). See, *infra*, notes 197-249 and accompanying text.

⁵¹ *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1533 (10th Cir. 1992).

⁵² COOKE, *supra* note 50, § 14.01[1] 14-14.

⁵³ See, e.g., *Daigle*, 972 F.2d 1527 (10th Cir. 1992); *Brewer v. Ravan*, 680 F. Supp. 1179 (M.D. Tenn. 1988); *Coburn v. Sun Chemical Corp.*, 28 Env't Rep. Cas. (BNA) 1665 (E.D. Pa. 1988); *Williams v. Allied Automotive*, 704 F. Supp. 782 (N.D. Ohio 1988); *Wehner v. Syntex*, 681 F. Supp. 651 (N.D. Cal. 1987). See COOKE, *supra* note 50, § 14.01[3][d] 14-54.

⁵⁴ 42 U.S.C. § 9601(25) (1988).

⁵⁵ *Id.* § 9601(23).

⁵⁶ Specific examples include security fencing, alternative water supplies, and temporary evacuation and housing. *Id.* § 9601(24).

⁵⁷ Including containment actions, treatment/incineration and/or provision of alternative water supplies. *Id.*

⁵⁸ *Jones v. Inmont Corp.*, 584 F. Supp. 1429, 1430 (S.D. Ohio 1984).

⁵⁹ Subsection (23) includes ". . . such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances . . . or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment . . ." 42 U.S.C. § 9601(23) (1988). Similarly, subsection (24) reads: "The term includes, but is not limited to, such actions at the location of the release as . . . any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment." *Id.* § 9601(24).

C. Standards for Private Recovery: Section 107(a)(4)(B)

While the EPA is responsible for the implementation of most CERCLA programs,⁶⁰ and cleanups are frequently initiated by the government,⁶¹ recovery actions under section 9607 are often initiated by private parties.⁶² Both governmental and private litigation regarding recovery of response costs center primarily on two issues: first, whether the plaintiffs must incur some cost prior to bringing suit; and second, whether particular expenditures warrant "response cost" status.⁶³ The first issue is the simpler of the two: plaintiffs are generally permitted to bring suit as long as they have made at least some investment of their own.⁶⁴

The question of precisely what constitutes a "response cost" is more problematic. Section 9607 presents three threshold requirements for a finding of liability.⁶⁵ First, the plaintiff must not be one of the parties potentially responsible for the contamination,⁶⁶ a provision some courts read broadly to mean the plaintiff cannot be in the class of potentially responsible persons.⁶⁷ Second, the response costs must be "necessary."⁶⁸ Here, again, CERCLA's failure to define the term "necessary" complicates the response cost debate.⁶⁹ Finally, the costs must be consistent with the EPA-promulgated National Contingency Plan (NCP).⁷⁰ Intended as a means to prevent wasteful or environmentally-unsound response actions, the NCP is basically a procedural document with few substantive criteria.⁷¹ While the NCP requires cleanup efforts to be cost-effective,⁷² its focus is more on the recoverability of various items of damages than the existence of a claim for relief,⁷³ and it poses little problem for plaintiffs.⁷⁴ Commentators have often

⁶⁰ See Tanenbaum, *supra* note 4, at 934.

⁶¹ See *id.*

⁶² See COOKE, *supra* note 50, § 14.01[1] 14-11.

⁶³ See *id.* § 14.01[3][b] 14-22.

⁶⁴ See *Jones v. Inmont Corp.*, 584 F. Supp. 1429, 1430 (S.D. Ohio 1984).

⁶⁵ 42 U.S.C. § 9607(a) (1988).

⁶⁶ *Id.* § 9607(a)(1)-(4).

⁶⁷ See Tanenbaum, *supra* note 4, at 937.

⁶⁸ 42 U.S.C. § 9607(a)(4)(B).

⁶⁹ See Tanenbaum, *supra* note 4, at 937.

⁷⁰ See 42 U.S.C. § 9607(a)(4)(B); 40 C.F.R. 300.700(c)(3)(i)-(ii) (1990).

⁷¹ See COOKE, *supra* note 50, § 14.01[7][b] 14-160.10. Mason, however, is of the opinion that consistency with the NCP is likely to develop into a major issue in CERCLA actions as defendants seek to use the consistency requirements as a shield against government recovery of cleanup costs. *Id.*

⁷² 42 U.S.C. § 9605(a)(7) (codified at 40 C.F.R. 300.430(f)(1)(ii)(D) (1990)).

⁷³ See *Jones v. Inmont Corp.*, 584 F. Supp. 1429, 1430 (S.D. Ohio 1984).

⁷⁴ Plaintiffs can take further comfort from the NCP's inherent flexibility: the plan requires only "substantial compliance with potentially applicable requirements," leaving the courts free

agreed with the lower court decisions in favor of including medical monitoring costs in recovery actions, arguing that a broad interpretation of the ambiguous terms surrounding "response costs" definitions would encourage private cleanup efforts.⁷⁵

D. Creation and Duties of the ATSDR

CERCLA section 9604(i) creates the Agency for Toxic Substance and Disease Registry (ATSDR) within the U.S. Public Health Service for the purpose of studying the effects of hazardous substances on human health.⁷⁶ The ATSDR was originally created to compile a national register of serious diseases or illnesses of persons exposed to, and of areas restricted as a consequence of, toxic substance contamination, and to inventory the literature regarding the health effects of toxic substances.⁷⁷ Additionally, the ATSDR was also charged with providing medical care and testing to exposed individuals in cases of public health emergencies caused or believed to have been caused by exposure to toxic substances.⁷⁸ The ATSDR's medical care duties included periodic screenings and surveys to be conducted in the event of a public health emergency to determine the relationship between toxic substances and illnesses.⁷⁹ SARA's enactment in 1986⁸⁰ expanded the ATSDR's responsibilities to include research on the impact of toxic chemicals on human health.⁸¹ Presently, in addition to the surveys required in cases of public health emergencies, the ATSDR may also perform health assessments where physicians or other individuals provide information that persons have been exposed to a hazardous substance and that a release of hazardous substances is the probable source of that exposure.⁸²

Upon the completion of each health assessment, the ATSDR must provide the EPA and each affected state with the results of the testing, and any recommendations it feels warranted.⁸³ Where the

to make case-by-case determinations of the meaning of "substantial compliance." 55 Fed. Reg. 8666, 8793-94 (Mar. 8, 1990). Additionally, the 1986 amendments to CERCLA limited judicial review of these determinations. See 42 U.S.C. § 9613(j). CERCLA's stringent cleanup standards, articulated in § 121(a)-(d) further impair challenges to EPA cleanups. 42 U.S.C. § 9621(a)-(d).

⁷⁵ See Jeffrey M. Gaba, *Recovering Hazardous Waste Cleanup Costs: The Private Cause of Action Under CERCLA*, 13 *ECOLOGICAL L.Q.* 181, 215 (1986).

⁷⁶ See COOKE, *supra* note 50, § 13.01[4][d] 13-36.13; Tanenbaum, *supra* note 4, at 935.

⁷⁷ See COOKE, *supra* note 50, § 13.01[4][d] 13-36.13.

⁷⁸ See *id.* § 13.01[4][d] 13-36.13.

⁷⁹ 42 U.S.C. § 9604(i)(4) & (5) (1988).

⁸⁰ See COOKE, *supra* note 50, § 13.01[4][d] 13-36.13; Tanenbaum, *supra* note 4, at 935.

⁸¹ See COOKE, *supra* note 50, § 13.01[4][d] 13-36.14; Tanenbaum, *supra* note 4, at 935.

⁸² 42 U.S.C. § 9604(i)(6)(B). See COOKE, *supra* note 50, § 13.01[4][d] 13-36.14.

⁸³ See COOKE, *supra* note 50, § 13.01[4][d] 13-36.14.

assessment indicates that an actual or threatened release of hazardous material has the potential to pose a serious threat to human health or the environment, the ATSDR must notify the EPA.⁸⁴ The EPA then becomes responsible for conducting an evaluation of the threat or release in order to determine whether the site in question warrants placement on the National Priority List (NPL), or if the site is already listed, whether it should be accorded higher priority.⁸⁵

Additionally, where health assessment study data indicates further inquiry would be appropriate, section 9604(i)(7) requires the ATSDR to conduct a pilot study of health effects for selected groups of exposed individuals.⁸⁶ Based on the results of the initial health assessment, this pilot study determines the need for full-scale studies.⁸⁷ In the event that a full-scale study reveals a significant excess of disease in the population, the ATSDR must present the EPA with a letter of transmittal including its assessment of possible explanations other than the release prompting the initial investigation.⁸⁸ Subsequently, if the study demonstrates hazardous substance exposure showing "significant risk to human health," the EPA is required to take the necessary steps to reduce the exposure and mitigate or eliminate the health risk.⁸⁹

Although effective where it is authorized to act, the ATSDR is limited by the scope of its charter.⁹⁰ It is effective where the site in question has been targeted and is listed on the NPL, but is essentially helpless to deal with smaller or less flagrantly contaminated locations.⁹¹ Further, any effort by the ATSDR to use health conditions as a gauge for monitoring or assessing the spread and impact of toxic contaminants on a long-range basis is hobbled by its restriction to short-term responses.⁹² While the ATSDR may conduct medical surveillance of unspecified duration as part of an assessment where it finds a "significant increased risk of adverse health effects in humans,"⁹³ this is not its focus. Additionally, although treatment is obvi-

⁸⁴ See *id.* § 13.01[4][d] 13-36.14-36.15.

⁸⁵ 42 U.S.C. § 9604(i)(6)(H). See *id.* § 13.01[4][d] 13-36.14-36.15.

⁸⁶ 42 U.S.C. § 9604(i)(7).

⁸⁷ See COOKE, *supra* note 50, § 13.01[4][d] 13-36.15.

⁸⁸ 42 U.S.C. § 9604 (i)(7)(B). See *id.* § 13.01[4][d] 13-36.15.

⁸⁹ 42 U.S.C. § 9604(i)(11). See COOKE, *supra* note 50, § 13.01[4][d] 13-36.15. CERCLA empowers the ATSDR to delegate these responsibilities to states and their political subdivisions where the ATSDR finds them capable of carrying them out. 42 U.S.C. § 9604(i)(15).

⁹⁰ Defined at 42 U.S.C. §§ 9604(i)(1)-(3), (5)-(6) and 9605(a)(8)(A). See Tanenbaum, *supra* note 4, at 935.

⁹¹ See Tanenbaum, *supra* note 4, at 935.

⁹² See 42 U.S.C. § 9604(i)(6)-(9); Gara, *supra* note 40, at 302.

⁹³ 42 U.S.C. § 9604(i)(9). See Gara, *supra* note 40, at 303.

ously necessary in cases of human exposure to toxic substances, it is not the purpose of the ATSDR, an agency designed primarily for information-gathering,⁹⁴ to bear the responsibility for providing individual health care.

CERCLA was enacted as an effort to arrest and ameliorate the vast problems presented by hazardous waste sites, especially those areas which RCRA failed to address.⁹⁵ This endeavor was financed through creation of the Superfund, backing private and governmental cleanup actions.⁹⁶ Although CERCLA authorizes recovery of "response costs" under section 9607,⁹⁷ it fails to define the term "response cost" in context.⁹⁸ Working through CERCLA's text, however, using the drafters' original purposes as a guide, makes inclusion of public health-oriented monitoring in the category of potential response costs at least a plausible option.⁹⁹ The question remains, however, of how best to take advantage of this option. Although the ATSDR was given responsibility for gathering information, and could conduct some monitoring toward this end, monitoring is not its primary purpose.¹⁰⁰ As the ATSDR does not conduct medical monitoring in all CERCLA cleanups,¹⁰¹ and arguably is not equipped to do so in its present form,¹⁰² we must look for another solution.

IV. MEDICAL MONITORING IN THE COURTS

A. Generally

Medical monitoring—conducting surveys or studies to determine the effects of hazardous substance contamination on human health—is a controversial aspect of CERCLA response cost actions. While the single appellate decision to date on the subject ruled against such monitoring,¹⁰³ lower courts are split on the issue.¹⁰⁴ One of the central

⁹⁴ See COOKE, *supra* note 50, § 13.01[4][d][vi].

⁹⁵ See *supra* notes 30 and 33.

⁹⁶ See *supra* note 37.

⁹⁷ See *supra* note 7.

⁹⁸ See *supra* notes 8 and 9.

⁹⁹ See *supra* note 14.

¹⁰⁰ See COOKE, *supra* note 50, at § 13.01[4][d][vi].

¹⁰¹ See *supra* note 92.

¹⁰² See Tanenbaum, *supra* note 4, at 935.

¹⁰³ See generally *Daigle v. Shell Oil Co.*, 972 F.2d 1527 (10th Cir. 1992).

¹⁰⁴ Cases supporting medical monitoring claims include: *In re Paoli R.R. Yard PCB Litigation*, 916 F.2d 829 (3d Cir. 1990), *cert. denied sub nom General Electric Co. v. Knight*, 113 L.Ed. 2d 649, 111 S. Ct. 1584 (1991); *Lykins v. Westinghouse*, 18 Env'tl. L. Rep. (Env'tl. L. Inst.) 21,498 (E.D. Ky. 1988); *Williams v. Allied Automotive*, 704 F. Supp. 782 (N.D. Ohio 1988); *Brewer v. Ravan*, 680 F. Supp. 1176 (M.D. Tenn. 1988); *Ayers v. Jackson Township*, 525 A.2d 287 (N.J. 1987).

reasons for this controversy is disagreement over the characterization of the term "medical monitoring."¹⁰⁵ Generally, the courts disapprove of medical monitoring where the term is interpreted to mean health assessments made with a view to the treatment of individual plaintiffs.¹⁰⁶ There are two primary reasons for this: first, the courts often view this type of cost recovery as an attempt by plaintiffs to recover costs under the tort system before the costs are actually incurred,¹⁰⁷ and second, the courts have difficulty reconciling individual treatment with the public health focus of CERCLA's language.¹⁰⁸

B. Tort Law Considerations

The primary tort law difficulty in medical monitoring suits is that latent harm has, by definition, no immediate signs—that is, initially, there is nothing obviously wrong with the plaintiff. In order to recover under tort law, the plaintiff must generally suffer demonstrable injury, such as detectable disease.¹⁰⁹ Where this is not possible, as in the case of injury in the form of latent disease, the courts are hesitant to create a new cause of action.¹¹⁰ The logical alternative, waiting to file suit until the onset of a present injury, is both unwise and often

Cases opposed include: *Daigle*, 972 F.2d 1527; *Bolin v. Cessna Aircraft Co.*, 759 F. Supp. 692 (D. Kan. 1991); *Woodman v. United States*, 764 F. Supp. 1467 (M.D. Fla. 1991); *Ambrogi v. Gould, Inc.*, 750 F. Supp. 1233 (M.D. Pa. 1990); *Werlein v. United States*, 746 F. Supp. 887 (D. Minn. 1990), *vacated, claim dismissed*, 793 F. Supp. 898 (D. Minn. 1992); *Lutz v. Chromatec, Inc.*, 718 F. Supp. 413 (M.D. Pa. 1989); *Coburn v. Sun Chemical Corp.*, 28 Env't Rep. Cas. (BNA) 1665 (E.D. Pa. 1988); *Wehner v. Syntex Corp.*, 681 F. Supp. 651 (N.D. Cal. 1987).

¹⁰⁵ See, e.g., *Daigle*, 972 F.2d at 1534–35.

¹⁰⁶ See *id.* at 1535 (medical monitoring would help individual plaintiffs, but would not further CERCLA's public health objectives); *Woodman*, 764 F. Supp. at 1469 (*Brewer* limited its holding to costs for public in general and not for individual treatment); *Ambrogi*, 750 F. Supp. at 1247 (plaintiffs' medical costs do not serve the interests of public health and are therefore not recoverable as response costs under CERCLA).

¹⁰⁷ See Tanenbaum, *supra* note 4, at 928. For a more comprehensive discussion of this subject, see generally David G. Posten, Note, *Gone Today and Here Tomorrow: Damage Recovery for Subsequent Developing Latent Diseases in Toxic Tort Exposure Actions*, 14 AM. J. TRIAL ADVOC. 159 (1990).

¹⁰⁸ See generally Allan T. Slagel, *Medical Surveillance Damages: A Solution to the Inadequate Compensation of Toxic Tort Victims*, 24 TRIAL, Oct. 1988, at 44.

¹⁰⁹ See *id.*

¹¹⁰ See Albert H. Parnell et al., *Medical Monitoring: a Dangerous Trend*, 34 FOR THE DEFENSE, Apr. 1992, at 8; *id.* Additionally, Posten describes the dilemma faced by many plaintiffs regarding the possibility of latent injury: many jurisdictions require that all injuries—past, present, and future—be alleged in the complaint under penalty of possible estoppel; the so-called "all or nothing rule" may deny the plaintiff recovery for future illness unless she can prove that the likelihood the injury will occur is more probable than not. Posten, *supra* note 107, at 163–64.

The Chief Justice of the U.S. District Court for the Eastern District of New York describes the difficulty courts have in making decisions before all information is in: "We must rule within

impossible due to the potentially prohibitive effect of statutes of limitation, statutes of repose, causation problems and the like.¹¹¹ The courts do not always find these obstacles insurmountable, however. Despite these difficulties, some courts have awarded damages in cases alleging environmental impact through contaminated ambient air, soil and groundwater,¹¹² often by holding that exposure to toxic substances is, in itself, a compensable injury.¹¹³

C. Reconciling CERCLA and Medical Monitoring

1. Generally

Fortunately for plaintiffs, CERCLA's drafting employs means other than the tort principles traditionally relied upon to support liability in pollution suits.¹¹⁴ Consequently, in deciding on medical monitoring questions, the courts most often struggle with the compatibility of medical monitoring with CERCLA's problematic language.¹¹⁵ Where the courts object to medical monitoring claims, they generally cite as their basis either monitoring's perceived inconsistency with CERCLA's language or difficulties in reconciling the facts of various monitoring cases with CERCLA's explicitly public focus.¹¹⁶ In addition to examining the statute's text, proponents of both sides of the argument look to CERCLA's extensive legislative history for support.¹¹⁷ Given the six years of discussion preceding CERCLA's

a short time after a claim is brought, whether or not all the evidence has been developed—by long term population studies, for example." Chief Justice Jack B. Weinstein, *The Role of the Court in Toxic Tort Litigation*, 73 GEO. L.J. 1389, 1389 (1985).

¹¹¹ See Slagel, *supra* note 108, at 44.

¹¹² See Parnell et al., *supra* note 110, at 7.

¹¹³ Unfortunately, this approach has had only limited success. See Slagel, *supra* note 108, at 49.

¹¹⁴ For a more comprehensive analysis of CERCLA liability, see generally Mason, *supra* note 35.

¹¹⁵ See *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1533 (10th Cir. 1992).

¹¹⁶ See, e.g., *Woodman v. United States*, 764 F. Supp. 1467, 1470 (M.D. Fla. 1991) (*Brewer's* holding limited to costs for public, not for individual treatment); *Bolin v. Cessna Aircraft Co.*, 759 F. Supp. 692, 710 (D. Kan. 1991) (citing and corroborating criticism of CERCLA's failure to satisfactorily define "response costs"); *Ambrogi v. Gould, Inc.*, 750 F. Supp. 1233, 1247-48 (M.D. Pa. 1990) (medical monitoring not within the scope of section 9601's language.)

¹¹⁷ See, e.g., *Daigle*, 972 F.2d at 1535-36 (Congress considered medical monitoring, but rejected it before CERCLA's passage); *Brewer v. Ravan*, 680 F. Supp. 1176, 1179 (M.D. Tenn. 1988) (monitoring conducted in the interests of the public health acceptable although legislative history shows medical monitoring for the purposes of private treatment and diagnoses was rejected).

passage,¹¹⁸ legislative history is a fertile, albeit ambiguous, area for argument.

2. Arguments Against Medical Monitoring

The courts are particularly hesitant to accept medical monitoring claims where the parties' interpretation of "medical monitoring" is broad enough to encompass a variety of observation and treatment costs.¹¹⁹ Such a reading not only tests the courts' ability and willingness to read into statutory language, it also forces them to attempt to rationalize the inclusion of costs which may favor individual plaintiffs over the general welfare for which CERCLA was designed.¹²⁰ Given CERCLA's preoccupation with eliminating and preventing threats posed to public health by toxic substances,¹²¹ some courts are reluctant to pay for monitoring when it appears the costs arose from individual treatment.¹²²

The Tenth Circuit in *Daigle v. Shell Oil Co.* found the costs of long-term health surveillance unrecoverable under section 107(a).¹²³ Here, plaintiffs attempted to recover costs of monitoring conducted to detect the onset of any latent disease, the onset of which was likely precipitated by the plaintiffs' exposure to hazardous materials.¹²⁴ While acknowledging the ability of this kind of diagnostic monitoring to assist individual plaintiffs, the court felt this narrow benefit base was incompatible with CERCLA's public health focus¹²⁵ and was conducted too late in the cleanup process to be considered a means of preventing contact between the public and a toxic release.¹²⁶ Similarly, the court in *Woodman v. United States* emphasized that even the pro-monitoring court in *Brewer v. Ravan* limited its holding to exclude diagnostic monitoring.¹²⁷

The fate of a given medical monitoring claim is often unclear at the outset of a particular suit. Where claims fail, however, they usually

¹¹⁸ For further discussion of the legislative process behind CERCLA's passage, see generally *SUPERFUND: A LEGISLATIVE HISTORY* (Helen C. Needham & Mark Henefee eds. 2d prtg. 1985); *infra* notes 198-249 and accompanying text.

¹¹⁹ See, e.g., *Daigle*, 972 F.2d at 1535; *Woodman*, 764 F. Supp. at 1470.

¹²⁰ See *Daigle*, 972 F.2d at 1535; *Woodman*, 764 F. Supp. at 1470.

¹²¹ See, e.g., *Ambrogi*, 750 F. Supp. at 1237.

¹²² See *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1535 (10th Cir. 1992); *Woodman v. United States*, 764 F. Supp. 1467, 1470 (M.D. Fla. 1991).

¹²³ See 972 F.2d at 1531.

¹²⁴ See *id.* at 1532-33.

¹²⁵ See *id.* at 1535.

¹²⁶ See *id.*

¹²⁷ See *Woodman*, 764 F. Supp. at 1470.

do so for one of a finite number of reasons, nearly all of which are bolstered with reminders that CERCLA was not enacted as a panacea for hazardous waste damage, and encouraging remarks regarding the increased availability of non-traditional tort remedies.¹²⁸ Aside from the larger issue of public health versus private treatment outlined above, one of the most common reasons medical monitoring suits fail, and one of the most difficult to counter in a satisfactory way, is the fact that medical monitoring is not explicitly named in CERCLA itself.¹²⁹

While acknowledging CERCLA's lack of clarity,¹³⁰ courts are often uneasy about allowing claims for monitoring when such monitoring is not specifically included in the statute's plain language.¹³¹ This concern is exemplified in *Coburn v. Sun Chemical Corp.*,¹³² the seminal case opposing medical monitoring suits, and its progeny.¹³³ Explicitly disagreeing with the *Brewer* decision,¹³⁴ the *Coburn* court held that medical monitoring does not qualify as a necessary cost of response under CERCLA, even where the monitoring is conducted in the interests of public health.¹³⁵ In making this determination, the court relied heavily upon the absence of any explicit mention of medical monitoring in CERCLA itself.¹³⁶ Acknowledging that both sections 9601(23) and (24) provide specific examples of removal and remedial actions,¹³⁷ but fail to mention medical monitoring *per se*, the *Coburn* court opted not to examine CERCLA's language in the context of its legislative history.¹³⁸ Dismissing the discussion surrounding CERCLA's hasty passage as unhelpful,¹³⁹ the court clung to standard statutory interpretation methods.¹⁴⁰ Although nothing in CERCLA iden-

¹²⁸ See *Ambrogi v. Gould, Inc.*, 750 F. Supp. 1233, 1248 (M.D. Pa. 1990).

¹²⁹ See *id.* at 1247.

¹³⁰ See *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1533 (10th Cir. 1992); *Bolin v. Cessna Aircraft Co.*, 759 F. Supp. 692, 710 (D. Kan. 1991).

¹³¹ See, e.g., *Ambrogi*, 750 F. Supp. at 1247.

¹³² 28 Env't Rep. Cas. (BNA) 1665 (E.D. Pa. 1988).

¹³³ See *Bolin*, 759 F. Supp. 692 (D. Kan. 1991); *Ambrogi v. Gould, Inc.*, 750 F. Supp. 1233 (M.D. Pa. 1990).

¹³⁴ See 28 Env't Rep. Cas. (BNA) at 1670.

¹³⁵ See *id.*

¹³⁶ See *id.* at 1670.

¹³⁷ See *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1535 (10th Cir. 1992); *Ambrogi*, 750 F. Supp. at 1247.

¹³⁸ See 28 Env't Rep. Cas. (BNA) at 1667.

¹³⁹ See *id.* Other courts, particularly *Ambrogi*, have cited the legislative history discussion in *Coburn* as the weakest link in the argument opposing medical monitoring. *Ambrogi v. Gould, Inc.*, 750 F. Supp. 1233, 1246 n. 16 (M.D. Pa. 1990).

¹⁴⁰ See *Coburn v. Sun Chemical Corp.*, 28 Env't Rep. Cas. (BNA) 1665, 1667 (E.D. Pa. 1988).

tifies the subsection (23) or (24) lists of examples as exhaustive,¹⁴¹ the *Coburn* court declined the opportunity to make such a determination in the context of CERCLA's confusing history.¹⁴² A space exists into which medical monitoring could fit; the question facing the courts is whether or not it *should*.

Another source of concern for some courts, including the *Coburn* court, is the potential for overlap between medical monitoring and the functioning of the ATSDR.¹⁴³ Courts expressing this concern feel that the existence of the ATSDR and its ability to provide some limited coverage of medical treatment and observation further invalidate medical monitoring claims by individual plaintiffs.¹⁴⁴ Proponents of this argument, including the courts in *Daigle*, *Coburn* and *Ambrogi*, contend the ATSDR's creation shows Congress' intention to limit permissible attention to human health as it relates to toxic substance emissions to consideration by this agency.¹⁴⁵ Under section 9604(i)(4), the ATSDR is empowered to conduct tissue sampling, chromosomal testing and epidemiological studies, as well as any other assistance appropriate under the circumstances.¹⁴⁶ Additionally, as the *Coburn* court points out, provision for medical testing under the auspices of the ATSDR is further distinguished from other medical monitoring claims by CERCLA's separation of the ATSDR from other liability provisions.¹⁴⁷

Judicial ambivalence on the issue of medical monitoring as part of recoverable "response costs" is further complicated by courts' uncertainty regarding the propriety of awarding costs for future damages.¹⁴⁸ This is particularly true where those costs do not appear tailored to preventing continued or future contact between the public and toxic releases.¹⁴⁹ Courts' sympathy regarding plaintiffs adversely

¹⁴¹ See generally 42 U.S.C. §§ 9601-9675. See *Ambrogi*, 750 F. Supp. at 1247 (lists not exhaustive, but provide template with which proposed response costs should be consistent).

¹⁴² See *Coburn*, 28 Env't Rep. Cas. (BNA) at 1667-68.

¹⁴³ See *id.* at 1670; *Bolin v. Cessna Aircraft Co.*, 759 F. Supp. 692, 713 (D. Kan. 1991).

¹⁴⁴ See *Ambrogi*, 750 F. Supp. at 1248-49; *Chaplin v. Exxon*, 25 Env't Rep. Cas. (BNA) 2009 (S.D. Tex. 1986).

¹⁴⁵ See *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1536 (10th Cir. 1992); *Coburn*, 28 Env't Rep. Cas. (BNA) at 1670; *Ambrogi v. Gould, Inc.*, 750 F. Supp. 1233, 1249 (M.D. Pa. 1990).

¹⁴⁶ See 42 U.S.C. § 9604(i)(4), (5)(A) (1988).

¹⁴⁷ See *Daigle*, 972 F.2d at 1537; *Coburn v. Sun Chemical Corp.*, 28 Env't Rep. Cas. (BNA) 1665, 1670 (E.D. Pa. 1988); *Chaplin*, 25 Env't Rep. Cas. (BNA) at 2012.

¹⁴⁸ See *Woodman v. United States*, 764 F. Supp. 1467, 1469 (M.D. Fla. 1991); *Ambrogi*, 750 F. Supp. at 1248. See *Slagel*, *supra* note 108, at 44.

¹⁴⁹ See *Daigle*, 972 F.2d at 1535; *Ambrogi*, 750 F. Supp. at 1248.

affected by hazardous substances does not allow them to justify granting costs for medical monitoring they see as back door routes to the recovery of the costs of personal treatment or individual diagnoses.¹⁵⁰

A final concern for many courts facing medical monitoring claims is the compatibility of such claims with *both* of CERCLA's purposes: even if medical monitoring provides for the public health, some courts question its ability to facilitate hazardous substance cleanup.¹⁵¹ The question at issue in this particular debate is the legitimate duration and scope of a "cleanup." To courts opposing the inclusion of monitoring, like that in *Ambrogio*,¹⁵² acceptable cleanups are those focused on the "removal" of a particular site of a particular contaminant.¹⁵³ Where this is not possible, as in the case of detrimental human exposure to hazardous substances, awarding response costs is inappropriate.¹⁵⁴ At least some courts have taken comfort from the apparent ease of matching hazardous waste problems with an "appropriate" remedy based on its timeframe. As the *Ambrogio* court laid its scheme out, CERCLA should be restricted to the remediation of past damage, while RCRA is the proper vehicle for present problems.¹⁵⁵ The flaw in this type of reasoning is not factual error, since these *are* appropriate ways of dealing with the stated problems, but rather, incompleteness. While CERCLA might not have been intended as a cure-all for hazardous substance contamination,¹⁵⁶ it appears shortsighted to conceive of CERCLA as a mere dustpan, idle until something is broken.

3. Arguments in Favor of Medical Monitoring

For the courts which have held medical monitoring costs to be at least potentially recoverable as response costs under section 9607, the critical factor is the courts' ability, given the facts of a particular case, to characterize the monitoring as something other than reimbursement for treatment costs.¹⁵⁷ CERCLA was envisioned and designed primarily as a system for public, not private protection.¹⁵⁸ Accordingly,

¹⁵⁰ See Daigle, 972 F.2d at 1535.

¹⁵¹ See Bolin v. Cessna Aircraft Co., 759 F. Supp. 692, 713 (D. Kan. 1991).

¹⁵² See *Ambrogio v. Gould, Inc.*, 750 F. Supp. 1233, 1250 (M.D. Pa. 1990).

¹⁵³ See *id.* at 1246-47.

¹⁵⁴ See *id.* at 1250.

¹⁵⁵ See *id.* at 1247-48.

¹⁵⁶ See *id.* at 1248.

¹⁵⁷ See Tanenbaum, *supra* note 4, at 939.

¹⁵⁸ See *id.* at 925.

to qualify as a response cost, medical monitoring must be more than repayment for personal harms.¹⁵⁹ Thus, the most successful cases have been those following the standard enumerated in *Brewer v. Ravan*,¹⁶⁰ where medical monitoring of human health is used to assess the effects of hazardous waste on the public and environment.¹⁶¹

Under this "public welfare objective" test, courts' acknowledgment of CERCLA's failure to explicitly include medical monitoring does not doom the decision-making process.¹⁶² While remedies for individuals are beyond CERCLA's scope, the Act permits private actions for the protection of the environment and the health of the population at large.¹⁶³ To the extent that plaintiffs can characterize medical testing and monitoring as necessary to assess the extent or effect of a release of hazardous substances, courts like that in *Brewer*¹⁶⁴ have held the costs of those activities recoverable.¹⁶⁵

Using the public welfare approach, rather than the tic list favored by many courts opposing medical monitoring recoveries,¹⁶⁶ allows CERCLA to be applied more consistently. While a tic list leaves room for the exercise of some judicial discretion in examining monitoring claims, a given claim may be doomed by its failure to meet a particular criterion in a satisfactory way. Using the public welfare objective test cannot guarantee perfectly just results. Nevertheless, as cases like *Brewer* demonstrate, this test allows judges to hinge their decisions on the fit between the purposes of the monitoring effort and CERCLA's objectives. In doing so, the test prevents claims from failing on the basis of relative technicalities, and eliminates the temptation for judges to circumvent an existing standard in order to achieve a just result.

¹⁵⁹ See *id.* at 930.

¹⁶⁰ 680 F. Supp. 1176, 1179 (M.D. Tenn. 1988).

¹⁶¹ See *id.*

¹⁶² See *Jones v. Inmont Corp.*, 584 F. Supp. 1425, 1430 (S.D. Ohio 1984); *Brewer v. Ravan*, 680 F. Supp. 1176, 1179-80 (M.D. Tenn. 1988).

¹⁶³ See *Brewer*, 680 F. Supp. at 1179.

¹⁶⁴ See *id.*

¹⁶⁵ See *id.*; COOKE, *supra* note 50, at 14-56.

¹⁶⁶ See, e.g., *Coburn v. Sun Chemical Corp.*, 28 Env't Rep. Cas. (BNA) 1665, 1671 (E.D. Pa. 1988) (finding medical monitoring does not assist in monitoring or evaluating a release); *Woodman v. United States*, 764 F. Supp. 1467, 1469 (M.D. Fla. 1991) (adopting *Coburn* analysis regarding CERCLA response costs); *Chaplin v. Exxon Co.*, 25 Env't Rep. Cas. (BNA) 2009, 2012 (S.D. Tex. 1986) (finding medical care provisions of CERCLA separate from liability provisions, rendering medical monitoring costs unrecoverable); *Wicklind Oil Terminals v. Asarco, Inc.*, 590 F. Supp. 72, 77-78 (N.D. Cal. 1984), *rev'd, in part, appeal dismissed, in part*, 792 F.2d 887 (9th Cir. Cal. 1986) (costs of response must be incurred in order for parties to have standing to seek relief under CERCLA).

Despite opposition concerns,¹⁶⁷ pro-monitoring decisions do not strain the text of section 9601. Rather, pro-monitoring courts interpret the plain meaning of the text of subsections (23) and (24) guided by CERCLA's purposes: facilitating the prompt cleanup of hazardous waste facilities and placing the ultimate financial burden on the responsible parties.¹⁶⁸ This reading emphasizes the crucial difference between public health and personal injury and disease,¹⁶⁹ but does not call the legitimacy of public purpose monitoring into question.¹⁷⁰ By emphasizing the public focus of informational medical monitoring, the distinction also relieves pressure on the courts to step in and delineate the role of the ATSDR. Leaving treatment-oriented action and surveillance to the ATSDR, and allowing informational monitoring to be conducted independently at least reduces the need for concern regarding competition between the two systems. Particularly given at least one court's discomfort with the EPA's experience in handling long-term responses,¹⁷¹ judicial approval of this kind of system seems likely.

While there is no definitive and universally-accepted answer regarding the recoverability of claims for future damages, the judiciary as a whole is clearly unwilling to allow the door to close on the permissibility of recovery for such claims.¹⁷² Although claims for future costs receive particularly favorable attention where plaintiffs can show that at least part of the costs have already been paid,¹⁷³ such expenditures are not universally required. In considering such prospective costs, the courts take the appropriate step of allowing CERCLA to overlay tort considerations, mending a previously unforeseeable gap in the law.¹⁷⁴

Finally, courts supporting medical monitoring claims have not found it difficult to see how such monitoring furthers CERCLA

¹⁶⁷ See Coburn, 28 Env't Rep. Cas. (BNA) at 1670.

¹⁶⁸ Brewer v. Ravan, 680 F. Supp. 1176, 1178 (M.D. Tenn. 1988), citing Walls v. Waste Resource Corp., 761 F. Supp. 311, 318 (6th Cir. 1985).

¹⁶⁹ While medical *treatment* serves personal injury, medical *monitoring* serves the public as a whole. See Tanenbaum, *supra* note 4, at 929.

¹⁷⁰ See *id.* at 929-30.

¹⁷¹ See Artesian Water Co. v. Gov't of New Castle County, 605 F. Supp. 1348, 1359 (D. Del. 1985).

¹⁷² See Williams v. Allied Automotive, 704 F. Supp. 782, 784 (N.D. Ohio 1988); Jones v. Inmont Corp., 584 F. Supp. 1429, 1429-30 (S.D. Ohio 1984).

¹⁷³ See Brewer, 680 F. Supp. at 1179.

¹⁷⁴ See, e.g., *id.* (finding public health-related tests clearly necessary to evaluate and assess releases); Velsicol Chemical Corp. v. Reilly Tar & Chemical Corp., 21 Env't Rep. Cas. (BNA) 2119, 2121 (E.D. Tenn. 1984) (finding costs of identifying and allaying environmental problems associated with hazardous waste releases clearly removal costs under section 9601(23)).

cleanup actions.¹⁷⁵ While some courts are more hesitant than others to give unconditional support to monitoring's status as an acceptable cost of response,¹⁷⁶ those accepting monitoring have had little difficulty identifying and supporting monitoring's role in CERCLA cleanups.¹⁷⁷ The clearest articulation of this reaction comes from the court in *Velsicol Chemical Corp.*¹⁷⁸ In upholding a claim for investigative costs,¹⁷⁹ the *Velsicol* court stated, "[i]t is difficult to see how costs of identifying and determining how to allay the environmental problem . . . are not subsumed within the definition of response costs."¹⁸⁰ This characterization clarifies the role of medical monitoring in furthering CERCLA's efforts to control and prevent toxic releases,¹⁸¹ finding that the statutory definition of "removal" contemplates tracking actions to determine the need for removal of contaminants and protection of the public.¹⁸²

Courts' ability to reconcile the facts regarding medical monitoring in individual cases with CERCLA's frustratingly vague language demonstrates the extent to which these courts have found public health-oriented monitoring consistent with CERCLA's purpose.¹⁸³ Acknowledging the elusive nature of a comprehensive definition of the

¹⁷⁵ See, e.g., *Brewer*, 680 F. Supp. at 1179; *Velsicol Chemical Corp.*, 21 Env't Rep. Cas. at 2121; *infra* note 176.

¹⁷⁶ See *Brewer*, 680 F. Supp. at 1179 (informational monitoring to assess effect of hazardous substance release on the public qualifies as response cost); *Williams v. Allied Automotive*, 704 F. Supp. 782, 784 (N.D. Ohio 1988) (future medical monitoring costs not categorically unrecoverable as response costs); *Jones v. Inmont Corp.*, 584 F. Supp. 1429, 1429-30 (S.D. Ohio 1984) (definition of "response" is broadly drawn and would be premature to say medical testing does not qualify).

¹⁷⁷ See *Brewer*, 680 F. Supp. at 1179; *Velsicol Chemical Corp.*, 21 Env't Rep. Cas. (BNA) at 2121.

¹⁷⁸ *Velsicol Chemical Corp.*, 21 Env't Rep. Cas. (BNA) at 2119.

¹⁷⁹ The court defined these costs as "monies, time and efforts expended in order to identify the problem and determine how the problem can best be allayed." See *id.* at 2121.

¹⁸⁰ See *id.*

¹⁸¹ See *Williams*, 704 F. Supp. at 784; *Jones*, 584 F. Supp. at 1429.

¹⁸² See *Jones v. Inmont Corp.*, 584 F. Supp. 1429, 1429 (S.D. Ohio 1984). Although the issue of recovery for recovery of *future* costs has not been heartily endorsed, at least one court has refused to exclude it entirely. *Williams v. Allied Automotive*, 704 F. Supp. 782, 784 (N.D. Ohio 1988).

¹⁸³ See, e.g., *Brewer v. Ravan*, 680 F. Supp. 1176, 1179 (M.D. Tenn. 1988); *Williams*, 704 F. Supp. at 784 (statutory definition of "remove" clearly contemplates "such actions as are reasonably necessary to making a reasoned determination of whether physical removal of hazardous contaminants is necessary in a given situation."); *United States v. Conservation Chemical Co.*, 628 F. Supp. 391, 406 (W.D. Mo. 1985) (costs of activities useful and necessary to the formulation of proposed remedy are conceivably recoverable as part of the response costs for the remedy); *Adams v. Republic Steel Corp.*, 621 F. Supp. 370, 376 (W.D. Tenn. 1985); *Jones*, 584 F. Supp. at 1429-30.

response costs identified in section 9607(a),¹⁸⁴ courts have nonetheless found that public health related medical tests and screenings are necessary to “monitor, assess [or] evaluate a release” and so constitute removal and remedial action under subsections (23) and (24).¹⁸⁵ As both removal and remedial actions are parts of “response” as defined in section 9601(25), these testing and screening costs may be recoverable under section 9607(a),¹⁸⁶ at least to the extent that plaintiffs seek recovery of monitoring costs for the purpose of protecting the public health by identifying and assessing health problems emerging from releases.¹⁸⁷

Medical monitoring is presently a controversial topic in the courts, and the outcome of cases concerning the recoverability of monitoring costs under CERCLA are difficult to predict.¹⁸⁸ A first hurdle for pro-monitoring plaintiffs is often judicial reluctance to award damages in the absence of some demonstrable harm.¹⁸⁹ Fortunately, CERCLA provides alternatives to recovery under tort law.¹⁹⁰ While this permits plaintiffs to avoid the obstacle of tort principles, however, monitoring’s proponents must still struggle to persuade courts to wade through CERCLA’s notoriously problematic language dealing with response costs.¹⁹¹ Where courts see medical monitoring as primarily concerned with the treatment and/or diagnosis of particular individuals, as the court did in *Daigle v. Shell Oil Co.*,¹⁹² they are generally unable to reconcile the plaintiffs’ claims with CERCLA’s explicitly public health and welfare orientation.¹⁹³ These courts are also often simultaneously concerned with using judicial power to promote CERCLA’s encroachment into the realm of the established ATSDR.¹⁹⁴ Where, however, courts can find public health benefits resulting from plaintiffs’ medical monitoring, as did the court in

¹⁸⁴ *Brewer v. Ravan*, 680 F. Supp. 1176, 1179 (M.D. Tenn. 1988).

¹⁸⁵ *See id.*

¹⁸⁶ *See id.*; *Jones*, 584 F. Supp. at 1429.

¹⁸⁷ *See Brewer*, 680 F. Supp. at 1179; *Williams*, 704 F. Supp. at 784 (statutory definition of “remove” clearly contemplates “such actions as are reasonably necessary to making a reasoned determination of whether physical removal of hazardous contaminants is necessary in a given situation.”); *Conservation Chemical Co.*, 628 F. Supp. at 406 (costs of activities useful and necessary to the formulation of proposed remedy are conceivably recoverable as part of the response costs for the remedy); *Adams*, 621 F. Supp. at 376; *Jones*, 584 F. Supp. at 1429–30.

¹⁸⁸ *See supra* note 94 and 104.

¹⁸⁹ *See generally Slagel, supra* note 108.

¹⁹⁰ *See supra* note 114.

¹⁹¹ *See supra* note 130.

¹⁹² 972 F.2d 1527 (10th Cir. 1992).

¹⁹³ *See supra* note 104.

¹⁹⁴ *See supra* note 145.

Brewer v. Ravan,¹⁹⁵ they often find the monitoring efforts recoverable for its public health benefits, and for its ability to promote and further CERCLA cleanup actions.¹⁹⁶

V. LEGISLATIVE HISTORY

As passed on December 11, 1980, CERCLA was a last-minute revision of a measure first approved by the House of Representatives.¹⁹⁷ In its urgency to acquire sufficient support in both houses to pass a hazardous wastes law before the close of Carter's presidency, Congress effected a number of drastic political compromises¹⁹⁸ whose practical effects proved extensive. No committee report accompanied the Senate's revisions of the proposal, and the House had little opportunity to discuss them.¹⁹⁹ The bill was offered on an all-or-nothing basis, and over clamorous objections, Congress took it.²⁰⁰

A. *The Major Bills*

Congress enacted the Resource Conservation and Recovery Act of 1976 (RCRA) to respond to the problems created by escalating hazardous waste production.²⁰¹ Specifically, RCRA was designed to protect health and the environment and to conserve valuable material and energy resources by regulating the disposal of toxic substances.²⁰² Although effective on a limited scale,²⁰³ RCRA proved inadequately funded and staffed to fulfill its purposes. Recognizing the need for a more comprehensive and better-funded plan,²⁰⁴ both the House and Senate proposed bills to this end. Four major bills emerged from these proposals: S. 1341, S. 1480, H.R. 85, and H.R. 7020.²⁰⁵ Although none of these bills was adopted into law, they provide background on the lengthy process that ultimately yielded CERCLA.²⁰⁶

¹⁹⁵ 680 F. Supp. 1176, 1179 (M.D. Tenn. 1988).

¹⁹⁶ See *supra* note 104.

¹⁹⁷ COOKE, *supra* note 50, at 12-12.

¹⁹⁸ See *id.*; Tanenbaum, *supra* note 4, at 930.

¹⁹⁹ See COOKE, *supra* note 50, at 12-12.

²⁰⁰ See *id.*

²⁰¹ See David A. Rich, Comment, *Personal Liability for Hazardous Waste Cleanup: an Examination of CERCLA § 107*, 13 B.C. ENVTL. AFF. L. REV. 643, 646 (1986).

²⁰² See *id.* at 647.

²⁰³ See *id.* at 649.

²⁰⁴ See *id.* at 650.

²⁰⁵ See SUPERFUND, *supra* note 118, at xiii.

²⁰⁶ CERCLA as passed in 1980 was a compromise first presented on the floor of the Senate. See *id.*

H.R. 85 was introduced by Representative Mario Biaggi on January 15, 1979.²⁰⁷ As proposed, H.R. 85 created two funds, one for oil spills, and one to cover spills of certain hazardous substances into navigable waters, to be funded by various tax revenues.²⁰⁸ The measure also provided for a scheme of strict joint and several liability, and included liability for both governmental and private costs and injuries resulting from discharges of hazardous substances.²⁰⁹

H.R. 7020, presented on April 2, 1980 and sponsored primarily by Representative James Florio, was designed to address the increasing health and environmental problems associated with hazardous waste dumpsites.²¹⁰ As passed by the House, the bill imposed strict liability, as well as joint and several liability for both governmental and specified private damages, and authorized the government to respond to dangerous releases of hazardous substances, or threats of such releases, at abandoned and inactive waste sites.²¹¹ The plan was financed by the establishment of a \$600 million Hazardous Waste Response Fund to be derived in equal shares from government appropriations and from fees on petroleum and petrochemical products of various kinds.²¹² As discussed below, while the House bill died in the Senate, the bill's number did not.²¹³

Senator John Culver introduced S. 1341 on June 14, 1979.²¹⁴ As proposed, this measure established a \$1.6 billion fund taken from government appropriations and fees imposed on oil, chemical feeds, and inorganic substances.²¹⁵ S. 1341 proposed a system of strict and

²⁰⁷ See *id.* at xiii. After its introduction, the bill was referred to the Committee on Merchant Marine and Fisheries, and subsequently, to subcommittee. *Id.* at xiv. After the addition of multiple amendments, H.R. 85 was reported to the full House on June 20 with report No. 96-172, Part 3. *Id.* at xiv. Probably as a result of opposition by the oil and chemical industry to the bill's industry liability provisions, this revision by the Ways and Means Committee was not considered by the full House. *Id.* A substitute, however, developed by Rep. John Breau, apparently reduced industry opposition; this substitute was taken up by the Committee of the Whole on September 18 and 19. *Id.*

²⁰⁸ See *id.*

²⁰⁹ The House passed the bill to the Senate, where it died after referral to the Senate Committee on the Environment and Public Works. See *id.*

²¹⁰ See 126 Cong. Rec. 26, 337 (1980) (remarks by Reps. Florio and Staggers). After its introduction and referral to various committees, H.R. 7020 ultimately was referred to and agreed upon by the Committee of the Whole. See SUPERFUND, *supra* note 118, at xv.

²¹¹ See SUPERFUND, *supra* note 118, at xv-xvi.

²¹² See *id.* at xv. After enactment by the House, the measure went on to the Senate and its committee on the Environment and Public Works. See *id.* at xvi. Although neither this committee nor the Senate ever formally considered the bill in its house version, H.R. 7020 was compared to S. 1480 in Senate debate on the latter measure. See *id.* at xvi.

²¹³ See SUPERFUND, *supra* note 118, at xvi.

²¹⁴ See *id.*

²¹⁵ See *id.*

joint and several liability on owners and operators of polluting vessels and facilities operated on navigable waters.²¹⁶

S. 1480 was introduced by Senators Culver and Edmund Muskie in early July, 1979, shortly after Senator Culver's introduction of S. 1341.²¹⁷ To assume liability for damages concerning certain closed hazardous waste disposal areas,²¹⁸ the Senate's bill established a multibillion dollar fund, as well as making provision for imposition of strict joint and several liability on a spectrum of potentially liable parties, for both governmental and private damages, including medical expenses.²¹⁹

B. *The Emergence of CERCLA*

By November of 1980, it had become clear that none of the proposed bills would be bicamerally adopted as written.²²⁰ In order to pass a bill before the close of the 96th Congress—before the change of the party controlling the administration and the Senate—the Senate proposed two compromises.²²¹ The first, Amendment 2622, proposed by Senators Stafford, Mitchell, *et al.* as a complete substitute for the substantive provisions of S. 1480, was found unacceptable, and failed.²²² The second proposal, however, the Stafford-Randolph Compromise introduced on November 24, 1980, met with great success.²²³ The measure

²¹⁶ *See id.* After its introduction, the bill was referred to the Subcommittees on Environmental Pollution and Resource Protection of the Senate Committee on the Environment and Public Works. *See SUPERFUND, supra* note 118, at xvi. The bill died in Senate after joint hearings with S. 1480 on June 21 and July 19 and 20, 1979. *See id.*

²¹⁷ *See id.* at xvii. The bill was referred to the Subcommittees on Environmental Pollution and Resource Protection, and while neither subcommittee produced a printed version of the amended bill, the whole committee did produce two preliminary versions of their revisions. *See id.* at xvii. On July 11, after the subcommittees' amended bill was forwarded to it for amendment, the full committee reported favorably on the bill to the Senate as a whole. *See SUPERFUND, supra* note 118, at xvii.

²¹⁸ *See id.*

²¹⁹ *See id.* at xvii–xviii. To facilitate findings of liability, the bill included presumptions of causation and modified evidentiary rules to be used in resulting litigation. *See id.* at xviii. So amended, S. 1480 was referred to the Senate Committee on Finance on October 10, 1980. *See id.* at xviii. Apparently intending to expedite the bill's floor consideration, the Committee reported it without amendment, recommendation, or written report on November 18, but the bill was never considered by the full Senate. *See SUPERFUND, supra* note 118, at xviii.

²²⁰ *See id.* at xviii. Sen. Stafford felt that the failure of H.R. 85 and H.R. 7020 was due, at least in part, to the bills' narrow scope. *See* 126 CONG. REC. S14968 (daily ed. Nov. 24, 1980) (statement by Sen. Stafford).

²²¹ *See SUPERFUND, supra* note 118, at xviii.

²²² *See id.* at xviii–xix.

²²³ *See* 126 CONG. REC. S14967–68 (daily ed. Nov. 24, 1980) (comments by Sen. Stafford and Sen. Randolph).

was passed the same day,²²⁴ with very little opportunity for discussion.²²⁵ Immediately after passing on the Stafford-Randolph plan, the Senate took up H.R. 7020 as passed by the House.²²⁶ The Senate struck all provisions of the existing H.R. 7020, inserted the Stafford-Randolph version of S. 1480 into the eviscerated House measure, and passed it by a voice vote.²²⁷ This Senate version of H.R. 7020 was then sent to the House, where it was taken up on December 3.²²⁸ Despite voluble protest, the Senate version was enacted by the House that day,²²⁹ and was signed into law by President Carter on December 11, 1980.²³⁰

The Senate's priority in passing the CERCLA bill was a desire to protect the abstract concepts of public health and the environment, not personal health or property.²³¹ Unfortunately, pressure to pass a bill furthering these interests within a limited timeframe precluded adequate discussion and consideration of its wording and provisions, and resulted in large-scale excisions of provisions which, had Congress had more time, would have been examined in a much less cursory fashion, and would have been unlikely to have been conceded.²³² Both supporters of the bill²³³ and their opposition emphasized the need to view the bill as only the skeleton of a satisfactory law,

²²⁴ See SUPERFUND, *supra* note 118, at xix.

²²⁵ See Anderson, *supra* note 33, at 346.

²²⁶ See SUPERFUND, *supra* note 118, at xxi.

²²⁷ See *id.* at xxi. 126 CONG. REC. S15009 (daily ed. Nov. 24, 1980). These procedural gymnastics were required because of the tax provisions in the bill; the Constitution requires revenue bills to originate in the House of Representatives. See SUPERFUND, *supra* note 118, at xxi.

²²⁸ See SUPERFUND, *supra* note 118, at xxi.

²²⁹ See *id.*

²³⁰ Pub. L. No. 96-510.

²³¹ See Tanenbaum, *supra* note 4, at 931.

²³² For instance, S.1480 had provisions for private recovery of medical expenses, but deleted them in an effort to get bipartisan support. See *id.* at 927.

Sen. Stafford admits the wholesale nature of the excisions in his comments on his own compromise:

[I]n consideration of the urgent need for remedial legislation to respond to the problems caused by the release of chemical poisons into our environment, I am putting forward a compromise. This compromise incorporates those parts of S.1480, H.R.7020 and H.R.85 on which there is broad consensus. Given the lateness of this session, it is my hope that this proposal will be an acceptable compromise for all concerned.

126 CONG. REC. S14642 (daily ed. Nov. 18, 1980) (remarks by Sen. Stafford).

Additionally, Sen. Stafford points out omissions resulting from the bill's hasty passage: "Mr. President, there are elements of S.1480 that are not contained in this substitute bill. The provisions we have eliminated were those that generated considerable controversy, resulting in delay of Senate passage of S.1480." 126 CONG. REC. S14643 (daily ed. Nov. 18, 1980) (remarks by Sen. Stafford).

²³³ Since proponents are expected to understand their proposals, their explanatory statements are usually more important than those of opponents. See SUPERFUND, *supra* note 118, at ix.

requiring additional steps to insure the transition to an acceptable long-term means of dealing with hazardous wastes.²³⁴ Despite the substantial debate on whether the bill's imperfections should prevent its passage, Congress ultimately decided they should not.²³⁵ The result, CERCLA, was recognized as an unsatisfactory solution even at the time of its passage,²³⁶ but was passed on the belief that the issue had reached the point of "now or never," and that some action, even one as plainly slipshod as this, was preferable to the danger that subsequent Congresses would be unable to pass any measure at all.²³⁷

A provision for out-of-pocket medical expenses was just one of the victims of the wholesale excisions made in the interests of passing the bill under the wire.²³⁸ The debate, limited as it was by the time constraints imposed by the impending change in party power, centered on the effect of the compromises on the practical effects of the bill, and on the compatibility of those effects with the bill's overriding purpose.²³⁹ Both houses of Congress were frank in their acknow-

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Mr. Speaker, one Member in the other body who dislikes what we send back can kill the whole product. We have worked on this for 6 years. Let us be pragmatic and let us still be a little idealistic and say we have a product that while not perfect it is far better than what we have now, which is nothing. Vote for this now and next year we have commitment that the oilspill section will be addressed and will be taken care of. 126 CONG. REC. H11792 (daily ed. Dec. 3, 1980) (remarks by Rep. Breaux).

"I am not happy with this bill, but I would be far sadder if we did not pass it. We must begin. We must start." 126 CONG. REC. H11793 (daily ed. Dec. 3, 1980) (remarks by Rep. Gibbons).

²³⁵ For examples of House debate surrounding the bill, see 126 CONG. REC. H11774-803 (daily ed. Dec. 3, 1980).

²³⁶ "It is on the face of it a very, very bad bill." 126 CONG. REC. H11793 (daily ed. Dec. 3, 1980) (remarks by Rep. Roberts).

²³⁷ "This compromise embodies concessions that I would otherwise not make. But I make the concessions because, even as we discuss the issue in this chamber, more chemical poisons are being released into our environment, threatening the health and well-being of present and future generations of Americans." 126 CONG. REC. S14642 (daily ed. Nov. 18, 1980) (remarks by Sen. Stafford).

"That text [the Stafford-Randolph compromise] will show that supporters of the legislation made some additional major concessions in the final effort to achieve a superfund bill this year." 126 CONG. REC. S14967 (daily ed. Nov. 24, 1980).

"Certainly, if this bill goes back, it will never see the light of day. I say to this body, from my own practical experience, this is not a full loaf, but let us take what we can get. . . ." 126 CONG. REC. H11793 (daily ed. Dec. 3, 1980) (remarks by Rep. Gibbons).

"I regret this legislation is not perfect. Had we not taken so long in getting it through our deliberative processes, there might have yet been time to consider perfection; yet if we insist on changing it now with no time left to the Senate for concurrence, then the issue self-destructs before our very eyes." 126 CONG. REC. H11797 (daily ed. Dec. 3, 1980) (remarks by Rep. Martin).

²³⁸ See 126 CONG. REC. S14967 (daily ed. Nov. 24, 1980) (statement by Sen. Stafford); 126 CONG. REC. S14973 (daily ed. Nov. 24, 1980) (statement by Rep. Mitchell).

²³⁹ See 126 CONG. REC. S14929-16428 (daily ed. Nov. 24-Dec. 12, 1980); 126 CONG. REC. H11773-12199 (daily ed. Dec. 3, 1980).

ledgment of the fact that the most controversial portions of the bill were eliminated.²⁴⁰ Unsurprisingly, much of the eliminated material dealt with liability for damage and danger to human health.²⁴¹ That excision of these portions of the original bills and subsequent compromises facilitated passage of the sanitized bill in no way indicates that the changes were seen as improvements in any context other than the political.²⁴² As time-consuming as Congress supposed the inclusion of private recovery provisions would be, individual members were outspoken in their belief that removal of those provisions not only eviscerated the bill, but rendered it inconsistent with its primary purposes.²⁴³ While recognizing the importance of protecting natural resources given the known adverse effects of hazardous substances on human health,²⁴⁴ members of both the House and Senate were vocal about their dissatisfaction with a system that failed to address the effects of hazardous substances on people.²⁴⁵

The Congressional concern regarding private recovery also encompassed debate on the inclusion of medical monitoring costs. Recognition in both Houses of the need to include health monitoring and surveillance in the hazardous substance context was backed by urging

²⁴⁰ During Senate debate on the Stafford-Randolph substitution to S. 1480, Sen. Stafford conceded that the compromise eliminates "at least the most controversial" elements of the other three bills: "Frankly, it eliminates 75 percent of what we were seeking in S.1480. But knowing of the urgent need for legislation, we were willing to do that." 126 CONG. REC. S14967 (daily ed. Sept. 23, 1980) (statement by Sen. Stafford).

²⁴¹ For example, Rep. Oakar raised issues of health problems associated with dumping. 126 CONG. REC. H9472 (daily ed. Sept. 23, 1980) (remarks by Rep. Oakar).

²⁴² See *supra* notes 232-241, *infra* notes 243-249 and accompanying text.

²⁴³ "The guiding principle of those who wrote S.1480 was that those found responsible for harm caused by chemical contamination should pay for the costs of that harm. We are abandoning that principle here today when the damage involved is to a person." 126 CONG. REC. S14973 (daily ed. Nov. 24, 1980) (remarks by Sen. Mitchell).

²⁴⁴ "As we all know, hazardous substances have wide-ranging effects including illness, birth defects, even death, as well as destruction of natural resources. Under S.1480, a party could be held responsible for those wide-ranging effects, specifically: . . . Costs of expert witness fees, health studies, and diagnostic examinations." *Id.*

²⁴⁵ "In this bill, we are telling the people of this country that under our value system a property interest is worth compensating but human life is not." *Id.*

"Neither logic nor compassion, good government nor commonsense compel this result. It is simply a failure of will on the part of Congress to deal with what is the most serious part of the problem—injuries to persons." *Id.* at S14974.

The gentleman from New Jersey's view is that this version is identical to the House-passed H.R. 7020. It is not. He even stated that the Senate added H.R.85's amendments to the Clean Water Act dealing with hazardous spills into navigable water—but he did not mention that they dropped H.R.85's third-party damages—the provisions that help people.—People have been left out of the bill before us today. Only things are covered. *Id.* at H11795 (daily ed. Dec. 3, 1980) (remarks by Rep. Snyder).

from sources outside Congress.²⁴⁶ Both Congress and the outside sources recognized the need for legislation on hazardous waste cleanup, particularly given the courts' unwillingness to speak to the issue in a unified way.²⁴⁷ Congress was clear in its finding that studies conducted to determine the effects of hazardous substance contamination would be relevant to proceedings involving claims for medical expenses.²⁴⁸ Further, despite Congress's priority in passing a bill at nearly any cost, there was specific objection to the removal of medical monitoring considerations.²⁴⁹ Although medical monitoring provisions fell to the sweeping expurgations undertaken to expedite CERCLA's hasty passage, they were neither disregarded nor eliminated on their merits. As the volume of ensuing litigation demonstrates, while CERCLA passed without provision for monitoring, the value of the exclusion was fleeting, at best.

VI. POSSIBLE SOLUTIONS

The confusion and inconsistency surrounding CERCLA response costs makes clear the need for a single, unified system of decision-

"The liability coverages are totally inadequate. They do not take care of people. They take care of cleanup and damages to natural resources and, as a consequence of that, the Federal preemption provision is deficient." *Id.* at H11796 (daily ed. Dec. 3, 1980) (remarks by Rep. Snyder). In the words of Rep. Snyder during House debates on H.R. 7020 as amended by the Senate on December 3, 1980, many felt the compromise meant the bill did not do what citizens wanted it to do: "it does not help people. . . ." *Id.* at H11796 (daily ed. Dec. 3, 1980).

²⁴⁶ Evidence that Congress specifically contemplated provisions for medical monitoring, even though provisions were not included in final form, can be found in S. Rep. No. 848. SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, ENVIRONMENTAL EMERGENCY RESPONSE ACT, S. REP. NO. 848, 96th Cong., 2d Sess. 114 (1980), *reprinted in* SUPERFUND, *supra* note 118, vol. I at 308. See *Hearings on S.1480 Before the Comm. on Finance*, 96th Cong., 2d Sess. 664-65 (1980) (written statement of John J. Sheehan, Legislative Director, United Steelworkers of America), *reprinted in* SUPERFUND, *supra* note 118, vol. I at 319-20 ("(1) specifically authorizes the admission of medical and scientific studies in courts of law including the results of animal studies, tissue studies, and microorganism studies which, in the past, have been excluded by some courts . . .").

²⁴⁷ See *Hearing on S.1341 and S.1480 Before the Subcomm. on Environmental Pollution and Resource Protection and Comm. on Environment and Public Works*, 96th Cong., 1st Sess. 225 (1979) (written statement of Peter H. Weiner, Special Assistant, Governor's Office, California), *reprinted in* SUPERFUND, *supra* note 118, vol. I at 320 ("It is vital that this bill attack this knotty problem in two ways. First, we urge substantial funding for epidemiological, laboratory, and field research to assess the human and environmental hazards posed by specific substances or specific sites.").

²⁴⁸ See S. 1480 Staff Working Paper No. 1, Senate Committee on Environment and Public Works, § 4(c)(a)(A) (Feb. 1, 1980).

²⁴⁹ "People are begging us not to weaken this bill. If anything, strengthening it with the Gore amendments, strengthen it with the amendments of the gentleman from Texas [Rep. Eckhardt]

making regarding these costs.²⁵⁰ There are two good possibilities for eliminating the confusion surrounding medical monitoring suits while simultaneously fulfilling CERCLA's purposes of facilitating cleanups and protecting human health: one relies upon the judiciary; the other, on the legislature. As a preliminary measure, both options require a clear standardization of the definition of medical monitoring. That definition should be the monitoring of long-term human health conditions in communities affected or suspected of being affected by hazardous substance contamination, where such monitoring is used as an information-gathering tool to track the contamination's spread and effects. While each individual's need for medical care after exposure to toxic substances is important, due to CERCLA's explicit focus on public health, for the purposes of the following proposals, "medical monitoring" does not include examinations of affected individuals conducted as part of a regimen for individual treatment. Both ideas attempt to diminish the unnecessary litigation currently surrounding the issue of medical monitoring while furthering efforts to handle the national crisis of hazardous substance contamination.

A. *By the Courts*

One alternative in handling medical monitoring cases would be to leave the courts to complete the interpretive task already begun in the lower courts, and in the Tenth Circuit Court of Appeals,²⁵¹ to establish a single, uniform method of deciding medical monitoring suits.²⁵² If this judicial route is selected, future courts should align themselves with the decision in *Brewer*, and view expenses for medical testing and screening as permissible response costs under sections 9607(a) and 9601(23) when the results are used to assess the effect of a toxic release on public health.²⁵³ Although the *Brewer* decision may more accurately be described as a refusal to discredit medical monitoring claims than an aggressive championing of them, clarifying the public health bent of medical monitoring itself would mitigate any opposition the *Brewer* decision may contain. Although the *Brewer* court ultimately found in favor of the recoverability of medical moni-

to provide minimal funding for the study of health effects, something we are not even doing now. . . ." 126 CONG. REC. H9617 (daily ed. Sept. 19, 1980) (remarks by Rep. Moffett).

²⁵⁰ See Weinstein, *supra* note 110, at 1390-91.

²⁵¹ See generally Daigle v. Shell Oil Co., 972 F.2d 1527 (10th Cir. 1992).

²⁵² See Weinstein, *supra* note 110, at 1390-91.

²⁵³ See *Brewer v. Ravan*, 680 F. Supp. 1176, 1179 (M.D. Tenn. 1988).

toring costs for public welfare-type monitoring, the court made clear its position that individual treatment costs are unrecoverable as response costs, and indicated its concern regarding the potential for overlap of these two monitoring approaches in individual cases.²⁵⁴ By redefining medical monitoring in such a way as to specifically exclude observations conducted with a view to personal treatment, these kinds of judicial concerns could be allayed.

The redefinition would mean that medical monitoring would necessarily and exclusively refer to public evaluation-oriented surveillance. In turn, this would have the practical effect of eliminating any uncertainty regarding the appropriateness of terming medical monitoring a "response cost." Since costs "necessary" to evaluate a release of hazardous material constitute "removal" under subsection (23), and "removals" are encompassed by "responses,"²⁵⁵ which, in turn, are privately recoverable under section 9607(a)(1)-(4)(B),²⁵⁶ the recoverability of monitoring costs should be relatively clear.

Allowing recovery of these costs should be permitted, even though monitoring is a preliminary cost relative to both private and governmental cleanups.²⁵⁷ As one commentator has pointed out, conditioning access to funding on, among other factors, whether funds were spent on conceiving or implementing the cleanup seems at best, arbitrary.²⁵⁸ Practically, neither of the two steps would be of any value without the other. What is not clear, however, is the status of the courts as the best vehicle for effecting this change. While, as this discussion indicates, the courts could conceivably solve the medical monitoring problem by agreeing to follow *Brewer*, a judicial approach presents potential problems. Even given judicial consensus on the desirability of permitting recovery of medical monitoring costs as defined above, the large number of courts facing the issue seems destined to lead to inconsistency and variations in interpretation. Refining the definition of "medical monitoring" runs the risk of becoming only an academic exercise if different courts are left without guidance in interpreting this definition. The burden imposed on the courts through the continuation of this kind of discretion is likely to result in redefining "medical monitoring" with the same lack of uniformity suffered under current efforts at interpretation. Secondly, in addition to undermining

²⁵⁴ See *id.*

²⁵⁵ See 42 U.S.C. §§ 9601(23), 9607(a).

²⁵⁶ See *Brewer*, 680 F. Supp. at 1178.

²⁵⁷ See Gaba, *supra* note 75, at 215.

²⁵⁸ See *id.*

the effectiveness of a more specific term, leaving medical monitoring in the hands of the court is counter to principles of judicial economy.²⁵⁹ Given the finite nature of judicial and financial resources, forcing the courts to consider medical monitoring on a case-by-case basis, even allowing them use of a more narrowly-defined medical monitoring standard, is unnecessary and wasteful.

B. A Legislative Approach

Despite the potential success of a judicial solution, a case-by-case determination is cumbersome and uncertain.²⁶⁰ A more efficient and satisfactory solution would be the development of a single substantive law which would make determining the outcome of medical monitoring actions more certain. A legislative solution would eliminate much unnecessary litigation, and would facilitate settlement of legitimate claims.²⁶¹ Legislative amendment of existing CERCLA provisions to include a provision for automatic medical monitoring to be conducted as part of every CERCLA cleanup action would serve this purpose.

While opponents are likely to argue that such action would be costly and inefficient, these contentions lose much of their impact when considered in light of the existing state of CERCLA administration and the judicial alternatives for improving that administration, some of which are discussed in the previous section of this comment. First, and most convincingly, even given the initial cost of a legislative solution to the medical monitoring debate, cost is not CERCLA's only consideration. Opponents of medical monitoring argue that CERCLA was not enacted to redress all wrongs stemming from hazardous waste disposal; neither, however, was it designed to allow responsible parties to avoid making good on wrongs which *are* contemplated under CERCLA simply because those remedies are expensive. CERCLA's focus is the environment and public welfare, not cutting costs.

Second, given the relative ease of modifying CERCLA's current provisions to accommodate these additions, cost is not the only consideration.²⁶² Even given the certainty that these modifications will involve some increased costs, the impact of arguments against any realistic increase is greatly reduced by the cost and inefficiency of the present case-by-case solutions and the proportions and potential effects of hazardous wastes.

²⁵⁹ See Weinstein, *supra* note 110, at 1389.

²⁶⁰ See *id.* at 1391; *supra* note 104 and accompanying text.

²⁶¹ See Weinstein, *supra* note 110, at 1392.

²⁶² See Tanenbaum, *supra* note 4, at 950.

1. Practical Application of a Legislative Scheme

a. *Through the ATSDR*

For monitoring to be effective as a means of protecting public health by tracking the spread and effects of contamination, it must be widespread, including all sites addressed by CERCLA cleanups.²⁶³ While the ATSDR is the most likely existing agency to handle these responsibilities, it cannot do so in its current form.²⁶⁴ Either the agency must be modified, or a new agency created to fill in the gaps left by the large-site focus of the current ATSDR.²⁶⁵

Retaining and expanding the current ATSDR is probably the best route to universal medical monitoring because of the ATSDR's ability to discharge its present duties, and for the practical considerations of existing sources of funding and existing organization. CERCLA's language, particularly after the SARA amendments, authorizes the type of monitoring suggested here, but on a smaller scale.²⁶⁶ The critical problems appear to be in streamlining and funding the ATSDR to enable it to increase its monitoring capacity.²⁶⁷ Building monitoring into cleanup procedures would obviously increase total response costs.

At least part of that cost, however, could be recouped in the form of time and materials saved by streamlining the existing monitoring system. As the procedure currently stands, the evaluation of waste sites includes at least three separate reporting efforts for every full-scale assessment action.²⁶⁸ Simplifying the evaluation process would mean less legwork and thus, less time and financial burden, freeing both people and resources to work on more sites in a limited time. Additionally, by reorienting the ATSDR exclusively to monitoring, monies could be redirected from current use in medical care in cases of public emergency²⁶⁹ to future use in a uniform monitoring system where the long-term value of each dollar is likely to be greater.

²⁶³ See *id.* at 946.

²⁶⁴ See *supra* notes 90-94 and accompanying text.

²⁶⁵ See Tanenbaum, *supra* note 4, at 946.

²⁶⁶ Section 9604(i)(6)(B) authorizes health assessments where individuals provide information that people have been exposed to toxic substances which are the probable cause of harm. See 42 U.S.C. § 9604(i)(6)(B) (1988).

²⁶⁷ See *supra* notes 90-94 and accompanying text.

²⁶⁸ Evaluations involve: (1) initial assessment on advice of individual or physician, (2) report of assessment and results to EPA and each affected state, and (3) determination of whether to put site on NPL, conduct a pilot study on a control group of exposed individuals, and/or conduct a full-scale assessment. See COOKE, *supra* note 50, § 13.01[4][d] 13-36.14-36.15; *supra* notes 78-89 and accompanying text.

²⁶⁹ See Tanenbaum, *supra* note 4, at 935.

Cost-cutting measures, however, are clearly only loose ends relative to the total cost increase involved in expanding the dimensions of the ATSDR's monitoring system. Additional revenues would be required, and could be accrued by expanding the scope of current tax-based funding procedures²⁷⁰ to include more of the activities and products currently involved in or benefitting from waste-producing processes.²⁷¹

b. Through a New, Dependent Agency

If, however, there is significant opposition to the idea of this reformulation of the ATSDR, governmental control of monitoring might be handled by the creation of a new agency, to work as a companion to the ATSDR, and possibly under ATSDR control. Ideally, such an agency would be responsible only for monitoring actions. To prevent disputes about overlaps in territory, or inconsistency in administration, this subordinate agency would do best to assume all the ATSDR's current responsibility for actual monitoring, and leave the original ATSDR to its compilation duties.²⁷² Funding and staffing issues would have to be resolved in a manner similar to that which might be used for expanding the ATSDR.

Despite the promise of such a new agency, however, opponents could be expected to argue convincingly that such a move would have drawbacks. The two major complaints would likely be those based on cost, and those questioning the wisdom of expanding an already intimidating bureaucratic system. Both these concerns may best be addressed less on the independent merits of a new agency, and more on the chances of success and improvement offered by the creation of such an agency, when compared with our present system. While there is no question that building and organizing a bureaucratic agency would be expensive, particularly in the startup phases, and would ultimately represent another office in a system already legendary for its massive inefficiency, these drawbacks simply do not outweigh the flaws in the system as it exists today. If a new agency is costly, it is no more so in the long view than a judicial system with neither the ability nor the inclination to unify the decisions of a panoply of different courts across the country. The same is true of questions regarding

²⁷⁰ For a more detailed accounting of the sources and amounts of the taxes used to fund the Superfund, see the Ways and Means Committee Superfund Fact Sheet, 29 TAX NOTES 397, 397-98 (Oct. 28, 1988).

²⁷¹ See *supra* note 35 and accompanying text.

²⁷² See COOKE, *supra* note 50, § 13.01[4][d] 13-36.13.

the efficiency of such a plan. While creating a new agency to do a job which might as well be performed by an existing office might be wasteful, the point is moot in the context of the medical monitoring issue. There is no existing agency tailored to do the job which a new agency could, and should, be outfitted specifically to perform.

2. Consistency with CERCLA

More important than the question of what can be done, and by whom, with respect to medical monitoring is the question of whether anything can be done at all without compromising CERCLA's purposes. Medical monitoring as defined in this Comment is consistent with those purposes. In fact, given the relative novelty of hazardous substance contamination, a failure to monitor cleanup sites may do a great deal to frustrate CERCLA's effort to protect the public.

Firstly, even if the legislative discussion described earlier in this Comment failed to show medical monitoring costs to have been anticipated and desired aspects of "response costs," the fact that one part of the definition of "response" includes "long-term" or "permanent"²⁷³ steps to control and eliminate hazardous wastes shows that CERCLA is not intended to be merely a short-term answer to the problem.²⁷⁴ Reading the plain language of the definition strains logic unless this point can be conceded. If CERCLA is to be part of an extended measure to solve contamination crises, rather than just to delay their effects, then it clearly requires an information base on which to ground decisions about how cleanup actions are to take place.²⁷⁵

Secondly, a broad definition of "response costs" is consistent with congressional intent to encourage private cleanup efforts.²⁷⁶ While private parties might recognize the need for a cleanup, there is little incentive to conduct any large-scale effort without assurances of the recoverability of the money spent in the cleanup. While, in theory, the government can still step in and orchestrate the cleanup on its own, practically, the government cannot handle the volume of sites crying for cleanup. Given this practical need for private party assistance, it seems not only wise, but critical that the definition of "response costs" be expanded to provide private parties with clear incentives to lend a hand in cleanup efforts.

²⁷³ See 42 U.S.C. § 9601(24).

²⁷⁴ See *id.*

²⁷⁵ See Weinstein, *supra* note 110, at 1389 (complaints about judges' lack of survey information in determining likelihood of appearance of latent disease in persons subject to contamination or contaminated areas).

²⁷⁶ See Gaba, *supra* note 75, at 215.

Thirdly, given the limitations inherent in the existing system, which focuses on a limited number of NPL sites,²⁷⁷ and within this limited pool, only on individuals' health data, an analysis of sites on the NPL provides information on a necessarily limited scale and for a time frame limited by individual health concerns. This limited information pool is insufficient to protect the public health over time. More sites would offer more detail and greater depth for analysis. Longer, standardized duration of study would offer the opportunity to observe and track the latent effects of exposure to contamination, and how contamination spreads. This would be particularly helpful in preventing researchers from overlooking effects which are slow to appear, and which might surface in unforeseen locations or forms, and which, for just those reasons, are unlikely to be recognized by even the affected population as potential consequences of exposure to hazardous substances.

Fourthly, this kind of monitoring also furthers CERCLA's goal of making potentially responsible parties bear the financial costs of their improper disposal.²⁷⁸ There is no indication that CERCLA's drafters intended to limit liability for damage to the public and the environment to immediate injuries, and no reason responsible parties should escape liability for latent harm caused by their actions.²⁷⁹ More widespread and intensive monitoring would provide a more complete picture of what contamination does, and of how its effects spread, allowing imposition of all liability, the most powerful disincentive for future contaminators.

As the copious litigation, and the uneven outcomes of that litigation make clear, there is a need for a uniform system of decision-making regarding medical monitoring claims under CERCLA.²⁸⁰ Development of such a system could take place either judicially or legislatively. Although a legislative solution is potentially costly, it would have the advantage of conserving judicial resources while ensuring a high degree of uniformity across the country and the courts regarding the acceptability of recovery for medical monitoring costs under CERCLA. Accepting the legislative solution as preferable to a judicial approach, the question becomes how best to administer the system. Again, there appear to be two options: either expand the existing ATSDR to accommodate the additional concerns of a full-scale moni-

²⁷⁷ Recall, in addition, that the NPL sites themselves only represent those sites selected for attention. 42 U.S.C. § 9604(i)(6)(H). Sites selected for placement on the NPL represent a handful of locations relative to the number of sites in need of cleanup.

²⁷⁸ See generally *id.* § 9607.

²⁷⁹ See *id.*; Gara, *supra* note 40, at 270.

²⁸⁰ See *supra* note 118.

toring program, or create a new agency, perhaps administered under the eye of the existing ATSDR, to handle the monitoring duties currently assumed by the ATSDR, as well as any additional duties imposed subsequent to a legislative answer to the medical monitoring question. While expanding the ATSDR would mean bypassing the expense and procedure required to start up a new agency, it would also mean burdening the existing ATSDR with responsibilities it was not originally equipped to bear. Conversely, although building a new agency from scratch only increases the already sprawling governmental bureaucracy, such an agency, by concerning itself solely with monitoring issues, would free the existing ATSDR to dedicate itself entirely to the information compilation for which it was originally formed.

VII. CONCLUSION

When Congress enacted CERCLA in 1980 as a hasty and perhaps ill-advised compromise, its purposes were to facilitate cleanup of hazardous substances and to place the financial burden on those responsible.²⁸¹ Congress imposed these burdens in the interest of protecting the public and the environment.²⁸² Given the circumstances of CERCLA's passage, its notoriously unclear language²⁸³ is not surprising. Despite the haste in which CERCLA was passed, explicit provision was made for recovery of monitoring costs incurred in the protection of the public. While the vagueness of these monitoring provisions may be excusable as the best attempts of a political system under pressure, allowing them to remain unclear in the face of the obvious need for permanent methods of handling toxic wastes is not acceptable.

Adopting a judicial standard patterned after the *Brewer* decision, viewing medical monitoring as a necessary part of assessing and preventing contamination by toxic materials would be one way of eliminating much of the confusion. Modifying CERCLA either by expanding the duties of the ATSDR to include monitoring of all sites, or by creating a new office to which all monitoring responsibilities would be delegated, is another. The latter option faces greater obstacles—including startup costs, budgeting, and staffing—than the former, but the cost is not the preeminent consideration, particularly in

²⁸¹ See *supra* notes 3 and 28 and accompanying text.

²⁸² See *Brewer v. Ravan*, 680 F. Supp. 1176, 1178 (M.D. Tenn. 1988).

²⁸³ See *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1533 (10th Cir. 1992).

light of the urgency of the toxic waste problem,²⁸⁴ and the cost of continued litigation on the issue.

To refuse to allow recovery for medical monitoring costs, and to overlook the critical importance in the information to be gained through extended medical surveillance of affected communities, is in effect to ignore the long-term threat toxic contamination poses to the environment and the people living there. The pure information to be gained by monitoring studies could translate into improved quality of life and longevity for entire communities. More important, though, is the effect that information would allow CERCLA to have on the problem as a whole.

Sources agree that toxic waste and contamination have become a national, if not worldwide, crisis. As CERCLA stands now, it is a good-faith effort to mitigate the worst of the problem by containing and isolating the products of past misconduct and simple error from surrounding communities. The inclusion of medical monitoring into this system would perhaps significantly increase cost, but could potentially increase the national benefits exponentially. A government informed by CERCLA monitoring of what present problems exist will become better able to use that knowledge to direct its energies away from frantic containment and toward considered prevention. In short, a plan as simple as the addition of health surveys of site-affected communities could change CERCLA from a primarily reactive scheme to a powerfully proactive scheme; from a mere cleanup statute to a prevention statute.