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Superfund Amendments and Reauthorization Act of 1986: Limiting Judicial Review to the Administrtive Record in Cost Recovery Actions by the EPA

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NOTES

SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT OF 1986: LIMITING JUDICIAL REVIEW TO THE ADMINISTRATIVE RECORD IN COST RECOVERY ACTIONS BY THE EPA

On October 17, 1986, President Reagan signed the Superfund Amendments and Reauthorization Act of 1986 (SARA) into law after a three year reauthorizing process.[1] SARA is an amendment to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the original "Superfund" law passed in 1980.[2]

SARA provides $8.5 billion to the Environmental Protection Agency (EPA) over a five year span[3] for the cleanup of inoperative waste sites.[4] The EPA is responsible for maintaining a National Priorities List (NPL) of the most hazardous waste sites and for implementing remedial programs for their cleanup.[5] After the EPA places a site on the NPL, it has four options: (1) file suit and obtain a court order compelling the responsible party to take the necessary remedial action; (2) issue an administrative order requiring the responsible party to take the necessary remedial action; (3) enter into an agreement with potentially responsible parties to perform a re-

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1 Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) [hereinafter SARA].

2 Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (1986) (codified at 42 U.S.C. §§ 9601-9657) [hereinafter CERCLA].

3 42 U.S.C. § 9611(a) (1982 & Supp. 1988). Compared to the $1.6 billion provided to the EPA under CERCLA, SARA provides a tremendous increase in funds to the EPA. These funds still are inadequate, however, because completion of the Superfund program will require as much as $100 billion. H.R. REP. No. 253(I), 99th Cong., 2d Sess., pt. 1, at 55 (1988).

4 *Superfund II: A New Mandate*, 17 Env't Rep. (BNA) 2 (Feb. 13, 1987) [hereinafter *Superfund II: A New Mandate*]. Congress initially granted statutory authority to the President, but the President delegated his authority to the EPA administrator. *See* Exec. Order No. 12,316, 46 Fed. Reg. 42,237 (1981).

5 Van Cleve, *Informal EPA Action Under CERCLA: Problems of Judicial Review*, 31 WASH. U.J. URB. & CONTEMP. L. 317 (1987). After placing a site on the NPL, either the EPA or a private party conducts a Remedial Investigation/Feasibility Study, "further categorized cleanup alternatives are identified, and a final plan for cleanup is determined." Gaba, *Recovering Hazardous Waste Cleanup Costs: The Private Cause of Action*, 13 ECOLOGY L.Q. 181, 193 (1986).

sponse action;[6] or (4) expend money from the Hazardous Substance Response Fund (Superfund) to clean up the site and then seek reimbursement from the potentially responsible party (PRP).[7]

In the event the EPA undertakes option four and brings a cost recovery action against a potentially responsible party, the PRP can challenge the remedy selected by the EPA. SARA's section 113(j), however, limits judicial review of the EPA's selected remedy to the administrative record. In addition, the court may require supplementation of the administrative record in accordance with "otherwise applicable principles of administrative law."[8]

This Note argues that Section 113(j) is an illegitimate means of accomplishing a legitimate and laudable end.[9] Section 113(j) deprives defendants of any meaningful right to challenge the EPA's

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6 42 U.S.C. § 9622(a) (Supp. 1988) gives the EPA authority to enter into such agreements if the EPA "determines that such action will be done properly by such person." Section 9622(a) further provides that whenever practical "and in the public interest . . . the [EPA] shall act to facilitate agreements . . . that are in the public interest and consistent with the National Contingency Plan in order to expedite effective remedial actions and minimize litigation." Such an agreement is then entered as a consent decree in the United States District Court. 42 U.S.C. § 9622(d)(1)(A). Although this option is the best available alternative for a party wanting to assure a cost effective cleanup, PRPs may not be able to come to an agreement with the EPA. The EPA has failed to encourage negotiated settlements in the past. Roberts, *Allocation of Liability Under CERCLA: A "Carrot and Stick" Formula*, 14 ECOLOGY L.Q. 601, 609 (1987). "[EPA] negotiations have been exclusively power based, offering no incentives to settle. Buttressed by judicial decisions consistently upholding EPA's position, the agency in effect has issued an ultimatum of 'settle on the government's terms or litigate and lose.'" *Id.*, quoting Anderson, *Negotiation and Informal Agency Action: The Case of Superfund*, 1985 DUKE L.J. 261, 320.

7 42 U.S.C. § 9606(a)(1982), § 9604(a)(1) (1982 & Supp. IV 1988). Out of the 110 sites where the EPA selected remedies, potentially responsible parties financed response efforts at only 52 of those sites. 17 Env't Rep. (BNA) 1221 (Nov. 21, 1986) (quoting EPA figures). The EPA financed response efforts with the Fund in most emergency actions. *Id.* Congress intended that the EPA limit use of the Superfund to emergency situations, and therefore favored PRP funding. Lyons, *Deep Pockets and CERCLA: Should Superfund Liability Be Abolished?*, 6 STAN. ENVTL. L.J. 283-84 (1986-1987); *see* 42 U.S.C. § 9604(a)(1) (1982 & Supp. 1988) (the President may allow a responsible party to perform cleanup if they can do so properly and promptly); 42 U.S.C. § 9604(a)(4) (Supp. 1988) (the President can use Fund resources only if there is a public health or environmental emergency and no other party can respond in a timely manner); *see also* Lone Pine Steering Comm. v. EPA, 600 F. Supp. 1487, 1490 (D.N.J. 1985) (CERCLA did not intend for the EPA to act where responsible parties have agreed to take the proper action).

8 *Lone Pine Steering Comm.*, 600 F. Supp. at 1490.

9 This Note does not criticize the broad liability provisions of CERCLA. It instead focuses on the inequities of cost recovery actions when judicial review is limited to the administrative record and PRPs have little control over the appropriate remedy selected for the site. For an excellent discussion on the liability provisions of CERCLA (as amended by SARA), see Lyons, *supra* note 7, at 285-312. It is important to note that a PRP's liability is not dependent upon a finding of a causal link between a PRP's acts and the harm suffered. *Id.* at 309.

selected remedy, despite the enormous liability exposure.[10] This Note advances two reasons in support of this conclusion. First, limiting judicial review to the administrative record in a cost recovery action gives the EPA enormous unchecked power,[11] while depriving PRPs of the right to cross-examine EPA personnel involved in the remedial selection process.[12] Second, because the judiciary is ill-equipped to analyze the complex data presented in an administrative record largely compiled by the EPA, judicial review is merely formalistic, and offers no substantive protection for a defendant's rights.[13]

This Note first discusses the purpose and history of CERCLA

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10 Although section 104 states that the EPA shall not continue a response action after spending $2 million or after 12 months have elapsed, this cap has not limited the liability of defendants. 42 U.S.C. § 9604(c)(1) (Supp. 1988). EPA response actions involve a two step process. Under section 104, Congress authorizes the EPA to utilize Superfund money to clean up a site. Once the EPA performs a cleanup, the EPA can then sue for reimbursement under section 107. Every court deciding the issue has held that the liability provisions of section 107(a) are seperate and independent from the requirements of section 104. *See, e.g.*, United States v. Conservation Chem. Co., 619 F. Supp. 162, 207 (D.C. Mo. 1985); United States v. Northeastern Pharmaceutical Co., 579 F. Supp. 823 (W.D. Mo. 1984), *rev'd on other grounds*, 810 F.2d 726 (8th Cir. 1986); United States v. Wade, 577 F. Supp. 1326, 1336 (E.D. Pa. 1983); State *ex rel.* Brown v. Georgeoff, 562 F. Supp. 1300, 1315 (N.D. Ohio 1983); United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1118 (D. Minn. 1982). In other words, failure to abide by the statutorily prescribed limit cannot be pleaded as a defense in a cost recovery action. "The restrictions contained in § 104 are intended to protect the integrity of the Superfund and *not limit the government's replenishing it* by recovery from responsible parties." *Wade*, 577 F. Supp. at 1336 (emphasis added). Additionally, there are exceptions to the $2 million/12 month cap as more fully discussed *infra* at note 96. As a result of CERCLA's broad liability provisions, "very few defendants can afford to ultimately bear the large and completely unexpected liabilities imposed by CERCLA. . . . In many cases, failure [of other parties sharing or assuming adjudicated liability] will leave [defendants] no alternative but bankrnptcy." Light, *A Defense Counsel's Perspective on Superfund*, 15 ENVTL L. REP. (Envt'l L. Inst.) 10,203, 10,206 (July 1985).

11 The Washington, D.C. law firm of Morgan, Lewis & Bockius wrote a memorandum for clients discussing the impact of SARA on American industry. In this memorandum, written principally by ex-EPA deputy administrator John Quarles, the authors expressed concern for the "dictatorial" government power over the cleanup process. 17 Env't Rep. (BNA) No. 29 at 1181 (Nov. 14, 1986). The memorandum also cautioned that SARA "thoroughly undercut the ability of a private party to successfully challenge decisions of the government through judicial review . . . ." *Id.* at 1182 (citing memorandum). In addition, the report claimed that a client could only avoid runaway costs and the "Cadillac approach" of the EPA to remedial action decisions by agreeing with the EPA that private parties perform the Remedial Investigation Feasibility Study. *Id.* During the House debate on CERCLA, Congressman Stockman also expressed concerned over the EPA's enormous power. 126 Cong. Rec. 26,759 (1980). He alleged that H.R. 7020 would make the EPA "the czar over every hazardous waste site in the entire country." *Id.*

12 Record review under SARA only applies to EPA remedy selection decisions and not to the implementation process. Light, *When EPA Makes a Superfund Mistake: Judicial Review Problems Under SARA*, 17 ENVTL L. REP. 10,148, 10,153 (May 1987) (asserting that the implementation process does not constitute "agency action").

13 *See infra* notes 116-27 and accompanying text.

and SARA. It then defines the parameters of an administrative record and discusses the appropriate scope of judicial review under SARA. Section II next emphasizes four criticisms of procedure and judicial review under SARA. Finally, this Note concludes by arguing that one way to accord PRPs due process, and to place a check on irrational agency behavior, is to provide PRPs with the right to cross-examine, at the trial level, EPA personnel involved in the remedial selection process. PRP cross-examination will achieve two goals: (1) protection of the due process rights of important American industries,[14] and (2) avoidance of overzealous remedial actions which involve the inefficient[15] expenditure of resources and labor that could be used to clean up other hazardous waste sites posing a threat to human health and the environment.

I
BACKGROUND

A. Pre-SARA: Purpose and History of CERCLA

In recognition of the tragic consequences of improper, negligent, and reckless hazardous waste disposal practices known as the "inactive hazardous waste site problem,"[16] Congress began work on CERCLA in the late 1970s. Although Congress recognized the growth of the chemical industry and the dangers of hazardous waste,[17] it did not fully comprehend the problem's magnitude.[18] In 1979, prior to the passage of CERCLA, both the EPA and Congress believed that a site could be adequately cleaned up by "scraping a few inches of soil off the ground."[19] At that time, the EPA estimated

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14 The fifth amendment to the Constitution provides that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The fifth amendment is applied to the states through the fourteenth amendment. Several articles have focused on the due process rights of industries when the EPA seeks an administrative order under section 106. *See, e.g.*, Glass, *Superfund and SARA: Are There Any Defenses Left?*, 12 HARV. ENVTL. L. REV. 385, 444 (1988) (setting forth due process arguments for PRPs in section 106 actions); Cross, *Procedural Due Process under Superfund*, 1986 B.Y.U. L. REV. 919 (arguing that section 106 actions violate due process).

The defendants in hazardous waste litigation are "the key industries of the modern American postwar industrial economy, including chemical manufacturing, petroleum refining, pesticide production, plastics manufacturing, electronics production, and mining." Lyons, *supra* note 7, at 274-75. Given tbis country's dependence on these industries, there is a compelling interest in giving them an ability to protect against unnecessarily expansive remedial actions taken by the EPA. This is especially true in light of the new, stringent cleanup standards under section 122 of SARA which increase cleanup costs even more. *Id.* at 281-82; *see infra* notes 55-59 and accompanying text.

15 42 U.S.C. § 9621(a) (Supp. 1988) requires the EPA to select a remedial plan "which provide[s] for [a] cost effective response."

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

17 *Id.* at 18-19.

18 H.R. REP. No. 253, *supra* note 3, at 54.

19 *Id.*

that between 1,200 and 2,000 sites posed a serious risk to public health.[20] The EPA also estimated that it needed between $13.1 and $22.1 billion to clean up all of these dangerous hazardous waste sites.[21] Politicians and professionals alike had little knowledge regarding the cleanup process and the financial resources required.[22] Thus, Congress passed CERCLA on December 11, 1980,[23] but provided the EPA with only $1.6 billion for the cleanup of 400 sites.[24]

By 1985, however, approximately 10,000 sites required cleanup.[25] At present, Congress estimates that the EPA needs $100 billion to solve the hazardous waste problem.[26] In addition, the EPA's average cost of cleaning up a site in 1988 was between $21 million to $30 million.[27]

The main purpose of CERCLA is to protect the health and environment from the dangers posed by inactive hazardous waste sites.[28] CERCLA accordingly requires the EPA to begin the cleanup of hazardous waste sites in a timely fashion.[29] However, recognizing that there was a "shortage of cleanup resources and insufficient legal remedies for collecting from owners of abandoned or inactive waste sites" under the old legislation,[30] CERCLA implicitly estab-

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20 H.R. REP. No. 1016, *supra* note 16, at 18.

21 *Id.* at 20. These estimates assume responsible parties will finance 40-60% of the cleanup costs. Lyons, *supra* note 7, at 281. Therefore, the EPA expects the actual cleanup costs for all of these sites to be much higher. *Id.*

22 This can be seen by comparing the $1.6 billion actually allocated with the current estimate of $100 billion.

23 *See generally* Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982) (discussing the history of CERCLA). CERCLA is a combination of both H.R. 7020 and S.1480. *Id.*

24 H.R. REP. No. 253, *supra* note 3, at 54.

25 *Id.* at 55. This is equivalent to an average of 23 sites per Congressional district.

26 *Id.*

27 18 Env't Rep. (BNA) No. 51, at 2454 (April 15, 1988); *see also* 18 Env't Rep. (BNA) No. 48, at 2363 (Mar. 25, 1988).

28 H.R. REP. No. 1016, *supra* note 16, at 1. CERCLA was, in part, a reaction to public pressure resulting from the high publicity given to hazardous waste sites, including Love Canal. The legislative history of CERCLA expressly mentions the incidents at Love Canal. *See id.* at 19-20. At Love Canal, the government had to evacuate 230 families from the area due to the dangers posed by hazardous substances released into the air, soil, and water from an improperly maintained waste site. *Id.* at 19. The health data at Love Canal indicated increased miscarriages and birth defect rates. *Id.* At the time Congress was considering the passage of CERCLA, cleanup costs at Love Canal exceeded $27 million. *Id.* at 20; *but see* Grad, *supra* note 23, at 25 ("Senator Moynihan . . . introduced a detailed chronology of the Love Canal events, a gesture which had the quality of futility because nothing in the provisions of the substitute bill would aid the Love Canal victims, though indeed it might prevent other situations of that kind in the future.").

29 *See* United States v. Wade, 577 F. Supp. 1326, 1331 (E.D. Pa. 1983) ("[CERCLA] is intended to facilitate the prompt clean-up of hazardous waste dump sites.").

30 Grad, *supra* note 23, at 8.

lished a standard of strict liability for potentially responsible parties (PRPs).[31] CERCLA also established a cleanup fund (Superfund) by imposing taxes on the petrochemical, inorganic chemical, and oil industries.[32] The industries most benefitted by the use of such wastes therefore suffer the burden of funding cleanup.[33]

One of the principle criticisms of CERCLA is the manner of its passage. It was a "hastily assembled bill,"[34] containing many technical flaws,[35] which passed in the House after a very limited debate.[36] Due to the inadequate knowledge of the effects of hazardous waste on the environment in 1980, however, CERCLA was perhaps "the best that could be done at the time."[37]

B. Purpose and History of SARA

Beginning in 1984, Congress turned its attention to amending CERCLA.[38] During the first five years of CERCLA, problems arose concerning improper political conduct by EPA officials in the hazardous waste division.[39] In addition, Congress became aware that the hazardous waste problem was larger in scope than previously thought.[40] In order to deal with these problems, Congress sought to define cleanup standards,[41] to expand the resources available to the EPA to conduct cleanups and investigations,[42] and to clarify the

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31 *See* H.R. REP. No. 253, *supra* note 3, at 74. Many courts have held that CERCLA imposes strict liability on all parties falling within the terms of section 107(a)(1-4). *See, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985); United States v. Conservation Chem. Co., 589 F. Supp. 59, 62 (W.D. Mo. 1984); United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 844 (W.D. Mo. 1984) (strict liability for site response costs imposed on transporter and generator under CERCLA), *rev'd on other grounds*, 810 F.2d 726 (8th Cir. 1986).

32 Grad, *supra* note 23, at 12.

33 *See* S. REP. No. 848, 96th Cong., 2d Sess., 72 (1980) ("Financing the Fund primarily from fees paid by industry is the most equitable and rational method of broadly spreading the costs of past, present and future releases of hazardous substances. . . .").

34 Grad, *supra* note 23, at 2.

35 *Id.* at 34.

36 *Id.* at 1.

37 *Id.* at 2.

38 *Superfund II: A New Mandate*, *supra* note 4, at 6.

39 Congress conducted an investigation of the EPA and dicovered that EPA officials had diverted cleanup funds from some Superfund sites in order to increase the political fortunes of Republican Senate candidates. *Id.* at 5. The investigation eventually led to the resignation of Anne Burford, the EPA Administrator, the imprisonment of Rita Lavelle, EPA's top hazardous waste official, and the resignation of more than 20 senior agency officials. *Id.*

40 *Id.*

41 *Id.* at 6. The new cleanup standards are found in section 121. That section provides in pertinent part: "Remedial actions in which treatment which permanently and significantly reduces the volume, toxicity, or mobility of the hazardous substances, pollutants, and contaminants is a principal element, are to be preferred over remedial actions not involving such treatment." 42 U.S.C. § 9621(b)(1) (Supp. 1988).

42 *See supra* note 3 and accompanying text.

EPA's authority.[43]

To effectuate these goals, Congress had to confront a fundamental policy question: "[h]ow to ensure in the future that there are adequate resources, and to see that past, thoroughly repudiated, mismanagement problems are behind us."[44] Congress, in short, had to restore public confidence in the program. Admittedly, CERCLA had failed. Political pressure to give high priority status to every site guaranteed this failure.[45] In addition, unrealistic time schedules, standards impossible to enforce, and program requirements exceeding funding contributed to CERCLA's failure.[46]

Although SARA makes several key changes to CERCLA,[47] this Note focuses on section 113(j).[48] This section provides that judicial review of the Administrator's selection of a response action shall be based solely on the administrative record.[49] One purpose of this section "is to ensure that the Administrator's decision is based on adequate information to which the public and potentially responsible parties have access."[50] Another objective is to provide the public with a clearly articulated basis for a remedial decision.[51] The administrative record therefore is open to scrutiny by potentially responsible parties and the public.[52]

By limiting judicial review in section 113(j), Congress hoped to expedite the reviewing process by precluding courts from considering information and criteria not used in the remedy-selection process.[53] Congress further assumed that limiting judicial review to the administrative record would encourage both the PRP's and the public to participate actively in the development of the record prior to remedy selection.[54]

Under section 121(b) of SARA, the EPA must choose a reme-

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43 H.R. REP. No. 253, *supra* note 3, at 54.

44 *Id.* at 55.

45 *Id.*

46 *Id.* at 56.

47 For a useful summary of changes to CERCLA, see generally *Superfund II: A New Mandate*, *supra* note 4.

48 Section 113(j)(1) states:

> In any judicial action under this chapter, judicial review of any issues concerning the adequacy of any response action taken or ordered by the President shall be limited to the administrative record. Otherwise applicable principles of administrative law shall govern whether whether any supplemental materials may be considered by the court.

42 U.S.C. § 9613(j)(1) (Supp. 1988).

49 *See id.* Prior to the amendment of CERCLA, Congress did not address the appropriate scope of judicial review issue.

50 H.R. REP. No. 253, *supra* note 3, pt. III, at 24.

51 *Id.*, pt. I, at 139.

52 *Id.*

53 *Id.*

54 *Id.* at 81.

dial plan that "permanently and significantly reduces the volume, toxicity or mobility" of hazardous substances.[55] Under CERCLA, there were no such statutory cleanup standards, and response action teams often transported Superfund waste off-site without treatment.[56] Due to SARA's new and stringent cleanup standards, the cost of cleanups has increased dramatically.[57] Although SARA, like CERCLA, requires that remedial actions be cost effective,[58] the EPA is now unsure how to apply this requirement under SARA's more rigorous cleanup standards.[59] In any case, a reviewing court must uphold the EPA's selection of a remedy unless the administrative record indicates that the remedy decision was arbitrary and capricious, or otherwise not in accordance with law.[60]

SARA also provides for the participation of interested persons in the development of the administrative record.[61] The Administrator must give PRP's notice of remedial plans and a reasonable opportunity for comment and for a public meeting. The Administrator must then respond to comments and criticisms and must supply a statement of the basis and purpose of the selected action.[62] The purpose of this section is to provide procedural protections to the

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55 42 U.S.C. § 9621(b)(1) (Supp. 1988) (effective Oct. 17, 1986). For the text of section 121, see *supra* note 41. The lack of new technology makes it difficult, however, for the EPA to establish permanent treatments at hazardous waste sites. 18 Env't Rep. (BNA) No. 11, at 774 (July 10, 1987). CERCLA also requires the EPA to publish a National Contingency Plan (NCP) in order to "establish procedures and standards for responding to releases of hazardous substances, pollutants and contaminants." 42 U.S.C. § 9605 (1982 & Supp 1988). The NCP requires the EPA to study the site, develop alternative cleanup plans, and select a cleanup strategy from among the alternatives discussed. 40 C.F.R. § 300.61-300.71 (1985) (Subpart F-Hazardous Substance Response).

56 *See Superfund II: A New Mandate, supra* note 4, at 2-3.

57 *See* 17 Env't Rep. (BNA) No. 22, at 778-79 (Sept. 26, 1986).

The cleanup standards called for in SARA "would drive the cost of a superfund cleanup from its present average of $9 million per site to between $30 million and $60 million per site." *Id.* at 779. Moreover, when long term costs such as groundwater cleanup are factored in, cleanup costs may total between $300 million and $600 million. *Id.*

58 SARA provides: "The President shall select a remedial action that is protective of human health and the environment, that is cost effective, and that utilizes permanent solutions. . ." 42 U.S.C. § 9621(b)(1) (Supp. 1988).

59 18 Env't Rep. (BNA) No. 8 at 667 (June 19, 1987).

60 42 U.S.C. § 9613(j)(2) (Supp. 1988).

61 42 U.S.C. § 9613(k)(2)(B) (Supp. 1988). Prior to the 1986 amendments, there were no provisions in CERCLA for the participation of interested parties in the remedy selection process. The EPA could begin cleanup at a site without giving notice to, or consulting with, potentially responsible parties. *See* United States v. Dickerson, 640 F. Supp. 448, 453 (D. Md. 1986) ("There is nothing in the plain language of the statute imposing a mandatory duty upon the government to consult with private parties before undertaking response actions.").

62 42 U.S.C. § 9613(k)(2)(B) (Supp. 1988). The public comment period follows publication of the RI/FS and precedes the agency's selection of a remedy.

public, and to safeguard the PRP's right to participate in the development of the administrative record.[63]

C. Limiting Judicial Review to the Administrative Record

1. *What is the Administrative Record?*

The first step in most judicial review proceedings is defining the administrative record.[64] The agency, in this instance the EPA, compiles the documents relevant to the hazardous site and then certifies this record to the court.[65] Although SARA prescribes the minimum information that the EPA must include in the Administrative Record,[66] this system of certification necessarily requires the agency to make subjective judgments as to what other relevant documents ought to be included in the record.[67] Given the infinite dimensions to an environmental problem and the extensive labor force commonly involved in the decision-making process,[68] the agency may overlook or erroneously exclude relevant documents.[69]

Although SARA mandates a deferential standard of review,[70] the record must be adequate for the court to examine the basis of the agency's decision. For example, the Supreme Court held in *Citizens to Preserve Overton Park, Inc. v. Volpe*[71] that judicial review of

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63 42 U.S.C. § 9613(k)(2)(A) (Supp. 1988) (effective Oct. 17, 1986).

64 McMillan & Peterson, *The Permissible Scope of Hearings, Discovery, and Additional Fact Finding During Judicial Review of Informal Agency Action*, 1982 DUKE L.J. 333, 340.

65 Litigants commonly argue over whether an administrative record is complete, and courts may differ in their resolution of this factual question. *Id.*

66 Under section 113(k)(2)(B), the administrative record must include, at a minimum, the comments submitted by potentially responsible parties and interested persons, information developed and received at the public hearing, and the EPA's responses to significant comments, criticisms, and data submitted in both oral and written presentations. 42 U.S.C. § 9613(k)(2)(B) (Supp. 1988). In addition, the record should include a brief analysis of the EPA's remedial plan and the alternative plans considered by the EPA prior to its final remedy selection. *Id.*

67 *Id.* at 341. For example, in Appalachian Power Co. v. EPA, 477 F.2d 495 (4th Cir. 1973) the EPA argued that the administrative record should include only two documents: (1) the EPA order of approval of state plans to implement federal ambient air quality standards under the Clean Air Act, and (2) the state plan itself. *Id.* at 505. The court held that restricting its review to these two documents would be a "meaningless gesture" and simply "a game of blind man's bluff." *Id.* at 507. The court, therefore, ordered the administrator to certify the full record including the EPA's reasoning and analysis. *Id.* The whole record included "the record of expert views and opinions, the technological data and other relevant material, including the state hearings, on which the Administrator himself acted." *Id.* Furthermore, the court asked the administrator to explain its reasoning and analysis. *Id.*

68 Oakes, *The Judicial Role in Environmental Law*, 52 N.Y.U. L. REV. 498, 502 (1977).

69 McMillan & Peterson, *supra* note 64, at 341. A litigant, however, may challenge the sufficiency of the record in court. *See Appalachian Power Co.*, 477 F.2d at 507 (the court declared it premature to remand for supplementation of the record until the administrator certified the record).

70 42 U.S.C. § 9613(j)(2) (Supp. 1988).

71 401 U.S. 402 (1971). In *Overton Park*, the Court had to decide whether to uphold

agency action under an arbitrary and capricious standard had to be based on the "whole record" compiled by the agency.[72] While the *Overton* Court recognized the benefits of terse agency explanations, it determined that courts need a complete administrative record to carry out a "searching and careful" analysis of an issue.[73]

In response to *Overton*'s "whole record" requirement, the courts have developed four gnidelines for determining the proper scope of the administrative record:

> First, the record should include all documents the agency considers rather than only those on which the agency relies. Second, . . . the record should include all documents considered by the agency employees whose input reached the decisionmaker. . . . Third, raw data that is bona fide confidential business information ordinarily need not be included in the administrative record. Fourth, deliberative intra-agency memoranda and staff reports should ordinarily be excluded from the administrative record.[74]

Overton held that if the record does not disclose "the factors . . . considered or the [agency's] construction of the evidence,"[75] additional supplementation is appropriate. Supplementation is particularly useful when the subject matter is complex.[76] The courts use this additional information to determine the substance of the agency decision and how the agency reached this decision, but not to evaluate the merits of that decision.[77] This distinction often is difficult to make.[78] When the court probes the basis for an agency's decision, there will inevitably be some probing of the validity of that judgment.[79]

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the Secretary of Transportation's approval of a highway project. In support of its actions, the agency submitted explanatory affidavits to the court. *Id.*

72 *Id.* at 419.

73 *Id.* at 415-16.

74 McMillan & Peterson, *supra* note 64, at 341-42; *see* Pierson v. United States, 428 F. Supp. 384 (D. Del. 1977) (discussing guidelines 1 and 2); Atchison, Topeka & Sante Fe Ry. v. Alexander, 480 F. Supp. 980, 995 (D.D.C. 1979) (discussing guideline 3); Madison County Bldg. & Loan Ass'n v. Federal Home Loan Bank Bd., 662 F.2d 393, 395 n.3 (8th Cir. 1980) (discussing guideline 4).

75 *Overton Park*, 401 U.S. at 420.

76 McMillan & Peterson, *supra* note 64, at 352.

77 *Id.*

78 *Id.* For example, the court in Camp v. Pitts, 463 F.2d 632 (4th Cir. 1972), *vacated*, 411 U.S. 138 (1973), determined that the Comptroller of the Currency failed to articulate adequately the basis for its denial of respondents application for a National bank charter; consequently the court ordered de novo review of the denial. *Id.* at 633. By ordering de novo review, the court, in essence, authorized judicial review of the merits of the denial. The Supreme Court, however, vacated the judgment, claiming the record was adequate, and noted that even if it were not, the proper remedy was to order supplementation of the record rather than to engage in de novo review. 411 U.S. 138, 142-43 (1973).

79 McMillan & Peterson, *supra* note 64, at 356.

2. *What is the Appropriate Scope of Review?*

To provide the EPA with more flexibility than that accorded under CERCLA,[80] SARA mandates a deferential standard of review.[81] Under Section 113(j)(2), "the Court shall uphold the President's decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law."[82] In *Ethyl Corp. v. EPA*, the court explained the nature of review under an arbitrary and capricious standard:

> There is no inconsistency between the deferential standard of review and the requirement that the reviewing court involve itself in even the most complex evidentiary matters. . . . The close scrutiny of the evidence is intended to educate the court. It must understand enough about the problem confronting the agency to comprehend the meaning of the evidence relied upon and the evidence discarded; the questions addressed by the agency and those bypassed; the choices open to the agency and those made. The more technical the case, the more intensive must be the court's effort to understand the evidence, for without an appropriate understanding of the case before it the court cannot properly perform its appellate function.[83]

In addition, PRPs cannot obtain judicial review of the EPA's actions under section 104 until the EPA completes the cleanup activity,[84] and only then if the government seeks reimbursement for cleanup expenses.[85] The House Committee recognized that pre-enforcement review of agency action would delay cleanups, increase response costs, and discourage settlements.[86] The courts consistently hold that the opportunity to object fully to an EPA action after the remedial process protects the due process rights of a PRP.[87]

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80 H.R. REP. No. 253, *supra* note 3, at 56.

81 42 U.S.C. § 9613(j)(2) (Supp. 1988). Congress modeled the judicial review provisions of many statutes, including SARA, after the judicial review provisions of the Administrative Procedure Act (APA). 5 U.S.C. §§ 701-706 (1982 & Supp. IV 1986) [hereinafter cited as APA]. This model provides the courts with a well-defined framework for reviewing agency action. H.R. REP. No. 253, *supra* note 3, at 25.

82 42 U.S.C. § 9613(j)(2) (Supp. 1988). *Id.* at 36.

83 541 F.2d 1, 36 (D.C. Cir.) (en banc), *cert. denied*, 426 U.S. 941 (1976).

84 Section 104 action allows the EPA to use the Superfund to finance cleanup. Reimbursement procedures against responsible parties under section 107 often follow cleanup activities. *See supra* note 11.

85 Van Cleve, *supra* note 5, at 330.

86 H.R. REP. No. 253, *supra* note 3, at 58.

87 *See* United States v. Dickerson, 660 F. Supp. 227 (M.D. Ga. 1987) (holding pre-enforcement review of the EPA's remedy selection as unnecessary); Lone Pine Steering Comm. v. EPA, 600 F. Supp. 1487, 1498-1499 (D.N.J. 1985) ("I see no reason why plaintiffs cannot raise as a defense in a cost recovery action every objection to the [Record of Decision] which they could legitimately raise in a judicial proceeding at this time."); United States v. Outboard Marine Corp., 104 F.R.D. 405 (N.D. Ill. 1984) (hold-

II
ANALYSIS

A. Four Criticisms of Procedure and Judicial Review Under SARA

A potentially responsible party[88] could make four valid criticisms of procedure and judicial review under SARA: (1) limiting judicial review to the administrative record is prejudicial to PRPs; (2) courts cannot engage in meaningful judicial review because of a lack of judicial expertise; (3) SARA's procedural requirements fail to encourage cost-effective behavior by the EPA; and (4) SARA's hearing requirements do not satisfy due process. Other considerations, such as fundamental fairness and efficiency, both economic and administrative, argue against limiting judicial review to the administrative record under SARA.

1. *Limiting Judicial Review To An Administrative Record is Prejudicial To Potentially Responsible Parties*

a. *Judicial Review Based On An Administrative Record Produces Inequitable Results In Environmental Cases Where Congress Has Mandated Broad Liability Provisions And An Arbitrary And Capricious Standard*

CERCLA holds defendants jointly and severally liable for all cleanup costs at a site.[89] In addition, the EPA can hold a party liable for cleanup costs even if that party's contribution to the site was minimal,[90] and even if the EPA cannot show that a party's contribu-

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ing CERCLA does not provide for judicial review until the EPA sues to recover its cleanup costs). *See also* Van Cleve, *supra* note 5, at 330-32.

88 Section 107(a) of CERCLA identifies four classes of persons that courts can hold liable for response costs: 1) the owner or operator of a facility; 2) past owners or operators during the period of hazardous waste disposal; 3) persons who arranged for disposal of hazardous substances at the facility; and 4) persons who accepted any hazardous substances for transportation to a facility from which there was a release of hazardous waste. 42 U.S.C. § 9607(a)(1)-(4) (1982 & Supp. 1988). Section 101(21) of CERCLA defines "person" as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. § 9601 (21)(1982 & Supp. 1988).

89 SARA did not include a provision establishing joint and several liability because the Senate preferred to rely on preexisting common law and prior statutory law. Grad, *supra* note 23, at 22. *See, e.g.*, United States v. Chem-Dyne Corp., 572 F. Supp. 802, 808 (S.D. Ohio 1983) ("the scope of liability and term joint and several liability were deleted to avoid a mandatory legislative standard applicable in all situations which might produce inequitable results in some cases. . . . The deletion was not intended as a rejection of joint and several liability.").

90 United States v. Wade, 577 F. Supp. 1326, 1333 (E.D. Pa. 1983) ("[T]he release which results in the incurrence of response costs and liability need only be of 'a' hazardous substance and not necessarily one contained in the defendant's waste.").

tion presented an actual hazard.[91]

In a section 107 cost-recovery action following a cleanup under section 104, the EPA seeks reimbursement for all response costs.[92] Response costs may include litigation costs and attorneys' fees, government salaries, monitoring costs, costs of planning and implementing a remedial action, future response costs, and prejudgment interest.[93] Given SARA's new cleanup standards requiring permanent response action, cleanup alone may cost up to $600 million per site.[94] Litigation expenses also may reach astronomical levels.[95] Consequently, each defendant in a section 107 cost recovery action faces enormous liability exposure.[96]

Given this potential liability exposure and SARA's stringent liability provisions, Congress' adoption of the traditional administrative rule limiting judicial review of agency action to the administrative record is inequitable. Under SARA's judicial review provisions, courts only can grant relief to a defendant if the EPA

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91 Light, *supra* note 10, at 10,206 (citing United States v. Carolawn Co., 14 Envt'l L. Rep. (Envt'l L. Inst.) 20,696 (D.S.C. 1984)); *see also* Lyons, *supra* note 6, at 310-11. For example, *Wade* held that courts may impose liability on any generator who transports waste to a site for all response costs at the site even if the site actually is contaminated by another generator's hazardous waste. 577 F. Supp. at 1333.

92 Under section 107(a), the EPA can establish liability for "all costs of removal or remedial action . . . not inconsistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(A) (1982 & Supp. IV 1986).

93 United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 850 (W.D. Mo. 1984), *rev'd on other grounds*, 810 F.2d 726 (8th Cir. 1986). The court found that under section 107(a)(4)(a) of CERCLA, responsible parties are liable for "all costs of removal or remedial action." *Id.*

94 17 Env't Rep. 779 (BNA) (Sept. 26, 1986).

95 For example, in United States v. Conservation Chem. Co., 661 F. Supp. 1416 (W.D. Mo. 1987), the expected litigation fees for defendants ranged from $5 million to $11 million for only the pre-trial portion of the case. Light, *supra* note 10, at 10,204 (citing papers filed by a generator-defendant).

96 Although section 104 of SARA states that the EPA cannot spend more than $2 million or 12 months cleaning up a site, section 9604(c)(1)(c) grants the EPA authority to continue the response action using superfund money if it is "otherwise appropriate and consistent with the remedial action to be taken." 42 U.S.C. § 9604(c)(1)(C) (1982 & Supp. 1988).

This provision effectively "emasculate[s] the time and dollar limitations on section 104 expenditures. If EPA is inclined to carry a response action beyond those limitations, there seems to be little doubt that doing so would be considered 'appropriate and consistent' with the response action underway." Roberts, *supra* note 6, at 607 n.41.

In addition, the EPA can also continue to use Fund resources if the EPA finds that: "(i) continued response actions are immediately required to prevent, limit, or mitigate an emergency, (ii) there is an immediate risk to public health or welfare or the environment, and (iii) such assistance will not otherwise be provided on a timely basis." 42 U.S.C. § 9604(c)(1)(A). In addition, the $2 million cap does not include investigative costs or monitoring costs. 42 U.S.C. § 9604(c)(1). These costs also often reach into the millions. In any case, if the EPA exceeds the statutory limit, this does not effect the EPAs ability to recover all response costs in a section 107 action. *See supra* note 10.

acted arbitrarily and capriciously in its selection of a remedy.[97] In addition, there is a presumption of agency expertise and rationality.[98] Faced with such limitations, it is difficult to see how the court could ever find for a defendant by reviewing an administrative record composed largely by the EPA.[99] John Quarles, former EPA deputy administrator, agrees that SARA "thoroughly undercut[s] the ability of a private party to successfully challenge decisions of the government through judicial review."[100]

b. *Judicial Review Based On The Administrative Record Fails To Protect: A Defendant's Right To Cost-Effective Remedies.*[101]

Both SARA and the National Contingency Plan establish a defendant's right to cost-effective remedial actions by the EPA. SARA mandates that the EPA select a remedial plan "which provide[s] for [a] cost effective response."[102]

In *United States v. Hardage*,[103] the government sought to limit judicial review of its selected remedy[104] to the administrative record, and thus sought to shield its decision-making process from further discovery.[105] The district court refused to limit judicial review to the administrative record, holding that such limited review "reeks of unfairness."[106] The district court reasoned that where the EPA

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97 42 U.S.C. § 9613(j)(1) (Supp. IV 1986).

98 *See* International Harvester v. Ruckelshaus, 478 F.2d 615, 641 (D.C. Cir. 1973) (recognizing that judicial review did not encompass "technical or policy redetermination"); Ethyl Corp. v. EPA, 541 F.2d 1, 36 (D.C. Cir.) (en banc), *cert. denied*, 426 U.S. 941 (1976) (courts should hold agencies to a minimum standard of rationality).

99 The argument that environmental expertise does not exist at the judicial level highlights this point. *See infra* notes 116-27 and accompanying text. *See infra* notes 146-53 and accompanying text for the argument that the EPA largely compiles the administrative record.

100 17 Env't Rep. (BNA) No. 29 at 1182 (Nov. 14, 1986) (citing memorandum largely written by John Quarles).

101 The National Contingency Plan requires that response actions be cost-effective. 42 U.S.C. § 9605(a)(7) (1982 & Supp. 1988). The EPA, however, does not have a history of cost-effective behavior. According to the Grace Commission's study on the EPA, "the efficiency of contracting procedures could be improved at least 20 percent," and streamlining "could reduce program staff time and contract costs," saving up to $62.9 million in three years. Anderson, *Negotiation and Informal Agency Action: The Case of Superfund*, 1985 DUKE L.J. 261, 301 n.141 (quoting THE PRESIDENT'S PRIVATE SECTOR SURVEY ON COST CONTROL, REPORT ON THE ENVIRONMENTAL PROTECTION AGENCY 32 (Spring-Fall 1983)). In addition, EPA cleanups cost an average of 30 to 40% more than private cleanups of comparable quality. *Id.* at 302.

102 42 U.S.C. § 9621(a).

103 663 F. Supp. 1280 (W.D. Okl. 1987).

104 The EPA's selected remedy was injunctive relief pursuant to section 106 compelling defendants to perform site cleanup. *Id.* at 1284.

105 *Id.* at 1283.

106 *Id.* at 1287. The court initially refused to apply SARA retroactively, but analyzed

seeks to force defendants to finance the EPA's remedial action under section 106, fairness entitles defendants to a cost effective remedy.[107] The *Hardage* court awarded de novo review of the EPA's selected remedy stating:

> [T]he private interest that will be affected by the official action, is great. The defendants found liable will be ordered to implement a remedy which may exceed $70 million in cost. . . . [T]he risk of an erroneous deprivation of such interest through the procedures used . . . suggests a scope of review less than de novo would be grossly unfair to defendants.[108]

Although, *Hardage* is a section 106 case, the issues are sufficiently analogous to support the claim that the courts should not limit judicial review to the administrative record in section 104 actions as well. Additionally, the private interest at stake in a section 104 action is perhaps even greater than in a section 106 action given that the EPA maintains control over the implementation process, and defendants therefore lack the ability to ensure cost effective behavior by the EPA.

c. *Judicial Review Based On An Administrative Record Becomes A Battle Of The Forms—A Battle In Which SARA Provides PRPs With Few Or No Weapons.*

Defendants can contribute to the administrative record during the public comment period following publication of the EPA's Remedial Investigation/Feasibility Study (RI/FS).[109] The EPA must also give notice to all PRPs and the public concerning proposed action at a site,[110] and must allow for a public meeting.[111] In addition, defendants can comment on the alternative remedies outlined by the EPA, conduct their own RI/FS, and suggest proper remedial action. However, SARA only requires that the EPA provide defendants with "a reasonable opportunity to comment and provide information regarding the plan;"[112] that the EPA respond "to each

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the judicial review issue "as though the court condone[d] retroactive application of SARA." *Id.* at 1284.

107 *Id.* at 1285; *see infra* notes 128-38 and accompanying text for the argument that this rationale equally applies to section 104 actions. In *Hardage*, the court reasoned:

> De novo review of any recommended remedy which the government seeks to impose on private parties effectively ensures its diligence in consideration of all issues, including cost-effectiveness, since the government knows the higher standard of review of such recommendation (de novo) will be applied by the court.

Hardage, 663 F. Supp. at 1285.

108 *Id.* at 1290.

109 42 U.S.C. § 9613 (k)(B) (Supp. 1988).

110 *Id.* § 9613 (k)(B)(i).

111 *Id.* § 9613 (k)(B)(iii).

112 *Id.* § 9613 (k)(B)(ii).

of the significant comments, criticisms, and new data submitted in written or oral presentations;"[113] and that the EPA provide a "statement of the basis and purpose of the selected action."[114] SARA does not specify any requirements, however, regarding the nature, form, or substance of the EPA's responses to a defendant's comments. Additionally, SARA fails to limit the discretion of the EPA in selecting a remedial plan, because it does not specify the time, consideration, or weight to be given to alternative remedial plans of PRPs or other interested parties.[115] Consequently, SARA promotes formalism at the expense of substance. Given the presumption of agency expertise under an arbitrary and capricious standard, defendants cannot wage war against excessive action by the fully-armed EPA in a battle of the forms.

2. *Environmental Expertise Does Not Exist At The Judicial Level*

Given the absence of environmental expertise at the judicial level, the only way to guard against unreasonable decision-making by the EPA is to provide adequate procedural safeguards which create incentives for the EPA to act reasonably and intelligently.[116] Cross-examination at the trial level is one such procedural safeguard. Cross-examination not only serves to improve administrative decision-making in the long run, but also aids an inexperienced judiciary in understanding the complex data presented in the administrative record.

In *Ethyl Corp. v. EPA*,[117] the Court recognized its duty to make a searching and careful review of the administrative record.[118] However, "no other field of public regulation requires such a complex balancing of so many subtle relationships."[119] The court confessed the inability of judges to comprehend fully the decision-making pro-

113 *Id.* § 9613 (k)(B)(iv).

114 *Id.* § 9613 (k)(B)(v).

115 SARA, however, does require the EPA to evaluate the cost-effectiveness of proposed alternative remedial actions. Section 121 provides in pertinent part: "In evaluating the cost effectiveness of proposed alternative remedial actions, the President shall taken into account the total short- and long-term costs of such actions, including the costs of operation and maintenance for the entire period during which such activities will be required." *Id.* § 9621.

116 *See* International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 652 (D.C. Cir. 1973) (Bazelon, C.J., concurring).

117 541 F.2d 1 (D.C. Cir.) (en banc), *cert denied*, 426 U.S. 941 (1976).

118 *Id.* at 36-37. In *Ethyl Corp.*, plaintiffs sought judicial review of an EPA order mandating the annual reduction of the lead content of leaded gasoline. The court held that the EPA's determination that lead emissions posed a serious threat of harm to the public health was not arbitrary and capricious despite the lack of proof of actual harm and scientific certainty. *Id.* at 20-23. The court emphasized that it had a narrowly defined duty of holding agencies to a minimal standard of rationality. *Id.* at 36.

119 Oakes, *supra* note 68, at 502.

cess of the EPA.[120] The court, however, failed to recognize that this inherent complexity of environmental issues precludes a "searching and careful" review of the record by a judiciary with little or no training in the environmental field. The fact that environmental cases rarely go to trial and often are settled increases the likelihood that the judiciary will not gain the necessary experience and scientific skill sitting on the bench. There is simply no way for an inexperienced court to engage in anything more than formalistic review without the benefits of procedures which illuminate the issues and facts.

In *International Harvester Co. v. Ruckelshaus*, Chief Judge Bazelon claimed that "environmental litigation represents a 'new era' in administrative law."[121] Judge Bazelon recognized his own inability substantively to review environmental decisions and argued that in order to gnard against unreasonable administrative decisions, courts must require procedures "that open the Administrator's decision to challenge and force him to respond."[122] In short, Judge Bazelon acknowledged that because judges cannot engage in meaningful substantive review, only sufficient process can ensure reasoned decision-making by the EPA.[123]

Additionally, because remedial plans are site specific and necessitate a case-by-case approach, the judiciary cannot rely on precedent when reviewing the EPA's selected remedy. This poses difficulty for a judge who is faced with a highly scientific administrative record in a dispute over appropriate remedial action at a site.

The process of remedy selection illustrates why precedent is unavailable to a reviewing judge. Before selecting a remedial plan for a site, the EPA must conduct a Remedial Investigation/Feasibility Study which suggests alternative remedies for the site.[124] Although defendants can conduct their own studies and can comment on the EPA's RI/FS, the EPA alone ultimately determines the appropriate remedy. In section 107 cost-recovery actions by the

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120 *Ethyl Corp.*, 541 F.2d at 36.

121 International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 651 (D.C. Cir. 1973) (Bazelon, C.J., concurring) ("[T]he interests at stake in this case are too important to be resolved on the basis of traditional administrative labels.").

122 *Id.* at 652.

123 *Id.* As Judge Bazelon explains:

> [I]n cases of great technological complexity, the best way for courts to guard against unreasonable or erroneous administrative decisions is not for the judges themselves to scrutinize the technical merits of each decision. Rather, it is to establish a decision-making process which assures a reasoned decision that can be held up to the scrutiny of the scientific community and the public.

Id.

124 *See supra* note 5.

EPA, a defendant is likely to argue that the EPA implemented an unnecessarily expansive remedial plan.[125] Remedial responses, however, are "*highly site specific*, involving *widely divergent* physical situations, environmental media that are contaminated, and chemistry of the contaminants."[126] Thus, judges cannot rely on precedent in determining the rationality of the EPA's remedial action.[127]

Consequently, judges must rely on personal knowledge of the environmental field to conduct a "searching and careful" review. Unfortunately, as previousely discussed, judges lack the expertise to engage in any form of meaningful review given the many technical and scientific dimensions to an environmental decision. This inability to understand the EPA's decision-making process prevents judges from protecting defendants against harsh remedial decisions.

3. *The EPA Lacks Incentive To Act In A Cost Effective Manner In Section 104 Actions*

In *United States v. Conservation Chemical Co.*[128] and *United States v. Hardage*,[129] the district courts ruled that in section 106 actions where the EPA seeks injunctive relief to compel defendants to perform site cleanup, the court is not limited to the administrative record. However, in section 104 cost recovery actions, the court is limited to the administrative record.[130] The courts provide two primary reasons for this distinction: (1) SARA specifically provides that judicial review is limited to the administrative record only when the President, not the court, takes action;[131] and (2) in section 104 cost recovery actions where the government is initially paying for cleanup, there is incentive for the government to act in a cost effective manner.[132] Therefore, the courts have determined that there is less need for discovery in section 104 actions.

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125 *See* United States v. Rohm & Haas Co., 669 F. Supp. 672, 677 (D.N.J. 1987) (defendants argued for de novo review because of their financial interest in the cost-effectiveness of the EPA's response action); United States v. Dickerson, 660 F. Supp. 227 (M.D. Ga. 1987) (responsible parties alleged EPA's remedial plan was not cost-effective).

126 18 Env't Rep., *supra* note 55, at 773 (July 10, 1987) (paraphrasing report by ERT, Inc., an environmental consulting firm) (emphasis added).

127 *See* Oakes, *supra* note 68, at 504. According to Oakes:

> [E]nvironmental law has proven more resistant to [the] process of common law development; cases instead have tended to turn on particular facts and on the subjective attitudes of those making the decisions. . . . [W]hat are called 'legal' decisions in the environmental field are often factual decisions and hence unlikely to yield useful precedent."

Id.

128 661 F. Supp. 1416 (W.D. Mo. 1987).

129 663 F. Supp. 1280 (W.D. Okla. 1987).

130 *Conservation Chem. Co.*, 661 F. Supp. at 1429; *Hardage*, 663 F. Supp. at 1284.

131 *See* 42 U.S.C. § 9613 (j)(1) (Supp. 1988).

132 *Hardage*, 663 F. Supp. at 1285.

The court's first justification as to the empowering language is merely a question of semantics.[133] The second rationale, on the other hand, evidences the court's concern about the cost-effectiveness of a remedial action. For example, the district court in *Hardage* refused to limit judicial review to the administrative record in a section 106 action because the court did not believe the EPA had incentive to act in a cost-effective manner when defendants must initially finance the remedial action selected by the EPA.[134] This lack of incentive, however, also exists in a section 104 action. Although the government provides the initial funding in a section 104 action, it is doing so with the knowledge that it can seek recovery of all of its expenses in a subsequent cost-recovery suit.[135] Indeed, the government also knows that the arbitrary and capricious standard places a heavy burden on a party challenging its remedial choice. It therefore is unlikely that the agency has any incentive to act in a cost effective manner.[136] While it is possible the EPA may not recover all of its response costs from PRPs,[137] "the pressure on EPA to show results will cause it to spend more money . . . [and] the tightening of cleanup standards [under SARA] 'will further encourage a Cadillac

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133 The semantics dilemma is due to contradictory language in the statute. Section 9613(j)(1) states that judicial review shall be limited to the administrative record in "*any judicial* action under this Act." 42 U.S.C. § 9613(j)(1) (Supp. 1988) (emphasis added). The same section immediately thereafter states that judicial review shall be limited to the administrative record when a response action is "taken or ordered *by the President.*" 42 U.S.C. § 9613(j)(1) (Supp. 1988) (emphasis added).

134 *Id.* The defendants in *Hardage* sought information from site contractors that was not in the administrative record. For a summary of the *Hardage* case, see 17 Env't Rep. (BNA) No. 34 at 1414 (Dec. 19, 1986).

135 Under CERCLA, PRPs are responsible for "all costs of removal or remedial action incurred by the United States Government." 42 U.S.C. § 9607(a)(4)(A) (1982 & Supp. 1988). Courts consistently have held that section 107 liability is independant of the requirements of section 104. *See, e.g.*, United States v. Conservation Chem. Co., 619 F. Supp. 162, 207 (D.C. Mo. 1985); New York v. General Elec. Co., 592 F. Supp. 291, 303 (N.D.N.Y. 1984); United States v. Wade, 577 F. Supp. 1326, 1336 (E.D. Pa. 1983).

Perhaps another safeguard against excessive EPA spending is 42 U.S.C. § 9611(k) which provides in pertinent part: "In each fiscal year, the Inspector General . . . shall conduct an annual audit of all payments, obligations, reimbursements, or other uses of the Fund in the prior fiscal year, *to assure that the Fund is being properly administered* . . . ." 42 U.S.C. § 9611(k) (emphasis added). The effectiveness of this check on agency action depends in large part on how the Inspector General interprets "properly administered." Arguably, this section could prevent the expenditure of funds in excess of the $2 million limit, but then only in those cases where such excess spending is not authorized by the statute. *See supra* note 96.

136 Of course, the Superfund is not an unlimited resource, and the EPA must take into consideration the availability of funds when remedying a site. But this does not guarantee the EPA will act cost-effectively. It simply means that the EPA might act more cost-effectively than if the fund was not capped at all.

137 The House Appropriations Committee has criticized the EPA for failing to actively pursue PRPs. 18 Env't Rep. (BNA) No. 48 at 2363 (March 25, 1988) (summarizing the House staff report). According to EPA Administrator Lee M. Thomas, "[w]here we've fallen down is pressing litigation [to recover funds] in the courtroom." *Id.*

approach to remedial action decisions.' "[138] In sum, there is little incentive for the EPA to conduct efficient cleanups in both section 104 and section 106 actions. Accordingly, the courts should not limit judicial review to the administrative record in section 104 actions for the same reasons they do not limit review in section 106 actions.

The fact that EPA has not acted in a cost-effective manner during other phases of the remedial process lends support to the assertion that EPA does not have a cost-effective disposition. The inadequate monitoring of contractors,[139] the lack of competition among contractors seeking remedial work from the EPA,[140] the EPA's own admission of its uncertainty over the role of cost,[141] and reports that the EPA has sued "deep pockets" for hazardous waste cleanup "where the agency should have been pursuing 'sound and practical' remedies to site problems" illustrate EPA's inefficient history.[142] Furthermore, the $2,000,000 or 12 month limit on EPA response actions under section 104 has proved futile as a limit on agency spending,[143] and the courts always have held that failure to comply with the requirements of section 104 does not affect the EPA's ability to collect all response costs under section 107.[144] These criticisms reveal that the EPA is an unorganized bureaucracy lacking the manpower and structure to make intelligent and cost effective decisions conceruing appropriate remedial action for each Superfund site.[145] More importantly, Congress has simply stood

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138 17 Env't Rep., *supra* note 100, at 1182 (Nov. 14, 1986) (citing a memorandum by attorneys with the Washington, D.C. law firm of Morgan, Lewis & Bockius).

139 18 Env't Rep. (BNA) No. 1 at 4 (May 1, 1987).

140 *See* 18 Env't Rep. (BNA) No. 6 at 494-95 (June 5, 1987) (noting that the lack of competition among contractors hired at the state level increases the cost of EPA cleanups). As a result of this lack of competition, contractors have engaged in excessive cost markups leading to an increase in cost of cleanups. *See* 18 Env't Rep. (BNA) No. 8 at 4 (May 1, 1987). For example, in one case, emergency contractors charged approximately $16 per hour for the use of a two inch trash pump. This equalled a markup of 16,000 percent from 10 cents an hour. *Id.*

141 18 Env't Rep., *supra* note 59, at 667 (citing Arthur B. Weissman, director of the policy and analysis staff in the EPA's Office of Emergency and Remedial Response). SARA does not define "permanent" remedy, nor does SARA provide adequate instructions on the role of cost-effectiveness in cleanup decisions. 17 Env't Rep. (BNA) No. 26 at 962-63 (Oct. 24, 1986).

142 17 Env't Rep. (BNA) No. 17 at 609 (Aug. 22, 1986) (citing a speech to the American Bar Association by Leonard L. Rivkin, a partner in Rivkin, Radler, Dunne, & Bayh). For an example of the EPA's failure to pursue sound and practical remedies to a site, see *infra* note 145.

143 *See supra* note 96.

144 *See* United States v. Wade, 577 F. Supp. 1326 (E.D. Pa. 1983).

145 According to a BNA staff correspondent, a report written by Inspector General for Region III, P. Ronald Gandolfo, claimed that " 'overzealous' remedial actions and lax monitoring of contractors . . . delayed cleanups at half of 20 Pennsylvania superfund sites." 18 Env't Rep. (BNA) at 1758 (Nov. 20, 1987) (paraphrasing the Gandolfo re-

back and watched.

4. *SARA's Hearing Requirements Do Not Adequately Protect a Defendant's Due Process Rights*

a. *PRPs Do Not Have An Adequate Opportunity To Contribute To The Administrative Record.*

While the EPA can take as much time as it needs to perform a Remedial Investigation/Feasibility Study (RI/FS) and select a response action, PRPs generally have only a few months to study the EPA's proposed remedies and perform their own investigations.[146] Although SARA requires that the EPA give defendants a "reasonable opportunity" to comment on the EPA's RI/FS,[147] it does not impose any time limit on the completion of an RI/FS by the EPA. The EPA, in fact, generally takes an average of 2.5 years to complete an RI/FS.[148] Given that the RI/FS constitutes a large, and certainly major, part of the administrative record, this lack of equal participation power results in an administrative record compiled largely by the EPA.[149] In such a situation, it is difficult to argue that SARA

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port). According to the report, the EPA designated two sites on the NPL as requiring major remedial action which only required ordinary removal actions involving less time and money. *Id.* at 1759. According to the report, "inaccurate, incomplete, or questionable information" caused this error. *Id.* (quoting the Gandolfo report). The report also noted that a third Pennsylvania site listed on the NPL, East Mount Zion, may not have contained any hazardous substances at all. *Id.*

146 For example, in *United States v. Hardage*, the EPA gave PRPs only 45 days to conduct their own RI/FS and comment on the EPA's study. 663 F. Supp. 1280, 1289 (W.D. Okla. 1987). The court held that this violated due process, and determined that de novo review of the agency's proposed remedy was appropriate. *Id.* at 1290. In *United States v. Rohm & Haas Co.*, the EPA also gave defendants only 45 days to submit their proposals in response to the EPA's plan. 669 F. Supp. 672, 682 (D.N.J. 1987). The court remanded the case back to the agency because the EPA failed to satisfy the administrative requirements of SARA. *Id.* at 683. However, the court cautioned that "[i]t is not immediately obvious . . . what this court's response should be in light of the identified deficiencies in the administrative process. . . . There is support . . . in SARA [for plaintiff's proposition that judicial review be based on the administrative record already compiled by the EPA]." *Id.* Therefore, it is not obvious that the courts will automatically remand cases where the EPA did not give defendants a reasonable opportunity to comment on a proposed remedy. Other problems include defining what is a "reasonable opportunity to comment," and determining the adequacy of SARA's judicial review provisions when the EPA joins additional PRPs following the participation process. *See id.* at 684 (the court recognized the latter problem but did not reach the issue).

147 42 U.S.C. § 9613(k)(2)(B)(ii) (Supp. 1988).

148 17 Env't Rep. (BNA) No. 51 at 2129-30 (April 17, 1987) (citing Judith Wong, chief of the superfund enforcement section, EPA Region VIII).

149 Although placement of a site on the NPL may alert PRPs of agency action early on, listing of a site does not indicate that the EPA will take immediate remedial action. The EPA is overburdened due to the large numbers of hazardous waste sites needing cleanup and EPA lacks the resources to respond quickly to each site. *See* Frost, *Strict Liability as an Incentive for Cleanup of Contaminated Property*, 25 HOUS. L. REV. 951, 958 (1988). There may be as many as 425,380 potential Superfund sites in the United States

ensures that PRPs have an adequate opportunity "to submit an effective presentation."[150]

For example, in *Hardage*, the EPA spent four years assembling its case against defendants, but provided the defendants with only forty-five days to investigate the site and "develop data to prove the conclusions in EPA's Feasibility Study were incorrect."[151] In order to gather sufficient data to allege innaccuracies in the EPA's study, defendant's spent over $1.5 million and six months worth of investigation.[152] On these facts, the court ordered de novo review of the EPA's remedy selection.[153]

b. *The Procedural Requirements Of SARA Do Not Encourage The EPA To Evaluate Fully And Adequately All Remedial Action Alternatives, Including Those Proposed By PRPs.*

Courts assume that the procedural requirements of SARA encourage the EPA to evaluate fully and adequately all remedial action alternatives, including those proposed by PRPs. This, however, is not the case. For example, in *Hardage*, the EPA utilized the same staff persons to perform the RI/FS, consider the alternative remedial options, select the final remedial plan, and evaluate the comments made by PRPs.[154] The court held that this was a "flagrant denial of due process."[155] In other words, the court recognized that the formal requirements of SARA alone do not satisfy the requirements of due process. In the exercise of its equitable jurisdiction, the court held that under the circumstances as outlined above, "a scope of review less than de novo would be grossly unfair to defendants."[156]

Perhaps more importantly, SARA imposes meaningless limits on the EPA's discretion in selecting between alternative remedial plans. SARA only requires the EPA to respond to the significant data submitted by PRPs. SARA, however, does not prescribe the standards by which EPA is to judge remedial plans proposed by PRPs; nor does SARA dictate the weight the EPA is to give such

today. *Id.* (citing *G.A.O. Finds 425,380 Potential Superfund Sites; Florio Hits E.P.A. For Delays in Site Assessments*, 18 Env't Rep. (BNA) 2043 (1988)).

150 In *Appalachian Power Co. v. EPA*, the court held that an adequate hearing provides parties a full opportunity "to submit an effective presentation." 477 F.2d 495, 503 (4th Cir. 1973).

151 *Hardage*, 663 F. Supp. at 1289.

152 *Id.*

153 *Id.* at 1290.

154 *Id.* ("Due process dictates separation of the prosecutorial function from the decision-making function.").

155 *Id.* (quoting defendants).

156 *Id.*

plans. Consequently, the EPA maintains significant control over the selection process.

c. *Courts Erroneously Assume That The Hearing Requirements Of SARA Afford Defendants An Opportunity to Submit An Effective Presentation.*

SARA's hearing requirements do not afford defendants an opportunity to submit an effective presentation. In *United States v. Seymour Recycling Corp.*,[157] the court recognized that due process requires that defendants have an opportunity to comment on the EPA's proposals "at a meaningful time, in a meaningful manner."[158] The court assumed that because defendants had the opportunity to comment on the EPA's RI/FS and to perform their own studies, defendants had access to all the information necessary to satisfy due process requirements.[159] While it is true that defendants had an opportunity to comment on the EPA's RI/FS prior to EPA's final selection of a remedy, this procedure by itself hardly satisfies the requirement that defendants comment "in a meaningful manner." SARA only requires the EPA to respond to a party's comments or criticisms.[160] SARA does not require full consideration by the EPA of a party's comments; nor does SARA specify the nature, form, or substance of the EPA's responses to such comments. In essence, SARA's hearing requirements "leave open the possibility that the government will require the most onerous level of pristine cleanup."[161] In the end, the EPA alone decides the appropriate remedy, subject only to an arbitrary and capricious standard of review. Without the benefit of cross-examination, defendants cannot rebut the presumption of agency expertise and will rarely be able to prove the EPA acted arbitrarily or capriciously.[162]

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157 679 F. Supp. 859 (S.D. Ind. 1987).

158 In *Seymour Recycling*, the United States sought a court ruling that if the defendants challenged the EPA's selected remedy, judicial review would be limited to the administrative record according to Section 113(j) of SARA, *Seymour Recycling*, 679 F. Supp. at 861. Defendants argued that a de novo trial was necessary to satisfy due process requirements. *Id.* at 864. The court denied defendants claim, stating that defendants had the necessary information to comment on the EPA's proposed remedies "in a meaningful manner." *Id.*

The court in *Appalachian Power Co. v. EPA* also recognized that hearings should provide defendants an "opportunity to submit an effective presentation." 477 F.2d 495, 503 (4th Cir. 1973) (quoting Walter Holm & Co. v. Hardin, 499 F.2d 1009, 1016 (D.C. Cir. 1971)). In addition, the court held that if " 'cross-examination on the crucial issues' is found proper, such right should be recognized and upheld." *Id.* The court therefore acknowledged therefore, that merely affording PRPs the opportunity to comment on the EPA's proposals may not enable them to sufficiently present their objections. *Id.*

159 *Seymor Recycling*, 679 F. Supp. at 864-65.

160 42 U.S.C. § 9613(k)(2)(B)(iv) (Supp. 1988).

161 Frost, *supra* note 149, at 959.

162 *See* 2 *Inside Litigation*, No. 1, at 4 (Nov. 1987) [hereinafter *Inside Litigation*] (In this

C. Proposal For Reform

Whenever additional procedural safeguards are given to a defendant, time and money become important issues. Although some cases involving judicial review of agency action have engaged in de novo review of agency decision-making,[163] this can be an enormously expensive process. Litigation involves both transaction and opportunity costs.[164] In environmental litigation, there is a public interest in expediting the litigation process and in minimizing the financial strain on Superfund. For these reasons, this Note does not advocate de novo review of agency decision-making. However, protecting the public interest at the expense of the rights of potentially responsible parties reeks of unfairness. By affording PRPs additional procedural protection through cross-examination of their opposition during the cost-recovery action following clean up,[165] the courts can serve justice without unduly burdening the EPA and the Superfund. More importantly, the courts will be fulfilling their constitutional duty to provide due process of law.

Although cross-examination at the public hearing stage, before the EPA takes remedial action, would provide PRP's with the opportunity to determine weaknesses in the agency's case and might create incentives for the EPA to act in an intelligent, orderly, and cost effective manner, providing judicial review at this stage is a time-consuming process. Due to the inherent dangers posed by hazardous waste sites and the public interest in expediting the cleanup of these sites, time is of the essence. Therefore, cross-examination at this stage would be counter-productive to the main goals of CERCLA and SARA. In any case, all of the above advantages of cross-

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article Stanley Brown, defense counsel for International Minerals & Chemical Corp., said: "In [*United States v. Ottati & Goss, Inc.*], we have demonstrated that the EPA has no expertise, or that they've misapplied it. Under SARA, there will be an assumption that they are experts and no way to prove otherwise."). In *Ottati & Goss*, 630 F. Supp. 1361 (D.N.H. 1985), the court allowed defendants to cross-examine the EPA's expert witness and contractor. *See also* International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 651-52 (D.C. Cir. 1973) (recognizing that "[w]hether or not traditional administrative rules require it, . . . this decision requires at the least a carefully limited right of cross-examination at the hearing and an opportunity to challenge the assumptions and methodology underlying the [EPA's] decision.").

163 *See* United States v. Hardage, 663 F.Supp. 1280 (W.D. Okla. 1986) (the court engaged in de novo review in the exercise of its equitable jurisdiction).

164 For a discussion of the transactions and opportunity costs involved in hazardous waste litigation, see Lyons, *supra* note 7, at 271.

165 *See International Harvester*, 478 F.2d at 631 (recognizing the advantage of cross-examination as an "engine of truth" and therefore, "a right of cross-examination, consistent with time limitations, might well extend to particular cases of need, on critical points where the general procedure proved inadequate to probe 'soft' and sensitive subjects and witnesses.").

examination can be realized in an adjudicatory hearing following cleanup.

Providing the opportunity to cross-examine EPA personnel and expert witnesses following cleanup does not violate the express purposes and concerns of CERCLA and SARA. On the contrary, it creates incentives for the EPA to act efficiently and in accordance with the requirements of the National Contingency Plan.[166] Although one could argue that cross-examination will increase the transaction and opportunity costs of environmental litigation, cross-examination also will create efficiencies that will offset any initial costs. For example, because cross-examination will act as a check on the cost-effectiveness of the EPA's actions, it will create incentives for the EPA to be highly selective in choosing among remedial alternatives. This may in turn prevent the unnecessary expenditure of funds and will serve to protect the integrity of Superfund.

Consequently, cross-examination will have the long term effect of encouraging the EPA to engage in reasoned decision-making. As Judge Bazelon adamantly asserts, "we will do more to improve administrative decision-making by concentrating our efforts on strengthening administrative procedures."[167] Because cross-examination will act as a check on agency behavior, this will force the EPA to improve remedial selection procedures. In turn, this will increase the quality of the EPA's decision-making process which will enable judges to comprehend more fully the administrative record in order to make determinations of arbitrariness and capriciousness.[168]

Cross-examination also serves to protect the due process rights of PRPs. In *Mathews v. Eldridge*,[169] the Supreme Court held that a determination of due process depends on a consideration of three factors: (1) the private interest involved; (2) the probable value of additional or substitute procedural safeguards if there is a risk of an erroneous deprivation of a private interest through the procedures used; and (3) the public interest involved, including the fiscal and administrative burdens resulting from additional or substitute procedural requirements.[170]

The first factor to consider under *Mathews* is the private inter-

166 *See supra* note 55 for an explanation of the requirements of the NCP.

167 Ethyl Corp. v. EPA, 541 F.2d 1, 67 (D.C. Cir.) (en banc) (Bazelon, C.J., concurring), *cert denied*, 426 U.S. 941 (1976).

168 While this Note agrees with Judge Bazelon's procedure based approach to judicial review, it disagrees with his belief that judges should not engage in any substantive review at all. Judges can engage in limited substantive review to determine arbitrariness and capriciousness if there are adequate procedures to illuminate the complex data in environmental cases.

169 424 U.S. 319 (1976).

170 *Id.* at 335.

est. In section 104 actions followed by cost recovery, the private interest of PRPs is financial given the enormous liability exposure.[171] Analysis under the second *Mathews* factor indicates that the formalistic requirements of SARA provide no actual, substantive protection of a defendant's rights against unreasonable agency behavior. Given the high risk of an erroneous deprivation of a defendant's interest in cost-effective remedies, cross-examination is a valuable procedural tool which will act as a check on agency behavior, allow defendents to question the EPA's expertise, serve to create incentives for the EPA to act in a cost-effective manner, and aid the judiciary in understanding the remedial selection and implementation processes.

Finally, consideration of the public interest factor indicates that the governmental burdens resulting from this additional procedural requirement following cleanup will be minimal compared to the private interests at stake. Because cross-examination will take place following cleanup, it will not affect the overwhelming public interest in prompt and effective responses. Rather, cross-examination serves the public interest by creating incentives for the EPA to act intelligently and efficiently in the cleanup of hazardous waste sites.[172] Cost-effective behavior by the EPA will allow the EPA to stretch its time and money over a greater number of sites needing immediate cleanup.[173] Overzealous remedial action by the EPA only serves to

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171 The astronomical costs of cleanup have caused PRPs to seek insurance coverage in order to insulate themselves against liability. *See* Murphy, *The Impact of "Superfund" and Other Environmental Statutes on Commercial Lending and Investment Activities*, 41 BUS. LAW 1133 (1986). Insurance companies, however, have attempted to narrow their policies to restrict coverage and minimize their risk. Note, *Taking the Insurers to the Dumps: Interpreting "Damages"—Is There Coverage for Hazardous Waste Cleanup Costs Under Comprehensive General Liability Insurance?*, 13 J. CORP. L. 1101, 1104-05 (1988). A great deal of controversy still exists as to whether cleanup costs, such as those imposed under SARA, are covered under Comprehensive General Liability policies. *Id.* at 1105-07. The potential inability to obtain insurance coverage places a PRP in an even more precarious position. *See generally* Brett, *Insuring Against the Innovative Liabilities and Remedies Created by Superfund*, 6 UCLA J. ENVTL. L. & POL'Y 1 (1986) (discussing Superfund liability provisions and how liability insurance policy language and public policy place Superfund liability outside scope of coverage).

172 For example, in United States v. Ottati & Goss, 630 F. Supp. 1361 (D.N.H. 1985), cross-examination helped demonstrate that the EPA contractor had violated the EPA's formal guidelines in preparing the Remedial Investigation/Feasibility study, and gave defendants an opportunity to show the EPA's lack of expertise. *Inside Litigation*, *supra* note 167, at 4 (summarizing the procedural aspects of the case and the effect of SARA on PRPs). In particular, the EPA did not evaluate the probability of certain events occurring. *Id.* Therefore, the threat of cross-examination in future cases should encourage the EPA to avoid the embarrassments of *Ottati & Goss*.

173 In *Lone Pine Steering Comm. v. EPA*, plaintiffs argued that the EPA should not unnecessarily exhaust the Superfund on one site, but rather should efficiently utilize it on as many dangerous sites as possible. 600 F. Supp. 1487, 1488 (D.N.J. 1985).

unnecessarily deplete Superfund resources and prevent EPA personnel from engaging in other important environmental projects.

CONCLUSION

This Note does not intend to undermine the compelling interest of protecting the environment nor to give pardon to companies that recklessly dump hazardous waste in disregard of human health and the environment. Rather, this Note recognizes that justice requires that we protect the interests of companies involved in hazardous waste litigation to the same extent that we protect the due process rights of every American citizen. As the law stands today, the actions of the EPA threaten the existence of our most valuable and productive American companies. Given the EPA's history of inefficiency, mismanagement, and questionable conduct, there must be a check placed on this agency's power. Perhaps one day the EPA will have the structure, expertise, and manpower to deal effectively and efficiently with the problems of hazardous waste. Until then, we must act to preserve two valuable resources: American industry and the environment.

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