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**SEEK AND DESTROY: DESIGNATION OF  
POTENTIALLY RESPONSIBLE PARTIES  
UNDER CERCLA**

A thesis submitted in partial fulfillment of the  
requirements for the Degree of Master of Science  
in Environmental Science

by

**Richard W. Harris**

Danny L. Taylor, Thesis Advisor

May 1994

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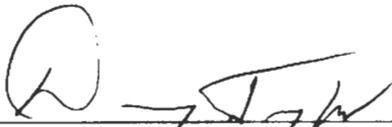
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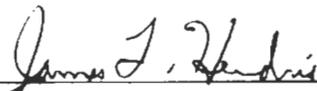
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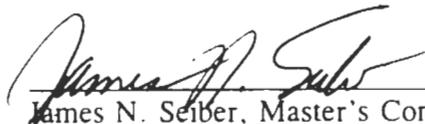
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**ABSTRACT****SEEK AND DESTROY: DESIGNATION OF  
POTENTIALLY RESPONSIBLE PARTIES  
UNDER CERCLA****By Richard W. Harris**

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or Superfund) gives the Environmental Protection Agency (EPA) broad powers to clean up hazardous waste sites in the United States. The EPA can designate owners and operators of waste sites and generators and transporters of hazardous substances as potentially responsible parties (PRPs). The PRPs must clean up the site or face substantial fines and penalties.

Under the doctrine of "strict, joint, and several liability", the EPA can require a few PRPs to assume the entire burden of cleaning up a site, even though their contribution to the release has been minimal. To avoid inequitable results, the paper proposes several practical and politically feasible modifications to CERCLA which would (1) require the EPA to justify its designation of PRPs, (2) allow nonculpable and de minimis PRPs to win dismissal from cleanup orders, and (3) allow minor contributors to avoid joint liability and pay only their proportional costs of cleanup.

A

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## 1. INTRODUCTION

In 1980 Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act,<sup>1</sup> commonly known as "CERCLA" or "Superfund". The law gives the federal government broad powers to clean up hazardous waste sites which pose a hazard to human health and the environment. The burden of cleanup falls primarily on Potentially Responsible Parties (PRPs) associated with the contaminated site. The PRPs can include current and prior owners and operators of the site, generators of hazardous substances who arranged for disposal of materials at the site, and transporters of materials to the disposal site. The Environmental Protection Agency (EPA) has nearly absolute authority and discretion in designating PRPs, and the EPA can order a few PRPs to assume the entire cost of cleanup. The liability of PRPs is strict, joint, and several,<sup>2</sup> and there are few defenses available to PRPs who feel they have been wrongly designated.<sup>3</sup>

The EPA is not required to wield its power in a fair and rational manner, and there are many instances in which PRPs have been improperly named and required to participate in a cleanup action. There is a nearly universal consensus

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1. Pub.L. No. 96-510, 94 Stat. 2767 (1980), 42 U.S.C.A. §§ 9601-9675 (1982) as amended by Pub.L. No. 99-499, 100 Stat. 1613 (1986).

2. The terms "strict liability" and "joint and several liability" are discussed in Section 2.5 below.

3. The defenses available to PRPs are discussed in Section 2.4 below.

that the law is unfair and often ineffective.<sup>4</sup>

This paper deals with PRPs who are “wrongfully” required to participate in cleanup actions. The first section deals with the origins of CERCLA and Congress’s intent to impose cleanup costs on those who profited from disposal of hazardous waste. We will see how the scope of CERCLA has been enormously expanded by judicial decisions, so that there is virtually no escape from an EPA cleanup order. The second section examines the costs of compliance by way of three case studies involving “innocent” PRPs. Finally, the paper recommends various changes to the Superfund statute which are designed to mitigate the impacts on parties who have contributed little or nothing to a hazardous waste site.

## 2. OVERVIEW OF CERCLA

2.1 Enactment of CERCLA. Some laws are intimately related to a notorious problem, and CERCLA is often viewed as a response to Love Canal. Commencing in the 1940’s, the Hooker Chemical Company used Love Canal, an abandoned short waterway near Niagra Falls, New York, as a disposal site for 22,000 tons of residue from the manufacture of over 200 chemical compounds. In 1953 the company covered the site and transferred ownership to the local school

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4. “The Congressional critics, environmentalists, lawyers handling CERCLA matters, and potentially responsible parties (“PRPs”) who are paying for the cleanups agree that the litigation-based CERCLA program is not an effective way to accomplish site remediation”. Allan J. Topol and Rebecca Snow, 1 Superfund Law and Procedure 7 (1992) [hereinafter cited as “Superfund Law”].

board, which then built an elementary school over the old canal. By the mid-1970's, it became apparent that chemicals were emanating from the site into the modest homes of the surrounding residential neighborhood. In the glare of national and international publicity, the neighborhood was ultimately abandoned, and Love Canal became the worldwide symbol of the legal, medical, and political problems of toxic waste disposal.<sup>5</sup> Another incident involved the "Valley of the Drums" in Kentucky, where users had littered a large ravine with some 20,000 drums that were spilling hazardous materials into the soil. The pollutants were then percolating into the groundwater.<sup>6</sup> Elsewhere, municipalities found that their groundwater-based water supplies were contaminated or endangered by industrial chemicals.

Although Congress perceived the need for a federal law of national scope, there was little consensus regarding the form and extent of the legislation. Four hazardous waste cleanup bills were introduced in the 96th Congress, and CERCLA emerged as a last minute compromise between conflicting House and Senate Bills. The resulting law was cobbled together from several sources, and emerged with virtually no legislative history.<sup>7</sup>

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5. Adeline G. Levine, *Love Canal and the Limits of Scientific Proof*, 2 Nat. Res. & Env. 21 (Fall 1986).

6. Superfund Law, *supra* Note 4, at 3.

7. The courts have offered caustic comments regarding the haphazard

In the absence of a well-written statute and extensive legislative history, the courts have been left with the task of defining the purpose and powers of CERCLA. In a much-quoted case, a federal judge defined the two main policy objectives of CERCLA as follows:

[First, Congress] intended that the federal government be immediately given the tools necessary for a prompt and effective response to problems of national magnitude resulting from hazardous waste disposal. Second, Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created. To give effect to these congressional concerns, CERCLA should be given a broad and liberal construction. The statute should not be narrowly interpreted to frustrate the government's ability to respond promptly and effectively, or to limit the liability of those responsible for cleanup costs beyond the limits expressly provided.<sup>8</sup>

The taxing and funding authority of CERCLA expired on September 30, 1985. In examining the Superfund program, Congress found that the EPA had begun work on 12 hazardous waste sites out of 10,000. Congressional investigators estimated the total cost of cleaning up all sites could reach \$100 billion and

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creation of CERCLA. *See Artesian Water Co. v. New Castle County*, 851 F.2d 643, 648 (3d. Cir. 1988) (Court noted that the legislative history "furnishes at best a sparse and unreliable guide to the statute's meaning"); *U.S. v. Mottolo*, 605 F.Supp. 898, 902, 905-6 (D.N.H. 1985) (Court indicated that CERCLA is notorious for having "vaguely drafted provisions and an indefinite, if not contradictory, legislative history"; *U.S. v. Wade*, 577 F.Supp 1326, 1331 (E.D.Pa. 1983) (Court indicated that the legislative history of CERCLA is "unusually riddled" with "self serving and contradictory statements").

8. *U.S. v. Reilly Tar & Chemical Corp.* 546 F.Supp. 1100, 1112 (D.Minn. 1982).

take 50 years or more.<sup>9</sup> After a year of acrimonious debate (during which time CERCLA expired and was renewed by an interim reauthorization), Congress enacted the Superfund Amendments and Reauthorization Act of 1986 (SARA), and the law was signed on October 17, 1986.

The “Superfund Law” therefore consists of CERCLA, SARA, and an enormous body of court interpretations, which are themselves as vague and contradictory as the statutes they interpret. In the first ten years after the enactment of Superfund, more than a thousand reported decisions were handed down bearing on Superfund issues. The authors of Superfund Law and Procedure note that “At the time of this writing, CERCLA-related decisions are appearing at a rate of almost one each court work day”.<sup>10</sup> Indeed, entire treatises are devoted to the emerging law of Superfund.<sup>11</sup>

2.2 Summary of Superfund Law. The key provisions relating to CERCLA enforcement are Section 107, which defines liabilities and defenses for cost recovery; Section 106, providing for administrative and judicial enforcement orders; Section 104, concerning administrative subpoenas for the production of

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9. Senate Comm. on Env't and Pub. Works, Superfund Improvement Act of 1985: Report to Accompany S. 51, together with Additional and Minority Views, S.Rep. No. 11, 99th Cong., 1st Sess. 2 (1985).

10. Superfund Law, *supra* Note 4, at VI.

11. See, for example, Superfund Law and Procedure, *supra* Note 4; 2 The Law of Hazardous Waste (1993); Grad, 1A Treatise on Environmental Law.

documentation and disclosure of information; and Section 101, which defines hazardous substances.<sup>12</sup>

Section 107(a) of CERCLA places the burden of cleanup on PRPs if the following conditions are satisfied: (a) the site where cleanup occurred was a “facility” as defined by CERCLA; (b) a “release” or a “threatened release” of a “hazardous substance” occurred at the site; and (c) the release or threatened release caused the federal government, state government, or private parties to incur response costs.<sup>13</sup>

The federal government can clean up a hazardous waste site itself and then sue PRPs to recover response costs. In addition, Section § 106(a) allows the EPA to seek “such relief as the public interest and the equities of the case may require” in situations of “imminent and substantial endangerment to the public health or welfare or the environment”.<sup>14</sup> The EPA can file suit against PRPs to seek a court-ordered injunction requiring the PRPs to perform the necessary cleanup work. Alternatively, the EPA can issue an administrative order requiring PRPs to conduct a cleanup. If a PRP declines to comply with an administrative order, the agency can ask a court to enforce the order and seek penalties against the

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12. John T. Ronan, *Being a PRP: Lessons from a Veteran*, Hazmat World 49 (January 1989) [hereinafter cited as “Ronan”].

13. Section 107(a), 42 U.S.C.A § 9607(a) (1982).

14. Section 106(a), 42 U.S.C. § 9606(a).

PRP.<sup>15</sup> If a recipient of an administrative order declines to comply, EPA may conduct the cleanup itself and then sue the PRP to obtain reimbursement for its response costs, as well as treble damages if the PRP's failure to comply was "without sufficient cause".<sup>16</sup>

The remedial program designed by Congress was intended to shift the burden of cleanup from the government to private industry and those parties profiting from disposal of hazardous wastes. However, the scheme had the effect of adding enormous "transaction costs" related to litigation, as noted in Superfund

Law and Procedure:

[CERCLA reflects] the general conception of Congress that PRPs should bear the costs of cleanup, whether by conducting the remediation and paying the contractors directly, or by making payments to the Superfund or other private parties to reimburse them for their expenses in conducting cleanup. For Congress, such a scheme had the political advantage of suggesting that the legislators had required that industrial users of chemicals who "were responsible" for the problem, rather than innocent taxpayers or consumers, pay for hazardous waste cleanup. In fact, this scheme increased the total cost of cleanup by adding transactional expenses - the costs that are invariably associated with the allocation of responsibility through litigation.<sup>17</sup>

2.3 Designation of PRPs. CERCLA does not specifically use the phrase

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15. Section 106(b)(1) 42 U.S.C. § 9606(b)(1).

16. Section 107(c)(3), 42 U.S.C.A. § 9607(c)(3). The foregoing summary of Sections 107 and 106 are taken from Superfund Law, *supra* Note 4, at 11-12.

17. Superfund Law, *supra* Note 4, at 12.

“Potentially Responsible Party”, but the term has come to mean any person whom the EPA has targeted as being potentially liable for cleanup of a designated site.

Section 107(a)<sup>18</sup> of CERCLA subjects the following parties to liability:

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18. Section 107(a) of CERCLA, 42 U.S.C.A. § 9607(a) (1982), imposes liability on the following categories of persons:

Section 107(a). Notwithstanding any other provisions or rule of law, and subject only to the defenses set forth in subsection (b) of this section -

- (1) the owner and operator of a vessel or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
- (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which cause the incurrence of response costs, of hazardous substance, shall be liable for -
  - (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
  - (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
  - (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
  - (D) the costs of any health assessment or health effects study carried out under section 104(i).

a. Current owners and/or operators of the sites or facilities from which there has been a release or there was a threatened release of a hazardous substance.<sup>19</sup>

b. Past owners and operators of the sites or facilities at the time of disposal of the hazardous material.<sup>20</sup>

c. Generators of hazardous materials who arranged for the disposal of their materials at the site.<sup>21</sup>

d. Transporters of materials to a disposal site.<sup>22</sup>

Section 106, which allows the EPA to issue administrative cleanup orders and obtain injunctive relief, contains no similar listing of parties who might be liable for cleanup. However, the courts have concluded that the parties designated under Section 107 are also PRPs under Section 106.<sup>23</sup>

CERCLA defines "owner or operator" as any person owning or operating any facility at which hazardous substances were released.<sup>24</sup> The meaning of

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19. Section 107(a)(1), 42 U.S.C.A. § 9607(a)(1) (1982).

20. Section 107(a)(2), 42 U.S.C.A. § 9607(a)(2) (1982).

21. Section 107(a)(3), 42 U.S.C.A. § 9607(a)(3) (1982).

22. Section 107(a)(4), 42 U.S.C.A. § 9607(a)(4) (1982).

23. *See* U.S. v. Bliss, 667 F.Supp 1298, 1313 (E.D.Mo. 1987).

24. Section 101(20)(A), 42 U.S.C.A. § 9601(20)(A).

"owner or operator" has been expanded by the courts to include all current owners, without regard to their involvement with the disposal of hazardous materials or release of hazardous materials into the environment. Past owners are liable for cleanup if there was a release of hazardous substances during their ownership. Owners can also include lenders, creditors, bankruptcy trustees, lessees, corporations, and joint ventures.

The courts have construed the term "operator" broadly to extend to all those who profited in a commercial, financial, or proprietary sense from the treatment or disposal of hazardous waste at a particular site, or were involved in disposal. Some courts have ruled that anyone having the *power* to direct disposal operations, or the capacity to prevent and abate damage, may be designated an "operator" under CERCLA.<sup>25</sup>

A generator under CERCLA is any person who arranges for transport, disposal, or treatment of hazardous substances owned by the generator at a facility owned or operated by another person.<sup>26</sup> A generator's liability does not end with the consignment of materials for transport for disposal. The generator may be held liable even though he did not select the disposal site.

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25. Superfund Law, *supra* Note 4, at 171; *see, e.g.*, U.S. v. NEPACCO, 579 F.Supp. 823 (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, 108 S.Ct. 146, 98 L.Ed.2d 102 (1987).

26. Section 107(a)(3), 42 U.S.C.A. § 9607(a)(3) (1982).

CERCLA does not require that a direct causal connection be established between the generator's hazardous material and the response costs at the disposal site. In *U.S. v. South Carolina Recycling and Disposal, Inc.*,<sup>27</sup> liability was imposed on generators when it was demonstrated that they had shipped hazardous substances to the site, substances of that type were present, and that there had been a release of "a hazardous substance" from the site.

The generator of hazardous waste in *U.S. v. Bliss*<sup>28</sup> was held liable along with the transporter/disposer when the transporter sprayed the waste on the ground. The Court cited the generator's *willful ignorance* regarding the manner in which the transporter intended to dispose of the waste. The generator did not inquire about or verify that the waste would be disposed of properly.

Finally, CERCLA imposes strict liability on "transporters" of hazardous waste.<sup>29</sup> A transporter is any person who accepts any hazardous substance for transport to facilities selected by that person, and from which there is a release or threatened release which causes response costs to be incurred. The transporter runs a substantial risk if the disposal site is improperly managed. The courts have ruled consistently that independent contractors who transport waste to disposal sites

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27. 14 E.L. 20272, 20274 (D.S.C., Feb. 23, 1984).

28. 677 F.Supp. 1298, 1304 (E.D.Mo 1987).

29. Section 107(a)(4), 42 U.S.C.(a) § 9607(a)(4) (1982).

*they have selected* are liable along with the site owner and the waste generators in the event of an unlawful discharge.

2.4 Defenses of PRPs. The defenses available to a PRP are few and strictly limited. Section 107(b)<sup>30</sup> of CERCLA allows a PRP to escape liability if he can show that the release or threatened release and resulting damages were caused solely by:

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30. Section 107(b), 42 U.S.C.A. § 9607(b), establishes the following statutory defenses:

Section 107(b). There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of a hazardous substance and the damages resulting therefrom were caused solely by -

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

- a. An act of God.
- b. An act of war.
- c. An act or omission of a contractually unrelated third party,

where the defendant can prove that he exercised due care with respect to the hazardous substance involved and “took appropriate precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions”<sup>31</sup>

In enacting SARA, Congress added a fourth defense, known generally as the “innocent landowner” defense.<sup>32</sup> In order to invoke the defense, the current owner of a property must demonstrate that he acquired the property after the disposal of hazardous substances and that he falls into one of the following protected categories:

1. At the time of acquisition, the owner did not know and had no reason to believe that anyone had disposed of hazardous substances on the site; or
2. The owner is a governmental entity that acquired the site through involuntary transfer, escheat, or eminent domain; or
3. The owner acquired the site through inheritance or bequest.

As a practical matter, it is difficult for a landowner to meet his burden of

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31. Section 107(b)(3), 42 U.S.C.A. § 9607(b)(3) (1982)

32. Section 101(35)(a), 42 U.S.C.A. § 9601(35) (1982).

“ignorance”. In order to demonstrate that he did not know about contamination on the site, the owner must have made a thorough investigation of the site. However, if hazardous materials are later found on the site, then the owner must not have looked hard enough.<sup>33</sup>

Although there are other defenses which a PRP might assert,<sup>34</sup> the courts have so limited the PRP's defenses that one lawyer has been led to comment that

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33. According to the authors of Superfund Law and Procedure, the innocent landowner must satisfy seven conditions in order to assert the defense:

[I]n the typical case, in order successfully to assert the “innocent landowner” defense, a party must demonstrate all four of the elements of the third-party defense, namely that: (1) the release or threat of release of a hazardous substance and the resulting damages were caused solely by an act or omission of a third-party; (2) the defendant exercised due care with respect to the hazardous substance; (3) the defendant took precautions against the third-party's foreseeable acts or omissions and the foreseeable consequences resulting therefrom; and (4) the third-party's act or omission did not occur in connection with a contractual, employment, or agency relationship (either direct or indirect) with the defendant. To prove the fourth element of the third-party defense, the party must then also show the further three elements listed in Section 101(35), namely that: (1) it received an interest in the property after the disposal had occurred; (2) it had no reason to know of any disposal at the time of acquisition; and (3) it had made all appropriate inquiry into the previous ownership and uses of the property. *Superfund Law, supra* Note 4, at 434.

34. These defenses include constitutional defenses (takings, due process, and retroactivity), equitable defenses, definitional defenses, the petroleum exclusion, procedural defenses, and a broad category described as “creative defenses”. *Superfund Law, supra* Note 4, at 400-401.

“there are no defenses to liability under the statute”.<sup>35</sup>

2.5 Strict, Joint, and Several Liability. The courts have held that CERCLA imposes a standard of strict liability, and that this liability is joint and several. These terms merit explanation.

*Strict liability* means liability without fault.<sup>36</sup> A party becomes liable for damages even though he has not departed in any way from a reasonable standard of intent or care. Activities which give rise to strict liability include blasting, impoundment of water, and other “abnormally dangerous” practices.

Interestingly enough, CERCLA does not specifically state that the release of hazardous substances will give rise to strict liability. However, Section 101(32)<sup>37</sup> provides that liability under CERCLA shall be the same as liability established under Section 311 of the Clean Water Act (CWA).<sup>38</sup> Judicial decisions interpreting the CWA have imposed a standard of strict liability on polluters.<sup>39</sup> Section 101(32) of CERCLA has therefore been construed to impose strict liability

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35. Superfund Law, *supra* Note 4, at 401.

36. Prosser and Keeton on Torts (5th Ed.) 534 (1984).

37. Section 101(32), 42 U.S.C.A. § 9601(32) (1982).

38. Federal Water Pollution Control Act, 33 U.S.C.A. § 1321 (1982).

39. *See, for example*, U.S. v. LeBeouf Bros. Towing Co., 621 F.2d 787, 789 (5th Cir. 1980), *cert. denied*, 452 U.S. 906, 101 S. Ct. 3031, 69 L. Ed. 2d 406 (1981).

upon PRPs, instead of a fault-based standard of liability.

*Joint and several liability* involves the allocation of blame. Imagine that the total liability for a hazardous waste site is represented by a pie. Under the concept of "several liability", the liability is "severed" and assigned to each party in proportion to its contribution. Thus, a party which contributed 1% of the waste would bear 1% of the cleanup costs (i.e., 1% of the pie).

In contrast, "joint liability" means that the liability of all parties is "joined" together, and one party can bear the entire cost of cleanup even though his contribution may represent a fraction of the total pie. Joint liability is generally assigned where the actions of several parties have contributed to a release, and the contribution of one party cannot easily be identified or quantified.

In enacting CERCLA and SARA, Congress did not specify whether the liability of PRPs should be "several" or "joint and several". If liability were merely several, the costs of cleanup would be apportioned among the defendants according to their contributions. But if liability were *joint* and several, the government could seek to recover *all* the costs from *only one* of the PRPs. Obviously, application of joint and several liability can simplify a cleanup or cost recovery. The EPA can name one or more PRPs with "deep pockets" and force them to assume the entire cost of cleanup. The PRPs can then initiate a cost recovery action against other parties to recover a share of their costs. The site will be

remediated without the use of federal dollars.<sup>40</sup>

The courts have generally held that joint and several liability is allowed but not mandatory under Section 107 of CERCLA, and liability *may* be apportioned according to the facts of each case. For example, in the case of *U.S. v. Chem-Dyne Corp.*,<sup>41</sup> the generator and transporter defendants argued that they should not be held jointly and severally liable for the entire cost of cleanup. The Court ruled that joint and several liability was permissible under CERCLA, although it had not been specifically provided for in the statute. The Court adopted the Restatement (Second) of Torts, which imposes joint and several liability when the actions of two or more individuals cause a single individual harm.<sup>42</sup> In the typical

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40. The rationale for joint and several liability is discussed in Lawrence S. Coven, *Liability Under CERCLA: After a Decade of Delegation, the Time is Ripe for Legislative Reform*, 17 Ohio Northern Univ. L.Rev. 165, 195 [hereinafter cited as "Coven"]:

Courts imposing joint and several liability under a strict liability standard justify their position by arguing that the ultimate goal of CERCLA is to provide the most efficient and effective method possible for cleaning up waste sites. By imposing joint and several liability, wealthy defendants must bear the brunt of financing the cleanup efforts and then seek indemnification, thereby negating the need for governmental involvement. By placing the burden on the guilty parties to remedy the hazardous waste problem, the "Superfund" need not be disturbed.

41. 572 F.Supp. 802 (S.D. Ohio 1983).

42. "Each of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm". Restatement, Second, Torts § 875.

CERCLA case involving numerous owners, operators, generators, and transporters, the apportionment of liability would be difficult and burdensome. The Court concluded that the burden of proof as to apportionment of costs rests on the PRP who seeks to limit his liability on the grounds that the harm is divisible.<sup>43</sup> It should therefore follow that a party who can establish his contribution with certainty should be allowed to escape joint liability. For example, if a party contributed ten barrels to a 500-barrel site, his liability should be limited to 1/50th of the cleanup costs. (This assumes that the barrels have not leaked and contributed to a "indivisible" plume of contaminants.) However, this is not always the case, as illustrated by the first case study below.

### 3. CASE STUDIES

3.1 The \$100,000 Can. On March 17, 1989 Region IX of the EPA issued Order No. 89-06, *In the Matter of Reno Barrel Recycling, et al.*, naming twenty-three PRPs, including the University of Nevada, Reno. The Order directed the PRPs to begin an immediate cleanup of the site owned and operated by Reno Barrel Recycling (RBR). For six years RBR had acquired and processed empty drums for resale. RBR also received drums containing hazardous substances and toxic wastes, and the drums were stored at a site 17 miles north of Reno in Cold Springs, Nevada. Acting on a request from the Nevada Division of Environmental

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43. Ronan, *supra* Note 12 at 51.

Protection, the EPA Site Inspection Team found 3,486 barrels in various states of deterioration. Several damaged drums were in direct contact with the soil, and there was a solvent odor in the air. The EPA sampled 20 of the drums and found perchloroethylene, a suspected human carcinogen; cyanides; ignitable and flammable liquids; acid oxidizers; and styrene. A later inspection team discovered leaking drums containing hydrofluoric acid. The site was located within 125 feet of a mobile home park, and there were no fences or security guards to protect the barrels from vandalism.

The owner and operator of the site, Richard Kozlowski, declared bankruptcy and contributed nothing to the cleanup. He was later convicted of numerous RCRA violations and given a one-year jail term.

The University of Nevada, Reno (UNR) was astonished to find itself listed with Mr. Kozlowski on the Section 106 Order. UNR had never done business with Reno Barrel Recycling or any of its employees. Upon further inquiry, UNR discovered that there were two five-gallon cans at the RBR site with old shipping labels addressed to the University of Nevada Chemistry Department. The cans had originally contained chloroform and carbon tetrachloride, but the cans were now filled with a fuel substance. A hand-written label stated that the cans contained JP-4 jet fuel; the label had the name "DeHart" on it.

The University was able to determine that a former student, Dillard Lovell DeHart, had taken the empty containers from a trash dumpster, had filled them

with JP-4 jet fuel from the Nevada National Guard, and had used the fuel to conduct tests at the Lear Fan facility at Stead, Nevada. Mr. DeHart left Lear Fan in 1984, and the cans were subsequently found at the RBR site. Mr. DeHart prepared an Affidavit confirming that the UNR had not contributed to the RBR site.

In a letter dated April 12, 1989 to Region IX, Donald Klasic, UNR's general counsel, requested that UNR be released from the Section 106 Order. Mr. Klasic invoked the "third-party defense" set forth in Section 107(b) of CERCLA:

There shall be no liability under [Section 107(a)] for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by... (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions....<sup>44</sup>

Since Mr. DeHart was neither an employee or agent of UNR, nor acting under any contractual relationship with the University, Mr. Klasic argued that the University should be immediately released from the Section 106 Cleanup Order:

It is UNR's contention, therefore, that based upon the above

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44. Section 107(b), 42 U.S.C. §9607(b) (1982).

information it has clearly established by more than a preponderance of the evidence that the hazardous substances contained in the two barrels attributed to the University of Nevada-Reno under Order No. 89-06 were generated by an act or omission of a third party other than an employee or agent of the University of Nevada-Reno or other than one whose act or omission occurred in connection with a contractual relationship with the University of Nevada-Reno.

Under these circumstances, therefore, the University of Nevada-Reno is clearly entitled, in both law and in equity, to be released from the requirements of Order No. 89-06 and my client, the University of Nevada-Reno, hereby requests that its name be removed from said order and that it be released from all requirements of complying with said order.

Given the fact that there are very short time constraints with respect to the compliance of said order and the fact that the persons and entities identified in said order are expected to make considerable outlays of funds to comply with said order in such a short period of time, it is requested that you respond to this letter as quickly as may be possible.<sup>45</sup>

Despite Mr. Klasic's request that the EPA respond to his letter "as quickly as may be possible", Region IX took *13 months* to consider his request. On May 20, 1990 Jean E. Rice, Assistant Regional Counsel for Region IX rejected the third party defense in a terse letter to Mr. Klasic:

UNR has raised section 107(b)(3) of CERCLA as a defense to its CERCLA liability. To support that defense, you provided EPA with a letter and an affidavit attesting to certain events that may have caused barrels generated by UNR to be located at the Reno Barrel Recycling Site. In general terms, the section 107(b)(3) defense is available only if there is no contractual relationship between the PRP and the third party; and the PRP established, by a preponderance of evidence, that (a) the PRP exercised due care with respect to the

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45. Letter dated April 12, 1989 from Donald Klasic to Region IX, EPA.

hazardous substance and (b) the PRP took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions. *EPA has concluded that the information UNR submitted to the Agency provides insufficient grounds for release from the Order under section 107(b)(3). The Order issued to UNR, therefore, remains in full force and effect.* (Emphasis added.)

The EPA gave no formal reason for its conclusion that UNR had provided "insufficient grounds for release". Privately, the University was told that it should have removed the shipping labels or "punched holes in the cans" to prevent their further use.<sup>46</sup> In other words, UNR was liable for cleanup at the RBR site because it did not prevent a stranger from collecting its empty cans and using them for his own purposes!

Faced with the threat of \$25,000-per-day fines and "punitive damages of three times the total cost incurred by the United States for site response",<sup>47</sup> UNR chose to join the PRP group which had assumed responsibility for cleaning up the RBR site. Over the next two years, the PRPs spent a total of \$2,000,000 on remediation and attorneys' fees. It was a frustrating task. The first contractor failed to complete the work on time and within the agreed-upon budget, and a second contractor had to be hired. Six of the PRPs declined to join the cleanup effort and, despite letters of remonstrance from the EPA, avoided liability and fines

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46. Conference with Brian Whalen, UNR Assistant Vice President of Facilities Management, February 15, 1994.

47. Order No. 89-06 at 10.

altogether. The EPA issued an Amended Administrative Order on February 14, 1991 threatening the PRP group with further sanctions if the remaining 227 drums of material were not immediately secured and removed.

Altogether, UNR expended approximately \$100,000 on remediating the RBR site. This includes the time of Mr. Klasic, the University counsel, who served as Chairman of the PRP group. To the very end, Region IX of the EPA insisted that UNR was subject to strict, joint and several liability for cleanup of the site.<sup>48</sup>

The Reno Barrel Recycling case is one example of a truly innocent party being forced to participate in a Section 106 cleanup. There are several lessons to be drawn from the RBR case:

1. The EPA was solely concerned with cleanup of the RBR site. Hav-

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48. In a letter dated March 30, 1992 to Brian McKay, Attorney General of the State of Nevada, Don R. Clay, Assistant Administrator for Solid Waste and Emergency Response in EPA's Washington, D.C. office, discussed the liability of the PRPs:

In multi-party Superfund clean-ups, EPA, as a matter of policy, prefers not to intervene in the internal discussions among PRPs regarding the relative liability and contributions of the individual companies. To ensure the Site is cleaned up expeditiously, the theory of strict, joint and several liability is applied to all identified PRPs. Those companies who choose not to participate in the clean-up will be subject to judicial enforcement actions and all related penalties for non-compliance. In addition, the cooperative parties may also pursue contribution claims against the non-complying companies through litigation to compel their contribution to the clean-up cost.

ing assembled a sufficient group of "deep pockets", the EPA was not inclined to release UNR, despite its evidence of nonculpability, nor was the EPA inclined to pursue the noncontributing PRPs. The EPA did not care in the least that its actions were inequitable or unfair, but only that the job was accomplished with a minimal cost to the federal government.

2. In view of the failure of six PRPs to participate, and the further failure of the EPA to levy fines or sanctions against them, UNR could probably have refused to join the PRP group. It is unlikely that the EPA would have sought sanctions against the University.<sup>49</sup>

3. As an alternative to the third party defense, UNR might have argued that its contribution to the RBR site was "divisible". That is, two cans were identified as University property. The cans were still intact and there had been no discharge to the soil or water. The University might therefore have argued that it was responsible for only 2/3486ths of the cleanup costs. As a "de minimis" PRP, it should have been able to negotiate a settlement and release under SARA.<sup>50</sup>

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49. In fact, Mr. Klasic has since stated that UNR should have denied liability and declined to participate in the cleanup. He has expressed his "frustration" that EPA did not pursue the recalcitrant PRPs. Telephone conversation with Donald Klasic, February 22, 1994.

50. Section 122(g)(1) of SARA, 42 U.S.C.A § 9622(g)(1) allows the EPA to dismiss de minimis PRPs in the following circumstances:

"[W]henever practicable and in the public interest,...the President shall as promptly as possible reach a final settlement with a poten-

4. In addition to the threat of fines and penalties, UNR was induced to join the PRP group by an unrealistically low assessment of cleanup costs. In a summary of the RBR case prepared for the Association of Physical Plant Administrators, a UNR official made the following observation:

The University legal counsel estimated that it would cost \$15,000 to \$20,000 to defend this case. When the PRP group, represented by seventeen attorneys, came to the conclusion that they could have an environmental contractor clean up the [RBR] site for a base contribution of \$20,000 per PRP member, plus a prorated cost based upon the number of barrels per company, the university agreed to contribute. Complications arose, however, and the base contribution had to be increased to \$50,000. To date, the university has invested \$72,000, plus more than \$25,000 in personnel costs, to comply with the federal EPA 106 Order.<sup>51</sup>

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tially responsible party in an administrative or civil action under section [106 or 107]...if such settlement involves only a minor portion of the response costs at the facility concerned and" either (1) the amount and toxic effects of the hazardous substances contributed by that party to the facility are minimal in comparison to other hazardous substances at the site; or (2) the PRP is the owner of the real property on or in which the facility is located and did not conduct or permit the generation, transportation, storage, or disposal of any hazardous substance at the facility, and did not contribute to the release or threat of release of a hazardous substance there. The section directs the President to reach a de minimis settlement as soon as possible after the necessary information is available, allows the President to provide the settling de minimis defendants with a covenant not to sue, and provides that a party who has resolved its liability to the United States will not be liable for contribution claims of non-settlers and that the de minimis settlement will reduce the potential of the non-settlers by the amount of the settlement.

51. Buzz Nelson, *We're from the Government and We're Here to Help*, Hazardous Materials and Solid Waste Management, APPA Monograph (1991).

3.2 The Tank That Didn't Leak. The Sparks Tank Farm is situated on the eastern edge of the Truckee Meadows, some two miles east of Reno. The site consists of 33 acres owned by Santa Fe Pacific Pipelines Inc. (SFPP) and other parties. Gasoline, diesel fuel, commercial jet fuel, and military jet fuel are transported to the Sparks Terminal through SFPP's pipeline system from the San Francisco Bay Area. The petroleum products are stored in 47 above-ground storage tanks at the Terminal, and the fuel is then delivered to trucks at six separate loading racks. The trucks carry gasoline and diesel fuel to service stations in northern Nevada and California, commercial jet fuel to Reno-Cannon International Airport, and JP-4 jet fuel to the Air National Guard and to Stead Air Force Base. JP-5 is pumped to the Fallon Naval Air Station through a separate SFPP pipeline directly out of tanks at the terminal.

The Sparks Tank Farm was formerly the site of a railyard operated by Southern Pacific Transportation Company (SPTCo). SPTCo's current and past operations include maintenance, cleaning, refueling, and storage of railroad engines and other rolling stock. Historic maintenance activities may have used chlorinated solvents for parts cleaning.

In 1955 SFPP started construction of the Terminal. During the original construction, SFPP crews encountered several areas containing railyard scrap, such as parts of locomotives, rail cars, and railroad track. Several areas appeared to have been used for liquid dumping, as evidenced by severely discolored soils

contained within those areas. In fact, most of the site appears to have been a dump area which has been capped by fill material.<sup>52</sup> Initial construction of the terminal was completed in 1957, and SFPP has since transshipped approximately ten billion gallons of product.

Although the Terminal site was known to be contaminated with oil residues, it was nonetheless surprising when SFPP's work crew discovered free-floating oil and gas during construction of SFPP's oil-water separator in 1987.<sup>53</sup> SFPP immediately notified the Nevada Division of Environmental Protection (NDEP), which is charged with enforcement of the federal Clean Water Act. SFPP engaged a local consulting firm to undertake a preliminary assessment of shallow soils and shallow groundwater at the terminal. In December 1987, the NDEP ordered the initiation and implementation of site cleanup activities.

Subsequent investigation revealed the presence of free-floating product in the groundwater along the southern and southwestern portion of the terminal. The

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52. This description is taken from written testimony presented to the Senate Subcommittee on Toxic Substances, Environmental Protection, Research and Development on August 19, 1991 by J.M. Abboud, Senior Vice President of Operations and Engineering, Santa Fe Pacific Pipeline Partners LP.

53. An oil-water separator (OWS) separates usable petroleum products from water. Normal operations at the terminal will generate product and water mixtures; these activities include wash downs of the truck loading racks and draining of water from the bottom of the product storage tanks. Water from the OWS is pumped through a carbon filtration system in order to meet the sanitary sewer permit conditions.

investigation identified the Helms Pit as having a major influence on the direction of groundwater flow in the area due to Pit dewatering by pumping. The relationship of the Helms Pit and the Tank Farm is shown on Figure 1, which also depicts the extent and location of the underground plume of fuel. The Pit acts as a hydraulic sink, interrupting the normal groundwater flow and drawing local groundwater to it instead of allowing the water to flow to the Truckee River. An inspection of the Helms Pit in November 1988 revealed that product was discharging along a seepage face in the southwest corner of the pit. The seep area appeared to be about 300 feet long and was located about 20 to 25 feet above the floor of the Pit, which by now was approximately 120 feet deep. The seep material was analyzed using a gas chromatograph, and the contamination was found to consist of petroleum products similar to those stored in the Terminal.

Following discovery of the seeps, SFPP undertook an extensive sampling program in December 1988 to determine if any contamination was leaving the Pit and entering the Truckee River. The quality of the Truckee River is particularly important because its waters flow into Pyramid Lake, which is the habitat of the endangered cui-ui, the threatened Lahontan cutthroat trout, and popular game fish. To date, no petroleum products associated with the Pit or the Terminal have been detected in the Truckee River.

In May 1989, SFPP received approval for a remediation plan involving three recovery wells, three injection wells, an oil water separator, and an open air

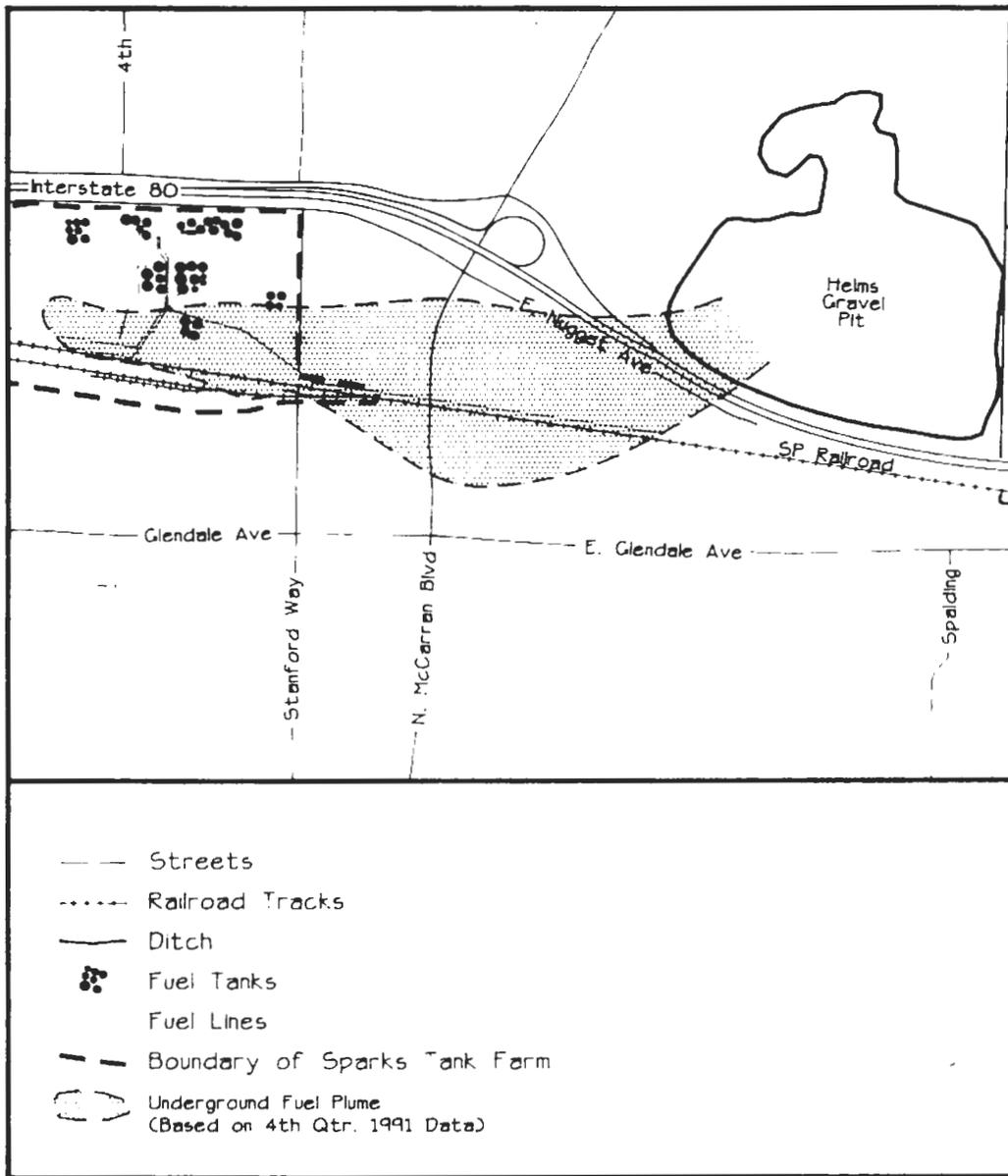


Figure 1: Map showing relationship of Sparks Tank Farm, underground fuel plume, and Helms Pit.

holding pond. However, implementation of the recovery system was delayed because SFPP could not obtain an air quality permit from the Washoe County District Health Department; the SFPP system did not begin operations until January 1991. In addition, a recovery system to capture free-floating product was designed and installed by SPTCo at the railyard in early 1991.

Commencing in the Spring of 1990, SFPP, SPTCo, Time Oil, and Shell Oil held several meetings with the NDEP and Washoe County to discuss group remediation of the site. Although some progress was being made, the NDEP apparently decided that the Tank Farm owners and operators were not proceeding quickly enough to characterize and remediate the site. The NDEP became especially concerned when it received notice from Helms Construction Company that it would cease pumping and dewatering the Helms Pit by March 8, 1991. This led to the state litigation and federal cleanup order described below.

On February 1, 1991 the Nevada Division of Environmental Protection filed its "Amended Complaint" against Santa Fe Pacific Pipelines, Inc.; Southern Pacific Transportation Company; Shell Oil Company; Time Oil Company; Berry-Hinckley Terminals Inc.; Chevron USA Inc.; Texaco Refining and Marketing, Inc.; Air BP, a Division of BP Oil; Unocal Corporation; and Golden Gate Petroleum Company. The Complaint alleged that the Defendants had violated the provisions of the Nevada Water Pollution Control Law, NRS 445.131 to 445.354; the Nevada Storage Tank Law, NRS 459.800 to 459.856; and the Nevada Hazardous

Waste Disposal Law, NRS 459.400 to 459.600. The Complaint further alleged that there existed "an underground banana-shaped plume of fuel" with an estimated volume in excess of 4,000,000 gallons. The immediate focus of the Complaint was set forth in Paragraph 18:

[NDEP] believes that the likely result of ceasing the dewatering of the pit is that the water table will rise, further contamination of water and soil will occur, and the plume will turn towards the Truckee River as an outlet.<sup>54</sup>

In addition to injunctive relief requiring dewatering of the Helms Pit and on-site and off-site remediation to remove the fuel, the NDEP sought civil penalties from each of the Defendants of up to \$25,000 for each day's violation.

On August 16, 1991 the federal government became involved as well when the EPA issued Administrative Order 91-22 under Section 106. The Order stated that chlorinated solvents in the groundwater posed a threat to human health, and a broader threat to the environment would result from migration of groundwater containing chlorinated solvents or petroleum products into the Truckee River. The Order directed the Respondents to stop continuing sources of contamination on the site, characterize the contamination on and off site, and develop and implement removal actions to eliminate imminent and substantial threat to the public health and/or the environment.

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54. Nevada Division of Environmental Protection v. Santa Fe Pacific Pipeline, Inc., et al., Case No. CV 91-546, Second Judicial District Court, Washoe County, Nevada.

The federal action was triggered by a curious series of events. In 1990 sports announcer Bruce Breslow was campaigning for Mayor of Sparks. As one of his campaign promises, he stated that his administration would turn the Helms Pit into an attractive marina for enjoyment by the people of Sparks. When he discovered that his plan might be delayed by years because of the petroleum contamination, he contacted Senator Harry Reid of Nevada to obtain assistance.

Senator Reid had a personal reason for concern about the Truckee River. As the architect of the Negotiated Settlement,<sup>55</sup> Senator Reid was concerned that contamination of groundwater and the Truckee River could upset the delicate political and legal balance among various municipal, agricultural, and tribal interests. He therefore directed the EPA to "find" a basis for invoking CERCLA and enforcing a more rapid cleanup. CERCLA itself contains a provision which excludes petroleum products from emergency regulation. The EPA therefore had to find a regulated, toxic substance to utilize its emergency powers. Its site investigation and sampling disclosed unlawful concentrations of various chlorinated solvents. This violation gave rise to the Section 106 Order in August 1991.

Under threat of substantial fines and other sanctions, the Respondents de-

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55. The Negotiated Settlement is a complex agreement involving the United States, the states of Nevada and California, Reno-Sparks, the Truckee Carson Irrigation District, and the Pyramid Lake Paiute Tribe of Indians. The agreement, if implemented, will provide for allocation of Truckee River water among various municipal, agricultural, and tribal groups and end a century of tortuous litigation.

veloped a Work Plan dated October 18, 1991 which identified the investigative activities and methods designed to evaluate the nature and extent of groundwater and surface water pollution at the Tank Farm. Work was initiated on October 28, 1991 and resulted in several key conclusions:

1. Dewatering of the Helms Pit was a key element in avoiding discharge of solvents and petroleum products into the Truckee River;
2. The plume of free product contained approximately 4,000,000 gallons of oil and gas; and
3. The public water supply had not become contaminated by chlorinated solvents or petroleum products.

These studies led to preparation of the Removal Action Plan (RAP) approved by the EPA in August 1992. The removal actions, designed to prevent harm to human health and the environment, consist of source control, product removal, aquifer protection, and surface water protection.

At the present time, the PRPs are engaged in soil sampling and analysis to identify sources of contamination. An engineering consultant is completing a hydrologic model of the site and a conceptual engineering design for removal of hydrocarbons and chlorinated solvents. The final engineering plan is not yet completed, but it will consist generally of some 28 ground water and vapor extraction recovery wells within the Tank Farm and extending towards the Helm Pit. It is presently expected that cleanup of the Sparks Tank Farm will cost more than

\$20,000,000 and require 15 to 20 years for completion.

The solvent and petroleum contamination at the Sparks Tank Farm has generated a veritable flood of litigation. The City of Sparks has filed an action seeking damages in the millions of dollars for delay in construction of the proposed marina, as well as injury to other properties. The suit by Sparks and a separate suit by the Washoe County District Health Department have been consolidated with the NDEP action.

In addition, a number of private parties have commenced civil law suits against the Respondents, alleging a loss of value and business opportunities. The gist of these suits is that the injured parties cannot sell or develop their properties because of the petroleum/solvent contamination and threat of state and federal action. Some of the parties also allege that they cannot obtain financing for development of their properties because banks and other lenders are reluctant to commit money to a property which cannot be foreclosed upon. (It should be noted, however, that some of these parties may have environmental problems apart from the petroleum spill.) Resolution of these cases will involve interesting issues of law and analytic chemistry.

One of the Respondents, Air BP, has obtained a dismissal from the NDEP and civil actions. Air BP purchased a single tank from Golden Gate Petroleum in December 1989. At the time of purchase Air BP conducted various tests on Tank R-35, including an ultrasound examination of the tank bottom to ascertain its integ-

rity. Air BP also tested the pipes leading to and from the tank and determined them to be "tight". Following initiation of the NDEP action and the CERCLA 106 Order, Air BP tested its tank a second time, using a magnetic flux exclusion test, an automated ultrasound thickness test, and a vacuum box test. Tank R-35 "tested tight" again. In addition, Air BP furnished the NDEP with throughput records which showed no loss of product. The company also engaged an outside consulting firm from Martinez, California to render its opinion that Tank R-35 was not the source of the chlorinated solvents and petroleum products in the soil and groundwater. In response to this information the NDEP rather grudgingly entered into a "Stipulation for Dismissal of Air BP without Prejudice"<sup>56</sup> and Air BP was dismissed from the action by court order on May 20, 1993. Air BP has also obtained dismissals from all of the civil litigants.

It has been considerably more difficult for Air BP to win release from the EPA's Section 106 Order. Following its dismissal from the NDEP action, Air BP approached Region IX of the EPA and requested a similar dismissal from Administrative Order No. 91-22. The EPA acknowledged that Air BP had not contributed to the discharge and agreed that the company "might" be dismissed if three conditions were fulfilled:

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56. The term "without prejudice" means that the NDEP can bring Air BP back into the action if subsequently discovered facts show that Air BP contributed to the Tank Farm contamination.

1. Air BP must form a coalition with two or three other "de minimis" PRPs to reduce the EPA's administrative burden;
2. The additional PRPs must demonstrate their lack of culpability through technical studies and reports; and
3. The de minimis parties must contribute a sum of \$50,000 or more toward creation of an artificial wetlands to treat waters from the Helms Pit.<sup>57</sup>

At the time of this writing, Air BP has not been able to obtain the full cooperation of other de minimis respondents, and it therefore remains subject to the Section 106 Order. Air BP has requested that it be released on grounds of "fairness", and the EPA has taken this request "under consideration". Region IX has advised Air BP that the Sparks Tank Farm is being treated as a "new model" for remediation and EPA involvement, particularly in the latitude given the PRPs in designing and funding the cleanup with a minimum of federal supervision. The EPA is also cognizant of criticisms regarding its prior failures to release non-culpable PRPs, and the agency has been given more authority to release de minimis PRPs. The EPA is well aware that CERCLA will expire in September 1994 unless reauthorized by Congress, and there is a possibility that Region IX, in an effort to demonstrate its "kinder and gentler" nature, will dismiss Air BP.

In the meantime, Air BP continues to participate in the legal and technical

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57. Conference with Mark Klaiman, Assistant Counsel for EPA's Region IX, June 16, 1993.

committees of the PRP group. Although every party (including the EPA) concedes that Air BP has not contributed to the underground spill, Air BP has expended approximately \$150,000 on site characterization and remediation, and some \$200,000 on attorney's fees and administrative costs. If Air BP is required to continue its funding level of 1% throughout the 20-year period of remediation, it will spend \$200,000 or more on remediation and a like amount on transactional costs.

Air BP's involvement in the Sparks Tank Farm and the Section 106 Order is instructive in a number of regards:

1. The "transaction costs" of participating in a cleanup order are considerable. In addition to paying consultants to prepare the site assessment and remediation plan, Air BP has incurred attorney's fees and administrative costs which exceed the actual costs of remediation to date. In addition, Air BP and the other PRPs will be assessed all of EPA's administrative and technical costs, which will run to many tens of thousands of dollars. It is probable that the legal and administrative costs for the entire project will match or exceed the monies spent on actual cleanup.

There are two reasons for these staggering transaction costs. First, the fines and penalties for noncompliance are so great (up to \$18,250,000 per year per PRP), that the PRPs are obliged to hire a phalanx of attorneys and technical assistants to advise and protect them. The arsenal of sanctions given to the EPA by

CERCLA, and the EPA's willingness to threaten fines at every turn, cause the PRPs to be extremely conservative and defensive.

A second reason for the substantial legal costs is the prospect of massive litigation among the PRPs. This civil litigation, termed a "contribution action", is the chance for outwardly friendly PRPs to settle private scores. The oil companies, for example, will try to recover all of their costs and damages (including attorney's fees) from SFPP because of SFPP's contractual obligations as operator of the Tank Farm. SFPP, in its turn, may endeavor to recover damages from SPTCo because of contamination from the historic railyard activities. Parties with de minimis liability, such as Air BP, may attempt to recover costs and fees from the other PRPs and from the Superfund itself.

2. Air BP became ensnared in the Section 106 Order because it acquired ownership of Tank R-35. Previously, Air BP had leased the tank from SFPP, and SFPP had dispensed the Jet A Fuel pursuant to an Operating Agreement. Had Air BP maintained this leasehold relationship, it might not have been named as a PRP in the Section 106 Order. In fact, two oil companies (Exxon and ARCO) who are neither owners or operators were not named as PRPs.

3. Air BP might also have avoided liability by working more closely with the State of Nevada before commencement of NDEP's civil action. Once Air BP was named as a co-defendant in the lawsuit, the EPA and civil plaintiffs automatically included Air BP in their actions. Had Air BP been able to convince

NDEP that its tank was "tight", thereby avoiding designation as a defendant in the civil action, the company might have avoided its entanglement with the EPA.

3.3 The Toxic Golf Course. In 1966 Robert Trent Jones, the famous golf course architect, purchased a 580-acre parcel of land in the Pinehurst area of North Carolina. One of the sellers was F. Dan Farrell, and Mr. Farrell maintained an interest in the property following its purchase by Mr. Jones. Unknown to Mr. Jones, Taylor Chemical Company and its successor, Grower Service Corporation, had dumped DDT residues and other hazardous wastes on about one acre of the land purchased by Mr. Jones. At the time, the dumping was lawful and was not considered a threat to public health. It appears that Mr. Jones was not aware of the hazardous waste when he purchased the land from Mr. Farrell and his partners.

By 1969, four years after Jones and Farrell first met, Mr. Farrell apparently began to give up hope that he and Jones would develop the 580-acre tract together. Mr. Farrell began to act independently in connection with the property in a number of ways. In March 1969 Farrell wrote to Jones, informing him that he had unilaterally made a number of so called "improvements" to the land, including planting thousands of trees, building and maintaining fire roads, and "taking the liberty to...bury chemical debris that was truly and eyesore...."<sup>58</sup> The letter re

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58. Response of Robert Trent Jones to Unilateral Administrative Order, In the Matter of Aberdine Pesticide Dumps Site, U.S. EPA Docket No. 93-15-C,

peatedly recites that Jones had refused to agree to these steps, that Farrell was therefore acting entirely on his own, and that Jones consequently had no liability to Farrell for any of the expenses Farrell incurred:

Sometime ago I wrote you about some improvements on our 580 acre tract of land. You never did answer my letter, though we talked about this over the telephone and at that time you would not agree with me in making these improvements.

During the past 30 days, I have taken the liberty to spend something over \$5,000.00 in burying the chemical debris that was truly an eye sore and the total tonnage was estimated at about 10,000 tons. I took the liberty to contract with a construction firm to dig a hole 1000 feet long, 300 feet wide, and 40 feet deep and bury all of this debris. This work has now been completed, and you would never recognize the eye sore or the bad exposure we had from this "junk-yard." The total cost was \$5014.00, and I have already paid the contractor for this work.

In view of the fact that I asked you to join me in this upgrading of the property and you never would agree to do it, then there is no legal liability to me. I hope, however, that when we get around to making some type development or settlement, you will consider the expenditure I have had in all of this upgrading and it will pay off many fold in the long run.

I again state that you did not agree to share these expenses with me, and I did them strictly on my own; but you will share in the net return the same as I and I will leave it strictly up to you, whether or not you want to reimburse me for half of this total expense.<sup>59</sup>

The relationship between Jones and Farrell deteriorated, and Farrell initiated a legal action for partition on December 4, 1969. Jones subsequently brought a

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U.S EPA Region IV at 22 [hereinafter cited as "Jones Response"].

59. *Id.* at 3.

separate action against Farrell for "waste" after learning that Farrell was cutting and selling large trees from the property which would have been important features of the golf course. The partition became final on April 23, 1971, after Farrell had gone into bankruptcy. The portion of the property allocated to Farrell included the acre on which the "chemical debris" had been buried.

On May 20, 1993 Region IV of the EPA issued its Administrative Order No. 93-15-C naming J.M. Taylor, Robert Trent Jones, and others as PRPs. The Order makes the following statement regarding Mr. Jones' liability:

In 1969 Robert Trent Jones was the co-owner of the Fairway Six Area when his business partner (now deceased) buried chemical debris including pesticide waste located on [Fairway Six] area.<sup>60</sup>

The EPA bases its claim of liability on two factors: (1) Jones owned the property at the time of disposal, and (2) Farrell was allegedly acting as Jones' partner when he buried the waste, so that Jones was an "operator" of the site.

The potential cost of the cleanup at Fairway Six is \$9,200,000. The EPA has informed Mr. Jones that he is jointly and severally liable for the entire cost of the cleanup. Mr. Jones has offered to contribute \$120,000.00 as a de minimis PRP, but he has declined to contribute more because of his minimal involvement at the site. If the EPA elects to enforce its Order against Mr. Jones and his assets,

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60. *Id.* at 28.

he will be entirely impoverished at the age of 87.<sup>61</sup>

The attorneys for Mr. Jones have asserted the third party defense embodied in Section 107(b)(3) of CERCLA. They argue that Mr. Farrell, the co-tenant of the property, was acting as an independent party in dumping the wastes on the property, and Jones had no way to restrain his activities. In response to the EPA's assertion that Farrell was a "business partner" of Jones, the attorneys note that Jones and Farrell were merely co-tenants, Jones opposed Farrell's disposal of the waste, and Jones was powerless to stop Farrell because Farrell's actions were within the lawful power of a tenant in common at that time in North Carolina:

The common thread running through the third-party defense is the concept that the defendant cannot be held liable, under CERCLA, for acts that he or she could not have controlled or prevented. The defense therefore fails either if the third party disposed of wastes in connection with a contract with the defendant that expressly or impliedly included such disposal or if the third party's actions, although unauthorized, could have been anticipated and prevented through the exercise of reasonable care. But where the defendant could not reasonably control the acts of the third party, the third-party defense *does* apply. Such is the case here. *See Westwood Pharmaceuticals v. National Fuel Gas Distrib. Corp.*, 964 F.2d 85, 91-92 (2d Cir. 1992) (to bar third party defense "the contract between the landowner and the third party must either relate to the hazardous substances *or allow the landowner to exert some element of control over the third party's activities*" [emphasis added]).<sup>62</sup>

In addition to the third party defense, Mr. Jones' attorneys attacked CER-

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61. *Id.* at 44-45.

62. *Id.* at 40.

CLA and the Section 106 Order on various constitutional and procedural grounds. It should be noted, however, that these challenges have been generally denied in various other cases.<sup>63</sup>

The EPA's proceeding against Robert Trent Jones raises a number of important issues that merit comment:

1. The Fairway Six case illustrates the retroactive effect of CERCLA. The disposal of DDT and other chemical wastes by dumping was legal in 1969, and the practice was not considered dangerous or harmful to the environment. A quarter century later, the EPA is seeking to impose liability on a property owner who did nothing wrong at the time.

2. The Order involving Mr. Jones also demonstrates the strict liability that attaches to ownership of land. Mr. Jones did not participate in waste disposal, and he was only marginally aware of Mr. Farrell's activities. Nevertheless, his ownership of the property renders him potentially liable for the entire cost of cleanup.

3. The Fairway Six cleanup also raises the issue of *control* between co-owners. If one owner becomes aware that his co-tenant has disposed of (or intends to dispose of) toxic substances, what can he do? If there has already been a discharge, the nonparticipating owner may be liable automatically. If the dis-

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63. See generally Superfund Law, *supra* Note 4, Chapter 5.

posal is imminent, the nonparticipating owner may be required to initiate legal action to restrain his co-tenant from dumping waste on the property. When one is an "absentee landlord", as Mr. Jones was, there may be no way to avoid liability if one's co-tenant independently pursues waste disposal on the property.

#### 4. RECOMMENDATIONS FOR CHANGE

4.1 Criticism of CERCLA. CERCLA is a powerful but flawed instrument, and very few people seem to be satisfied with its application. As noted in Superfund Law and Procedure,

Ten years after the enactment of CERCLA, congressional and other critics contend that the Environmental Protection Agency ("EPA"), which was given the primary responsibility for enforcing the statute, has not effectively used its sweeping CERCLA powers. According to these critics, enforcement efforts are mired in a legal and bureaucratic gridlock that absorbs much of the available resources. Some groups have charged that well over one half of the money that has been allocated for cleanup of hazardous waste sites has been devoted to paying legal and administrative expenses - money spent to "fix the blame" rather than to fix the problem. Other critics claim that given the astronomical amounts of money that have been spent in remedial efforts, too few sites have actually been cleaned up. Still other critics argue that, despite the Agency's efforts, the threat to human health and the environment presented by the indiscriminate disposal of hazardous chemicals is actually increasing rather than declining. The congressional critics, environmentalists, lawyers handling CERCLA matters, and "potentially responsible parties" ("PRPs") who are paying for the cleanups agree that the litigation-based CERCLA program is not an effective way to accomplish site remediation. Unfortunately, these parties cannot agree on the steps that should be taken to improve the program.<sup>64</sup>

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64. Superfund Law, *supra* Note 4, at 7.

Other critics are even more vehement in denouncing the impact of CERCLA on the rights of PRPs:

CERCLA is a zealous law that treads upon time-honored legal concepts such as the prohibition of *ex post facto* laws, the protection of due process and the right of everyone to a day in court. The law batters down the ramparts of state sovereign immunity under the 11th Amendment, and even turns its sword against its own master to enforce itself on various branches of the federal government, including the Department of Defense. CERCLA holds sway over the bankruptcy laws, drawing reluctant bankrupts into federal court to face up to their environmental liabilities and imposing an overriding priority on their debts for cleanup costs.

CERCLA liability for the unlucky potentially responsible parties (PRPs) is a Draconian form of strict, joint and several liability with limited statutory defenses that in most cases are impossible to establish. CERCLA vigorously employs these legal concepts, stretching a PRP's financial exposure to the limits necessary to meet the enormous financial costs of remediation. At the same time, Superfund uses the prohibition against pre-enforcement review effectively to cut off the PRP's ability to challenge the cost-effectiveness of the project he is forced to fund.<sup>65</sup>

More specifically, we have seen from our three case studies that the slightest connection with a toxic site can give rise to enormous liabilities. In administering CERCLA, the EPA is not moved by concepts of fairness and reasonableness.<sup>66</sup> The EPA's mandate is to clean up toxic sites, and the agency does so

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65. Ronan, *supra* Note 12, at 1.

66. "As the court's narrow reading of the third party defense demonstrates, and as anyone who has worked with [CERCLA] is aware, the statute's liability scheme is so broad as to be patently unfair." Superfund Law, *supra* Note 4, at 433.

without regard to the rights of nonculpable PRPs.

The courts, traditionally the source of protection for innocent parties, are obliged by the broad reach of CERCLA to uphold the EPA in nearly every instance. While deploring the draconian effect of Superfund, the courts are nonetheless obliged to uphold it.<sup>67</sup>

Since the courts seem to be handcuffed by the strict language of CERCLA, it therefore follows that the law itself must be changed in order to give relief to innocent and de minimis PRPs.<sup>68</sup> The following sections of this paper offer four changes to CERCLA which would minimize some of the adverse impacts and inconsistencies of the statutory scheme.

4.2 Designation of PRPs. One of the most frustrating aspects of CERCLA, from the standpoint of an attorney representing a PRP, is the very sketchy description of alleged wrongdoing in a Section 106 Order. The designation of Robert Trent Jones in the Fairway Six cleanup is an example on point. In re-

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67. The potential unfairness of CERCLA was recognized early when Judge Newcomer stated that a defendant whose sole contribution to a hazardous waste site was a copper penny could be held responsible for the entire cost of cleaning up the site. *U.S. v. Wade*, 577 F.Supp. 1326, 1341 (E.D.Pa. 1983).

68. The proposed "Superfund Reform Act of 1994" (S.1834) introduced by Senators Baucus and Lautenberg on February 7, 1994 does not afford relief to PRPs. A new Section 107(5)(B) would exempt generators and transporters "involved [with] less than ten pounds or liters of materials containing hazardous substances" from CERCLA liability. However, even this exemption is limited where "the Administrator has determined that such material contributed significantly or could contribute to the costs of response at the facility".

sponding to the Order, counsel for Mr. Jones observed:

The Agency's theory, as best we are able to determine, is that Mr. Jones is a responsible party under §107(a) of CERCLA on the basis that (1) Mr. Jones "was co-owner of the Fairway Six Area when... chemical debris including pesticide wastes" were buried there by Jones' alleged partner F. Dan Farrell and hence that (2) "at the time of disposal [Mr. Jones] owned [a] facility at which such hazardous substances were disposed of...." (Emphasis added).<sup>69</sup>

By comparison, if the government brought a *civil action* against Mr. Jones and other defendants for \$9,200,000 in damages, the Complaint would be very detailed. There would be many pages of factual allegations, together with statements detailing the damages caused by each defendant. Even under the liberal rules of "claim pleading" in the federal courts, Section 106 Orders might sometimes be dismissed for failure to state a claim for relief.

When PRPs are confronted with a multi-million dollar liability, it is not too much to ask that the government state its case against its PRP with some particularity. This goal could be achieved by adding a new Section 107(a)(2) to CERCLA:<sup>70</sup>

**Section 107(a)(2). When issuing administrative orders or initiating legal action pursuant to Section 106, the Environmental Protection Agency (EPA) or the Attorney General shall give each Potentially Responsible Party (PRP) a detailed statement in writing which sets forth all of the reasons for designating that party**

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69. Jones Response, *supra* Note 59, at 2.

70. The existing text of Section 107(a), 42 U.S.C.A. § 9607(a), would be designated Section 107(a)(1).

**a PRP, including a description of any release attributable to that PRP. The designation of PRPs pursuant to Section 106(c) shall advise the PRPs of their right of appeal, as set forth in Section 107(a)(3) below.**

Comments. Except in unusual situations involving a catastrophic discharge, the EPA generally spends weeks or months (or even years) investigating a potential Superfund site and assembling a list of PRPs. In most cases the EPA has prepared a detailed description of the site, the hazardous wastes associated with the site, and the relationship of each PRP to the unlawful release. By requiring the EPA to disclose this information, some of the due process safeguards abrogated by CERCLA will be restored to the PRPs.

4.3 Release of PRPs. Under the present statutory scheme, it is fair to say that "once a PRP, always a PRP". Air BP is an example of a PRP which has won dismissal from seven civil actions, including the State enforcement action, but cannot extricate itself from a Section 106 Order because it is the "owner" of an oil tank. A statutory provision allowing release of PRPs would address this problem. The following is one possible mechanism:

**Section 107(a)(3). A person shall have the right to appeal his designation as a PRP at any time. The appeal shall be made in writing to the Regional Administrator of the EPA, and shall be accompanied by a fee established by the EPA. Within three months of the filing, a hearing shall be held before an Administrative Law Judge (ALJ) designated to hear appeals for the Region. The ALJ shall be an employee of the U.S. Department of Justice, and all costs involved in maintaining the ALJ and the ALJ's office shall be borne by the parties to the hearing, as set forth below.**

The PRP shall bear the burden of showing that (1) it is not a past or present owner or operator of the site, (2) it is not a generator of a hazardous substance shipped to the site, or (3) even though an owner, operator, or generator, it has not contributed to a release of a hazardous substance at the site or facility. The evidentiary burden of the PRP shall be "clear and convincing evidence". After the PRP has met its burden, the burden of proof shall shift to the EPA to show that the PRP has actually contributed to pollution at the site. The EPA may satisfy its burden through a preponderance of the evidence.

The ALJ shall issue a ruling which confirms or overturns the designation of the party as a PRP. The nonprevailing party shall be ordered to pay all costs associated with the hearing, including the prevailing party's attorney's fees and costs, and costs assessed by the ALJ for conduct of the hearing, including a proportional share of the ALJ's annual salary and benefits. The ALJ's ruling may be appealed to District Court for review of the administrative record, but the appellant shall pay the respondent's attorney's fees and costs if the appellant fails to overturn the ALJ's decision.

Comments. This mechanism for appeal and release would go a long way toward addressing the current concerns of PRPs. For example, the University of Nevada, Reno could readily have met its burden of showing that it did not contribute to unauthorized releases at the Reno Barrel Recycling site. Furthermore, UNR would not have been obliged to wait 13 months to be told "no" by the EPA. Similarly, Air BP could meet the burden of "clear and convincing evidence" in showing that it has not contributed to a release at the Sparks Tank Farm. Air BP could have met this burden at a relatively early stage of the case, thereby saving \$100,000 or more in cleanup and transaction costs.

The foregoing scheme would create a new cadre of Administrative Law

Judges (ALJs) specifically assigned to each Region of the EPA.<sup>71</sup> The ALJs would be employees of the U.S. Department of Justice (as opposed to employees of the EPA) in order to ensure their impartiality and independence. Initially there would be ten ALJs, but this number could grow if there were sufficient demand for their services.

At a time of burgeoning federal deficits, a proposal to create a new class of federal employees may not be popular. It is therefore suggested that the parties to an appeal and hearing bear all of the costs of maintaining the ALJ and his/her support staff. Of particular note, the EPA itself would pay part of these costs if it designated a PRP without adequate justification. This sanction is deliberate and is intended to discourage careless or unfounded naming of PRPs. A number of administrative "fines" assessed against a Region would indicate that there was insufficient research prior to initiation of Section 106 actions.

The EPA could usually avoid such sanctions by reaching agreement with the PRP prior to a hearing. Again, using the University of Nevada-Reno as an example, it should have been clear to Regional Counsel for the EPA that UNR had not contributed to the release at the Reno Barrel Recycling site. The EPA would enter into a stipulation with the PRP allowing for its dismissal without prejudice.

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71. The ALJs assigned to Superfund duty would be modeled after the Administrative Law Judges who now hear mineral contest proceedings and other land matters for the Department of the Interior.

(As a general rule, all dismissals should be without prejudice, so that a PRP could be brought back into a case if subsequent evidence disclosed its culpability.)

As further protection for EPA, the PRP would bear a substantial burden of proof in trying to win its dismissal from a Section 106 Order. The justification for “clear and convincing evidence” has been explained by one commentator in the following manner:

Due to the severity of the contaminated environment and the need to ensure cleanups, the higher “clear and convincing” standard in contrast to the ordinary “preponderance of the evidence” standard would appear necessitated in these cases.<sup>72</sup>

Finally, to avoid frivolous appeals from rulings of the ALJ, any party who appeals the ALJ’s ruling to the District court and loses shall pay the prevailing party’s attorney’s fees and costs.

4.4 Release of de minimis PRPs. The scheme set forth in SARA for release of de minimis PRPs has had little effect. In its discussions with Region IX, Air BP has found that the EPA has virtually no interest in allowing the release of a nonculpable PRP. The EPA seems even less inclined to dismiss PRPs whose contributions are minuscule. The following mechanism would ensure that de minimis PRPs also have a chance to appeal their designation to an impartial adjudicator:

**Section 107(a)(4). A “de minimis” PRP shall also have the rights**

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72. Coven, *supra* Note 40, at 195.

**of appeal set forth in Subsection 107(a)(3) above. If a PRP demonstrates by clear and convincing evidence that it has contributed to a release of less than 1% of the hazardous substances at a site or facility, the ALJ shall dismiss the PRP from the Section 106 Order. The ALJ may order the PRP to pay an assessment equal to its percentage contribution to the release at the site.**

Comments. The primary purpose of this statutory change is to allow a PRP with minimal liability to avoid the enormous transaction costs associated with a Section 106 Order. As noted above, it is not uncommon for a PRP's legal fees and technical costs to equal or exceed its share of cleanup costs. A de minimis PRP would therefore be motivated to pay a proportional share of cleanup costs up front in order to avoid the long-term transaction costs.

The proposed language gives the Administrative Law Judge the discretion to grant or refuse the PRP's request for dismissal. There may be insufficient information regarding the PRP's contribution, so that the ALJ cannot determine (1) whether the PRP's contribution to the site is less than 1%,<sup>73</sup> or (2) what the total cost of remediation, and hence the PRP's assessment, will be.

This is an alternate approach to the elimination of joint liability (as discussed in Section 4.5 below). It would allow a PRP to "sever" its contribution to a contaminated site and pay only those costs attributable to its share of the release.

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73. The figure of 1% is based primarily on political considerations. Region IX of the EPA has suggested its willingness to release PRPs from the Sparks Tank Farm Order if their contribution to the underground plume has been 1% or less. It is unlikely that Congress would allow release of a party that has contributed 10% or even 5% of toxic chemicals to a Superfund Site.

The rationale for such a plan has been nicely summarized by Coven:

An alternative approach would encompass retaining the strict liability standard while reserving the right of a defendant to prove clear and convincingly that their share of the dumping can be apportioned. If their respective liability can be apportioned, joint and several liability would be avoided. Liability would only be assessed to the extent of the defendant's apportionable share. In this manner, defendants can monitor and record their involvement in hazardous waste dumping in order to meet the clear and convincing proof which may be necessitated during future litigation.<sup>74</sup>

4.5 Elimination of Joint Liability. If there is one factor which unites all PRPs, it is a universal loathing for joint liability. By identifying only one or two "deep pocket" PRPs, the EPA can impose on them the entire burden of (1) cleaning up the site, and (2) endeavoring to recover their costs from other parties. An extreme example of this practice is the Tybouts Corner Superfund Site in New Castle County, Delaware. The site had been leased by the County from private parties as a municipal and industrial land fill site. It was designated as the exclusive industrial waste disposal site for manufacturing operations within a radius of approximately 50 miles. The County accepted all kinds of industrial waste, including those clearly identifiable as hazardous. Tybouts Corner was unusual for a Superfund site because of a nearly total lack of documentation. Thus, when the EPA issued a Section 106 Cleanup Order, it identified only a *single company* to join the County in a massive cleanup of wastes generated by dozens of other

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74. Coven, *supra* Note 40, at 195-196.

parties:

The Justice Department brought suit under RCRA and CERCLA against New Castle County, with Stauffer [Chemical Co.] as the sole industrial defendant. Stauffer's involvement was based on a single entry in the gatekeeper's diary identifying a load of off-specification resin as originating from the company. No other companies were specifically identified. A further link to Stauffer was the presence of vinyl chloride monomer in the groundwater that could be linked to the Stauffer PVC-resin manufacturing operation at Delaware City. At that point, the Region III office apparently lost interest in searching for additional PRPs. Stauffer and New Castle County had pockets deep enough to pay the bill.<sup>75</sup>

In order to spread the burden, Stauffer identified 24 potential PRPs based on a comparison of their operations and chemicals found at the site. The end result was a four-inch-thick report presented to EPA's Region III office in Philadelphia. The result was underwhelming:

The report was presented to the Region III office in Philadelphia. Rather than being delighted with our diligent investigation, EPA was very reluctant to file suit directly against any of the candidate companies, although the Agency was quite willing to stand aside and let Stauffer file third-party complaints.<sup>76</sup>

After months of effort, Stauffer was finally successful at convincing the EPA to sue *four* additional parties against whom the evidence was compelling.

Tybouts Corner is not a unique example of EPA action. In the Picillo Pig Farm case in Rhode Island, American Cyanamid and Rohm & Haas (de minimis

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75. Ronan, *supra* Note 12, at 55-56.

76. *Id.* at 56.

generators who supplied only a fraction of the site's hazardous waste) were jointly and severally liable for over \$1,000,000 in past costs and interest, not covered by other settlements, and for all future site cleanup costs.<sup>77</sup>

In order to moderate the impact of a cleanup order on de minimis defendants, CERCLA should be modified by including the following provision:

**Section 107(a)(5). A PRP will be held jointly liable for costs of characterization and remediation at a site only if (1) the PRP has contributed or released more than 5% of the hazardous waste at the site or facility, or (2) the PRP has received a financial benefit from its activities at the site. Unless both of these conditions are met, the PRP's liability shall be several and in direct proportion to its percentage contribution to hazardous waste at the site or facility. In seeking relief under this Subsection, a PRP must demonstrate that it is not subject to joint liability by clear and convincing evidence.**

Comments. This provision would allow relief for a PRP like Robert Trent Jones at the Fairway Six site. Mr. Jones made no direct contribution to the hazardous waste conditions at Fairway Six, and he thereby satisfies the first prong of the test. Mr. Jones also satisfies the second prong, inasmuch as he did not receive any financial benefit from waste disposal at the site.

The provision should also apply to de minimis generators such as American Cyanamide at the Picillo Pig Farm site. American Cyanamid contributed less than 5% of the site's hazardous waste, and the company was not engaged in operation

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77. O'Neil v. Picillo, 883 F.2d 176 (1st Cir. 1989), *cert.den.* 493 U.S. 1071, 110 S.Ct.1115, 107 L.Ed.2d 1022 (1990).

of the site for a profit. (A generator of hazardous waste would not be deemed to receive a "financial benefit" by sending its waste to a site. Actual ownership or operation of the site *for a profit* would be required to subject a de minimis PRP to liability.)

Again, this provision would not allow PRPs to "stampede for the door". The statutory change requires the PRP to demonstrate by clear and convincing evidence that it is a de minimis contributor (i.e., less than 5%) and that it has not gained any financial benefit as an owner or operator of the site. Moreover, once this burden of evidence has been met, the PRP bears a further burden in winning dismissal. The PRP must quantify the volume of its own release with reasonable certainty, and further quantify the total release at the site. Finally, the total cost of remediation must be known with a reasonable degree of certainty. Only when all of these criteria have been satisfied can the PRP's liability be "severed" and a dollar value assigned to the cost of obtaining dismissal.

For some PRPs, this burden will be fairly easy to satisfy. For example, if a PRP has contributed 400,000 gallons of used oil to a site containing 10,000,000 gallons of oil, based on well-kept records by the generators and the site itself, then the PRP's share of liability is 4% and it is eligible for dismissal. If the cleanup costs at the site are estimated at \$8,000,000, the PRP's contribution to cleanup shall be \$320,000. As a condition of dismissal, the order should require the PRP to contribute its pro rata share to costs in excess of \$8,000,000.

## 5. CONCLUSION

CERCLA was enacted by Congress to address the real threat of environmental contamination and pollution of the nation's water and environmental resources. The law confers enormous powers on the EPA to clean up existing sites of hazardous waste. However, in its zeal for protecting human health and the environment, Congress sacrificed fairness for expediency. Many parties are improperly designated as PRPs, and others bear a disproportionate share of costs because of joint liability. The most glaring defects of CERCLA can be modified by relatively simple changes in statutory language. With Superfund due for re-enactment in September 1994, Congress has the opportunity to consider legislative changes along the lines of those suggested in this paper.

## REFERENCES

	PAGE
Coven, Lawrence S., <i>Liability Under CERCLA: After a Decade of Delegation, the Time is Ripe for Legislative Reform</i> , 17 Ohio Northern Univ. L.Rev. 165 . . . . .	16, 50, 52
Grad, 1A <u>Treatise on Environmental Law</u> (1993) . . . . .	5
<u>Law of Hazardous Waste</u> (1993) . . . . .	5
Levine, Adeline G., <i>Love Canal and the Limits of Scientific Proof</i> , 2 <u>Nat.Res. &amp; Env.</u> 21 (Fall 1986) . . . . .	3
Nelson, Buzz, <i>We're from the Government and We're Here to Help</i> , Hazardous Materials and Solid Waste Management, <u>APPA Monograph</u> (1991) . . . . .	25
<u>Prosser and Keeton on Torts</u> (5th Ed.) 534 (1984) . . . . .	15
<u>Restatement, Second, Torts</u> . . . . .	17
Ronan, John T. <i>Being a PRP: Lessons from a Veteran</i> , Hazmat World 49 (January 1989) . . . . .	6, 45, 53
Senate Comm. on Env't and Pub. Works, Superfund Improvement Act of 1985: Report to Accompany S. 51, together with Additional and Minority Views, S.Rep. No. 11, 99th Cong., 1st Sess. 2 (1985) . . . . .	5
Topol, Allan J. and Rebecca Snow, 1 <u>Superfund Law and Procedure</u> (1992) . . . . .	2, 3, 5, 7, 10, 14, 42, 44, 45

## TABLE OF CASES

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U.S. v. LeBeouf Bros. Towing Co., 621 F.2d 787, 789 (5th Cir. 1980), <i>cert. denied</i> , 452 U.S. 906, 101 S. Ct. 3031, 69 L. Ed. 2d 406 (1981). . . . .	15
U.S. v. NEPACCO, 579 F.Supp. 823 (W.D.Mo.1984), <i>aff'd in part,</i> <i>rev'd in part</i> , 810 F.2d 726 (8th Cir.1986), <i>cert. denied</i> , 484 U.S. 848, 108 S.Ct. 146, 98 L.Ed.2d 102 (1987). . . . .	10
U.S. v. Reilly Tar & Chemical Corp. 546 F.Supp. 1100, 1112 (D.Minn. 1982). . . . .	4
U.S. v. South Carolina Recycling and Disposal, Inc 14 E.L. 20272, 20274 (D.S.C., Feb. 23, 1984) . . . . .	11
U.S. v. Wade, 577 F.Supp. 1326, 1341 (E.D.Pa. 1983) . . . . .	45
Westwood Pharmaceuticals v. National Fuel Gas Distrib. Corp., 964 F.2d 85, 91-92 (2d Cir. 1992) . . . . .	42