

# Who Pays? PRP Liability for CERCLA Investigations

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## I. INTRODUCTION

Recently, the Tenth Circuit held that the government may recover all costs the Environmental Protection Agency (EPA) incurs while investigating and developing a remediation plan for a Superfund site.<sup>1</sup> Numerous studies by the General Accounting Office have pointed to the EPA's management problems and unwarranted expenditures.<sup>2</sup> This Note argues that a party who is responsible for response costs under the Comprehensive Environmental Response Compensation Liability Act (CERCLA) should be able to reduce its investigatory cost liability to the EPA by showing that the government was wasteful or inefficient when it conducted the response action.<sup>3</sup>

Section II of this Note provides a history and overview of CERCLA and reviews the progression of a CERCLA action. Section III suggests that the statutory language of CERCLA, the Constitution, and the National Contingency Plan (NCP) allow responsible parties to challenge the EPA's investigatory costs. Section IV discusses policy reasons for allowing responsible parties to challenge investigatory costs.

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<sup>1</sup> *United States v. Hardage*, 982 F.2d 1436 (10th Cir. 1992), *cert. denied*, 114 S. Ct. 300 (1993).

<sup>2</sup> *See, e.g.*, GENERAL ACCOUNTING OFFICE, *Environmental Protection: EPA's Actions to Improve Longstanding Information Management Weaknesses*, GAO/T-IMTEC-93-4 (Mar. 29, 1993); GENERAL ACCOUNTING OFFICE, *Superfund: EPA Action Could Have Minimized Program Management Costs*, GAO/RCED-93-136 (June 7, 1993); GENERAL ACCOUNTING OFFICE, *Superfund: Actions Needed to Correct Longstanding Contract Management Problems*, GAO/T-RCED-92-78 (July 8, 1992); GENERAL ACCOUNTING OFFICE, *Federally Sponsored Contracts: Unallowable and Questionable Indirect Costs Claimed by CH2M Hill*, GAO/T-RCED-92-37 (Mar. 19, 1992); GENERAL ACCOUNTING OFFICE, *Superfund: EPA Has Not Corrected Long-Standing Contract Management Problems*, GAO/RCED-92-45 (Oct. 24, 1991).

<sup>3</sup> This Note only addresses those response costs associated with the investigatory and remediation plan development phase as opposed to those costs associated with the final remedial actions. I use investigatory cost in this Note to refer to the investigatory and remediation plan development expenditures. The *Hardage* court found that the EPA was not required to conduct itself in a cost-efficient manner during the investigatory phase. *Hardage*, 982 F.2d 1436. Courts generally agree, and CERCLA mandates, that the EPA must conduct final remedial actions in a cost-effective manner.

## II. CERCLA

### A. History and Overview

Congress enacted CERCLA in 1980 to address the problems of prior hazardous waste disposal.<sup>4</sup> Numerous parties have criticized CERCLA's statutory language for its lack of conciseness and clarity.<sup>5</sup> Perhaps Justice Marshall said it best when he stated that CERCLA "is not a model of legislative draftsmanship."<sup>6</sup> Congress amended CERCLA in 1986 with the Superfund Amendments and Reauthorization Act of 1986 (SARA).<sup>7</sup> The legislative history of CERCLA stresses the importance of responsible and cost-effective federal action when investigating and remediating hazardous waste sites.<sup>8</sup> Congress found that prior acts such as the Resource Conservation and Recovery Act (RCRA)<sup>9</sup> and the Toxic Substances Control Act (TSCA)<sup>10</sup> were ineffective in dealing with the hazardous waste problem.<sup>11</sup> Although RCRA contains a provision that allows the EPA to enjoin the handling of hazardous waste that presents "an imminent and substantial endangerment,"<sup>12</sup> the major thrust of RCRA is to prevent future contamination from hazardous waste.<sup>13</sup>

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<sup>4</sup> BRADFORD F. WHITMAN, *SUPERFUND LAW AND PRACTICE* 14 (1991).

<sup>5</sup> ALFRED R. LIGHT, *CERCLA LAW AND PROCEDURE* 25 (1991).

<sup>6</sup> *Exxon v. United States*, 475 U.S. 355, 363 (1985).

<sup>7</sup> 42 U.S.C.S. §§ 9601-9672 (Law. Co-op. 1989 & Supp. 1994).

<sup>8</sup> 126 CONG. REC. 26,339 (1980). "Response actions taken by the Administrator and financed out of a newly created hazardous waste response fund are circumscribed by cost-effectiveness considerations . . ." *Id.* (statement of Rep. Staggers).

<sup>9</sup> 42 U.S.C.S. §§ 6901-6992 (Law. Co-op. 1994). The Resource Conservation and Recovery Act (RCRA), enacted by Congress in 1976, was the first major piece of legislation to cover hazardous waste. It creates a "cradle to grave" system to track the movement and transportation of hazardous wastes. RCRA also mandates that the EPA enact standards for generators, operators, and transporters who work with hazardous wastes. The Act also defines the hazardous wastes that are subject to RCRA. WARREN FREEDMAN, *FEDERAL STATUTES ON ENVIRONMENTAL PROTECTION* 92 (1987).

<sup>10</sup> 15 U.S.C.S. §§ 2601-2692 (Law. Co-op. 1982 & Supp. 1994). In 1976, Congress enacted the Toxic Substances Control Act (TSCA), which regulates the manufacture, distribution, and sale of chemical substances or mixtures. FREEDMAN, *supra* note 9, at 110.

<sup>11</sup> 126 CONG. REC. 26,339 (1980). "Presently, however, there are inadequate statutory authorities to cope with these unfortunate legacies of the past. . . . There is a clear and compelling need for comprehensive legislation to fill these gaps in existing law. . . ." *Id.* (statement of Rep. Staggers). "Existing statutes are inadequate to cope with the inactive waste site problem." *Id.* at 26,338 (statement of Rep. Florio).

<sup>12</sup> 42 U.S.C.S. § 6974 (Law. Co-op. 1994).

<sup>13</sup> WARREN FREEDMAN, *HAZARDOUS WASTE LIABILITY* 154 (1987).

The main enforcement technique for the government in the environmental protection area, CERCLA covers both the sudden spill and the slow leakage of a hazardous substance.<sup>14</sup> CERCLA encompasses the Clean Air Act,<sup>15</sup> Clean Water Act,<sup>16</sup> RCRA,<sup>17</sup> and TSCA<sup>18</sup> by regulating releases of the hazardous substances covered under these prior acts.<sup>19</sup>

CERCLA governs response actions,<sup>20</sup> establishes the NCP,<sup>21</sup> establishes liability for potentially responsible parties (PRPs),<sup>22</sup> and sets cleanup standards for hazardous waste sites.<sup>23</sup> Under section 104, whenever a "hazardous substance is released or there is a substantial threat of such a release"<sup>24</sup> that may present an imminent and substantial danger to the public health or welfare, the President may act to remediate<sup>25</sup> the problem or may take response actions to protect the environment.<sup>26</sup> Section 105 directs the President to establish the NCP<sup>27</sup> and requires the President to act consistently with the NCP.<sup>28</sup> The NCP establishes "procedures and standards for responding to releases of hazardous substances"<sup>29</sup> and is codified in 40 CFR § 300 et seq. The EPA drafts and publishes the NCP which regulates investigatory and remedial actions.

<sup>14</sup> FREEDMAN, *supra* note 9, at 101.

<sup>15</sup> 42 U.S.C.S. §§ 7401-7671 (Law. Co-op. 1989 & Supp. 1994). In 1977, Congress enacted the Clean Air Act which is the principle Act for regulating air pollution. *Id.*

<sup>16</sup> 33 U.S.C.S. §§ 1251-1387 (Law. Co-op. 1987 & Supp. 1994).

<sup>17</sup> 42 U.S.C.S. §§ 6901-6992 (Law. Co-op. 1994).

<sup>18</sup> 15 U.S.C.S. §§ 2601-2692 (Law. Co-op. 1982 & Supp. 1994).

<sup>19</sup> FREEDMAN, *supra* note 9, at 101.

<sup>20</sup> 42 U.S.C. § 9604 (1988 & Supp. IV 1992).

<sup>21</sup> 42 U.S.C. § 9605 (1988).

<sup>22</sup> *Id.* § 9607.

<sup>23</sup> *Id.* § 9621.

<sup>24</sup> 42 U.S.C. § 9604(a)(1) (1988 & Supp. IV 1992).

<sup>25</sup> Definitions for the terms "remedy" and "remedial" action can be found in 42 U.S.C. § 9601 (1988).

<sup>26</sup> "[R]espond' or 'response' means remove, removal, remedy, and remedial action; . . . all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto." *Id.* § 9601(25).

<sup>27</sup> *Id.* § 9605(a).

<sup>28</sup> 42 U.S.C. § 9604(a)(1) (1988 & Supp. IV 1992).

<sup>29</sup> 42 U.S.C. § 9605(a) (1988). The NCP must include, at a minimum:

(1) methods for discovering and investigating facilities at which hazardous substances have been disposed of or otherwise come to be located;

(2) methods for evaluating, including analyses of relative cost, and remedying any releases or threats of releases from facilities which pose substantial danger to the public health or the environment;

Section 107 establishes a party's liability for response actions.<sup>30</sup> PRPs who may be liable under section 107 include owners, operators, and transporters of hazardous wastes.<sup>31</sup> Defenses to CERCLA liability are extremely limited; a

(3) methods and criteria for determining the appropriate extent of removal, remedy, and other measures authorized by this chapter;

(4) appropriate roles and responsibilities for the Federal, State, and local governments and for interstate and nongovernmental entities in effectuating the plan;

(5) provision for identification, procurement, maintenance, and storage of response equipment and supplies;

(6) a method for and assignment of responsibility for reporting the existence of such facilities which may be located on federally owned or controlled properties and any releases of hazardous substances from such facilities;

(7) means of assuring that remedial action measures are cost-effective over the period of potential exposure to the hazardous substances or contaminated materials;

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*Id.* (emphasis added).

<sup>30</sup> *Id.* § 9607.

<sup>31</sup> *Id.* § 9607(a). Persons liable under CERCLA are:

(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 causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(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 cost of any health assessment or health effects study carried out under section 104(i) [42 U.S.C. § 9604(i)].

*Id.*

party may plead only an act of God, an act of war, or an act or omission of a third party other than an employee or agent of the defendant to escape liability.<sup>32</sup> Although the statute is silent about strict, joint, and several liability, courts consistently hold that parties are strictly and severally liable when damages cannot be apportioned.<sup>33</sup>

### B. *The CERCLA Case*

The EPA conducts a CERCLA action by notifying the PRPs, investigating the contaminated property, developing a remediation plan, and remediating the

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<sup>32</sup> *Id.* § 9607(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 release 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; . . . .

#### *Id.*

Some courts have also allowed defendants to raise equitable defenses such as waiver, estoppel, and unclean hands when sued under CERCLA § 107. The courts reasoned that because suits under § 107 are in equity, the defendants should be allowed equitable defenses. Theodore L. Garrett, *Superfund Liability and Defenses: A 1992 Primer*, in *THE ENVIRONMENTAL LAW MANUAL* 79, 86 (Theodore L. Garrett ed., 1992). For cases allowing equitable defenses, see *United States v. Mottolo*, 695 F. Supp. 615, 626–27 (D.N.H. 1988); *Violet v. Picillo*, 648 F. Supp. 1283, 1294–95 (D.R.I. 1986). *But see* *Versatile Metals, Inc. v. Union Corp.*, 693 F. Supp. 1563 (E.D. Pa. 1988) (denying the use of equitable defenses); *Allied Corp. v. Acme Solvents Reclaiming*, 691 F. Supp. 1100 (N.D. Ill. 1988) (denying the use of equitable defenses).

<sup>33</sup> Raul A. Deju & Dean A. Calland, *The Cleanup of Inactive Hazardous Waste*, in *THE ENVIRONMENTAL LAW MANUAL* *supra* note 32, at 106, 113.

property. The CERCLA action often concludes with litigation between the PRPs and the EPA over liability for investigation and remediation costs.

CERCLA states that owners and operators of facilities that treat, store, or dispose of hazardous wastes must notify the EPA of their activities.<sup>34</sup> CERCLA also requires prior operators and owners of hazardous waste facilities to notify the EPA.<sup>35</sup> Prior owners often are unable to notify the EPA of the location of their hazardous wastes because they do not have records of where they deposited their wastes years ago. CERCLA does not address transporters who delivered wastes to a site, rather, it focuses exclusively on owners of hazardous waste sites and parties that have stored wastes at hazardous waste sites.

In a CERCLA action, the EPA first completes a preliminary assessment of the sites that it considers potential Superfund sites.<sup>36</sup> The EPA may enter a PRP's property<sup>37</sup> to inspect and sample<sup>38</sup> "only if there is a reasonable basis to believe there may be a release or threat of release of a hazardous substance . . . ."<sup>39</sup> If the owner of the facility does not grant permission for the agency to enter the property, then the agency may issue a compliance order or "commence a civil action to compel compliance."<sup>40</sup> A court may fine the owner up to \$25,000 per day if it finds that the party has unreasonably failed to comply.<sup>41</sup> The EPA may also gain access to information concerning materials at a facility, the nature or extent of a release, and a party's ability to pay for or perform a cleanup.<sup>42</sup> Failure to comply with such a request for information can also result in a \$25,000 per day fine.<sup>43</sup> PRPs may refuse to disclose trade secrets to the EPA during this investigation,<sup>44</sup> but only if they meet stringent statutory requirements.<sup>45</sup> Because very little information relates to trade secrets

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<sup>34</sup> WHITMAN, *supra* note 4, at 16-17.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 24.

<sup>37</sup> 42 U.S.C. § 9604(e)(3) (1988 & Supp. IV 1992). This section of CERCLA describes the types of facilities that the EPA may enter to gather information.

<sup>38</sup> *Id.* § 9604(e)(4). This section describes what items the EPA may sample and procedures for providing duplicate samples to the PRP.

<sup>39</sup> *Id.* § 9604(e)(1).

<sup>40</sup> *Id.* § 9604(e)(5)(B).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* § 9604(e)(2).

<sup>43</sup> *Id.* § 9604(e)(5).

<sup>44</sup> *Id.* § 9604(e)(7).

<sup>45</sup> Section 9604(e)(7)(E) lists the requirements that a party must meet to protect information from disclosure:

and the owners or operators often cannot meet the prerequisite conditions for precluding disclosure, the EPA can usually acquire almost all of a company's relevant records.

After conducting the preliminary investigation, the EPA, using seven criteria set out in CERCLA,<sup>46</sup> applies a hazard ranking system to prioritize hazardous waste sites and to determine whether a specific facility should be placed on the national priority list (NPL).<sup>47</sup> The EPA then drafts the NPL with the highest priority sites being the "top priorit[ies] among known response

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(E) No person required to provide information under this chapter may claim that the information is entitled to protection under this paragraph unless such person shows . . . :

(i) Such person has not disclosed the information to any other person . . . .

(ii) The information is not required to be disclosed, or otherwise made available, to the public under any other Federal or State law.

(iii) Disclosure of the information is likely to cause substantial harm to the competitive position of such person.

(iv) The specific chemical identity, if sought to be protected, is not readily discoverable through reverse engineering.

*Id.* § 9604(e)(7)(E).

<sup>46</sup> The items to be considered in the hazard ranking system are the risks of or to:

- 1) the population at risk;
- 2) the hazard potential of the hazardous substances at the facilities;
- 3) contamination of drinking water supplies;
- 4) direct human contact;
- 5) destruction of sensitive ecosystems;
- 6) damage to natural resources associated with the human food chain;
- 7) contamination of the ambient air and the State's ability to participate in the cleanup.

*See* 42 U.S.C. § 9605(a)(8)(A) (1988).

<sup>47</sup> The NCP details the calculations for determining whether a facility should be placed on a priority list. 40 C.F.R. § 300 (1993). The EPA uses three factors to complete the calculations to determine whether a facility is placed on the NPL.

The first factor (labelled Sm) reflects the potential harm to the environment or humans from migration of hazardous substances from the site via ground water, surface water, or the air. The second factor (labelled Sfe) reflects the potential for harm from substances that could explode or cause a fire. The third factor (labelled Sdc) represents the potential for harm from direct contact with hazardous substances at the site without migration being included.

WHITMAN, *supra* note 4, at 32.

targets . . . .”<sup>48</sup> Although an owner or operator of an NPL facility may challenge its NPL designation, the challenge will likely be unsuccessful because the EPA has broad discretion when it places facilities on the NPL.<sup>49</sup> The EPA then further investigates the priority NPL sites.

The next step in a CERCLA action is to conduct a Remedial Investigation/Feasibility Study (RI/FS) and to develop a remediation plan for the NPL site—often a costly procedure.<sup>50</sup> Although the PRPs may do the RI/FS themselves, often the EPA completes the RI/FS without notifying the PRPs or even knowing the identity of the PRPs. The EPA and the PRPs apply a seven step strategy when they develop an RI/FS: “(1) scoping, (2) community relations, (3) site characterization, (4) baseline risk assessment, (5) treatability studies, (6) development and screening of remedial alternatives, and (7) detailed analysis of remedial alternatives.”<sup>51</sup> PRPs may conduct the RI/FS only if the EPA determines that the PRPs will conduct the study properly and promptly,

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<sup>48</sup> 42 U.S.C. § 9605(a)(8)(B) (1988).

To the extent practicable, the highest priority facilities shall be designated individually and shall be referred to as the “top priority among known response targets”, and, to the extent practicable, shall include among the one hundred highest priority facilities one such facility from each State which shall be the facility designated by the State as presenting the greatest danger to public health or welfare or the environment among the known facilities in such State.

*Id.*

<sup>49</sup> LIGHT, *supra* note 5, at 42.

<sup>50</sup> *United States v. Hardage*, 750 F. Supp. 1460, 1495 (W.D. Okla. 1990), *aff'd in part, rev'd in part*, 982 F.2d 1436 (10th Cir. 1992), *cert. denied*, 114 S. Ct. 300 (1993). The EPA spent \$6,000,000 to develop a remediation plan that the district court found was fraught with problems.

<sup>51</sup> LIGHT, *supra* note 5, at 45 (citing MODEL STATEMENT OF WORK FOR A REMEDIAL INVESTIGATION AND FEASIBILITY STUDY CONDUCTED BY POTENTIALLY RESPONSIBLE PARTIES (June 2, 1989) (OSWER Directive No. 9835.8)). (1) Scoping involves the determination of what work will be performed, the tests to be completed, and what data will be needed to complete the RI/FS. (2) Community relations involves keeping the public informed through interviews and local repositories for information. (3) The site characterization objective is to conduct site studies to determine and describe the areas that may present a hazard to human health or the environment. (4) A baseline risk assessment is used to identify (a) the toxicity and levels of hazardous substances, (b) method and rate of transportation of the hazardous substance, (c) potential human and environmental exposure, and (d) risk to human health and the environment. (5) Treatability studies are used to assist in determining what remedial alternatives are best. They often involve a pilot or bench test of the suggested remedial plan. (6) Remedial alternatives are developed and screened according to § 121 of the national contingency plan. *Id.* at 45-49.



are qualified to conduct the RI/FS, are overseen and reviewed by a contractor or an agent of the EPA, and agree to reimburse the EPA for the costs of overseeing and reviewing the investigation.<sup>52</sup> If the PRPs do not conduct the RI/FS, then the EPA conducts the investigation and holds the PRPs responsible for the RI/FS costs.<sup>53</sup>

PRPs are liable pursuant to section 107(a) for all government incurred "costs of removal . . . not inconsistent with the national contingency plan[.]"<sup>54</sup> The term "removal" is somewhat misleading; rather than just meaning "removal" in the ordinary sense of the word, it also means "such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances."<sup>55</sup> Therefore, because the RI/FS investigation and remedial plan development are removal actions, section 107(a)(4) allows the EPA to recover its RI/FS investigation and remedial plan development costs from the PRPs.

### III. LIMITING LIABILITY UNDER CERCLA

If the EPA conducts the investigation without notifying the PRP or affording the PRP the opportunity to conduct the investigation itself or in cooperation with the EPA, then courts should allow a PRP to challenge the

<sup>52</sup> 42 U.S.C. § 9604(a)(1) (1988 & Supp. IV 1992).

<sup>53</sup> 42 U.S.C. § 9607 (1988).

<sup>54</sup> *Id.* § 9607(a)(4)(A).

(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 causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

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

*Id.* § 9607(a)(4)(A)–(B).

<sup>55</sup> *Id.* § 9601(23). Courts have held that many costs are recoverable as removal costs. *See Amoco Oil Co. v. Borden*, 889 F.2d 664, 672 (5th Cir. 1989) (allowing recovery for security fencing); *United States v. Mexico Feed & Seed Co.*, 729 F. Supp. 1250, 1253–54 (E.D. Mo. 1990) (allowing recovery of prejudgment interest); *Brewer v. Ravan*, 680 F. Supp. 1176, 1179 (M.D. Tenn. 1988) (allowing recovery for medical testing); *Artesian Water Co. v. Government of New Castle County*, 659 F. Supp. 1269, 1287–88 (D. Del. 1987) (allowing recovery for alternative water supplies), *aff'd*, 851 F.2d 643 (1988).

EPA's investigatory costs. This Section reviews cases in which PRPs challenged investigatory costs, discusses possible issues that parties should investigate when they wish to challenge investigatory cost liability, and argues why parties should not be liable for EPA actions that result in excessive and unnecessary investigation costs.

*A. Limiting the EPA's Recovery Under Section 107 to Those Costs That Are Consistent with the NCP*

If the EPA does not notify the PRPs about the investigation or refuses to permit the PRPs to conduct their own RI/FS investigation, then courts should allow the PRPs to challenge unreasonable or unnecessary investigatory costs because the PRPs did not have the opportunity to participate in or conduct their own RI/FS studies. Conversely, if the EPA notifies the PRPs about the investigation and the PRPs choose not to act, then the courts should bind the PRPs to the EPA-incurred costs because the PRPs are sitting on their rights and agreeing to the EPA procedures.

1. *United States v. Hardage*

The PRPs in *United States v. Hardage*<sup>56</sup> were required to pay the EPA's investigatory costs even though for six years the PRPs were unaware of the investigation, and once made aware of the investigation, conducted their own RI/FS and developed a remediation plan that the district court found superior to the EPA's. On appeal, the Tenth Circuit held that "[c]osts, by themselves, cannot be inconsistent with the NCP. Only response actions—i.e., removal or remedial actions—can be inconsistent with the NCP . . . ."<sup>57</sup> This is an error in the reading of the statutory language of CERCLA. Section 107(a)(4) specifically states that the government may only recover "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 . . . ."<sup>58</sup> Thus, the language of CERCLA indicates that not only removal or remedial actions, but also costs, may be inconsistent with the NCP.

The *Hardage* case involved a landfill operated by a former farmer in Oklahoma. The EPA began investigating the Hardage site in 1979 and filed suit

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<sup>56</sup> 982 F.2d 1436 (10th Cir. 1992), *cert. denied*, 114 S. Ct. 300 (1993).

<sup>57</sup> *Id.* at 1443.

<sup>58</sup> 42 U.S.C. § 9607(a)(4) (1988).

against the owner of the property, Royal Hardage, in 1980.<sup>59</sup> After the district court entered judgment in favor of the United States in 1985, Mr. Hardage filed bankruptcy.<sup>60</sup> The EPA then notified PRPs who had deposited wastes at the Hardage site.<sup>61</sup> The PRPs organized the Hardage Steering Committee (HSC)<sup>62</sup> to conduct their own RI/FS and to develop a remediation plan.<sup>63</sup> The EPA was also conducting its own RI/FS at this time and developed its own remediation plan.

The EPA sued the PRPs in 1986, and although the court found the HSC remediation plan superior to the EPA's, the court awarded the EPA the six million dollars it had spent for investigatory actions since 1979.<sup>64</sup> The HSC remediation plan's estimated cost of implementation was fifty-four million dollars while the EPA's plan would cost approximately \$150 million.<sup>65</sup> The district court also found that the HSC plan better represented the NCP requirements.<sup>66</sup> The court further stated that if it had tried the case on the administrative record rather than conducted a de novo review, it would have found the EPA's plan arbitrary and capricious and inconsistent with the NCP.<sup>67</sup> Thus, the court held the PRPs liable for all of the EPA's investigatory costs even though (a) the EPA did not notify the PRPs about the investigation until six years after it began, and (b) the PRPs developed the preferred remediation plan.

HSC appealed the district court's decision to the Tenth Circuit. The Tenth Circuit stated that as long as the response action that the EPA develops is not inconsistent with the NCP, then any investigatory costs associated with developing the response action are recoverable.<sup>68</sup> This holding will allow the EPA to recover excessive and unreasonable investigatory costs, such as overpayments to contractors or excessive unwarranted expenditures, from PRPs so long as the remedial plan that the EPA develops is not arbitrary and capricious.

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<sup>59</sup> *United States v. Hardage*, 750 F. Supp. 1460, 1468 (W.D. Okla. 1990), *aff'd in part, rev'd in part*, 982 F.2d 1436 (10th Cir. 1992), *cert. denied*, 114 S. Ct. 300 (1993).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 1469.

<sup>64</sup> *United States v. Hardage*, 982 F.2d 1436, 1439 (10th Cir. 1992), *cert. denied*, 114 S. Ct. 300 (1993).

<sup>65</sup> *Hardage*, 750 F. Supp. at 1462.

<sup>66</sup> *Id.*

<sup>67</sup> *Hardage*, 982 F.2d at 1440.

<sup>68</sup> *Id.* at 1444.

## 2. Lone Pine Steering Committee v. United States

Other courts have consistently recognized the right of PRPs to challenge their liability for investigatory costs.<sup>69</sup> In *Lone Pine Steering Committee v. United States Environmental Protection Agency*,<sup>70</sup> the Third Circuit stated that "courts . . . will undoubtedly look carefully at the claims made by the government when suit for reimbursement is brought under sec. 9607."<sup>71</sup> *Lone Pine* involved a PRP steering committee that sought pre-enforcement review of an EPA remediation plan. The Third Circuit refused to review the plan, but stated that "[t]he reimbursement trial will not be a pro forma proceeding but will permit presentation of adequate evidence for careful and exacting study by the court. *The statute requires the EPA to observe cost effectiveness*, and that mandate is a limitation, not a license to squander."<sup>72</sup> Thus, the *Lone Pine* court clearly recognized the right of a PRP to challenge its liability for ineffective and unnecessary investigatory costs.

### B. *The Statutory Language of CERCLA Requires the EPA to Use Cost-Effective Methods When It Conducts a Response Action*

The EPA argues that all costs which are incurred during a response action are recoverable so long as the response action is consistent with the NCP.<sup>73</sup> It appears that this argument has its roots in the Eighth Circuit decision of *United States v. Northeastern Pharmaceutical & Chemical Co.*<sup>74</sup> This case can be read in several ways. First, the *Northeastern Pharmaceutical* court stated that costs "that are not inconsistent with the NCP are conclusively presumed to be reasonable."<sup>75</sup> But one must look at the context of this statement. The court is discussing who has the burden of showing the inconsistency or consistency of the government's actions with the NCP.<sup>76</sup> Stating that the costs are presumed to be reasonable does not mean that they are unchallengeable, but rather that

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<sup>69</sup> See *United States v. Northernair Plating Co.*, 685 F. Supp. 1410, 1417 (W.D. Mich. 1988) (allowing a party to challenge the response costs of a \$993 title search that should have only cost \$120).

<sup>70</sup> 777 F.2d 882 (3d Cir. 1985), *cert. denied*, 476 U.S. 1115 (1986).

<sup>71</sup> *Id.* at 887.

<sup>72</sup> *Id.* (emphasis added).

<sup>73</sup> Alfred R. Light, *The Importance of "Being Taken": To Clarify and Confirm the Litigative Reconstruction of CERCLA's Text*, 18 B.C. ENVTL. AFF. L. REV. 1, 28 (1990).

<sup>74</sup> 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987). For a discussion of this argument, see LIGHT, *supra* note 5, at 89.

<sup>75</sup> *Northeastern Pharmaceutical*, 810 F.2d at 748.

<sup>76</sup> *Id.* at 747.

the PRP will have the burden of proof of showing inconsistency with the NCP. Had the defendants had evidence that the costs were unreasonable, the court would have to take that into consideration when awarding recovery to the government.<sup>77</sup>

*United States v. Northern Plating Co.*<sup>78</sup> provides a model of how PRPs should be allowed to challenge response costs incurred by the government. Although the court acknowledged that the burden is on the defendant when the EPA seeks to recover its costs, it allowed the party to challenge the costs as unnecessary and ineffective.<sup>79</sup> The court granted summary judgment on most of the costs because the defendant raised no issue of material fact, but did allow some costs to go to trial because the defendant had demonstrated that there was a less expensive way to conduct those parts of the investigation.<sup>80</sup> These are the types of challenges to response costs that the PRPs should be allowed to raise.

The government interprets section 107 to allow a court to inquire only into whether the response action is arbitrary and capricious rather than whether the investigatory costs that the EPA incurred when it developed the response action are arbitrary and capricious.<sup>81</sup> The EPA argues that if its remedy is not arbitrary or capricious, then it may recover all investigatory costs associated with developing that remedy. The EPA's position contradicts the plain language of the statute which states that the government may recover only costs that are ". . . not inconsistent with the national contingency plan."<sup>82</sup>

Congress banned pre-enforcement review of response actions by PRPs when it amended CERCLA with SARA in 1986.<sup>83</sup> Henry Habicht II, Assistant United States Attorney General, testified before the House subcommittee on administrative law and governmental relations that after the enactment of the SARA amendments, "responsible parties will still be able to establish that the [NCP] was not followed or that *specific costs were not proper*."<sup>84</sup> Although the

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<sup>77</sup> LIGHT, *supra* note 5, at 89.

<sup>78</sup> 685 F. Supp. 1410 (W.D. Mich. 1988).

<sup>79</sup> *Id.* at 1415-16.

<sup>80</sup> *Id.* at 1421. The court allowed a challenge of a response cost of a title search to stand because the EPA had paid \$993 for a title search when it could have been conducted for \$120. *Id.* at 1417.

<sup>81</sup> Light, *supra* note 73, at 38.

<sup>82</sup> 42 U.S.C. § 9607 (1988).

<sup>83</sup> *Id.* § 9613.

<sup>84</sup> *Superfund Reauthorization: Judicial and Legal Issues, Oversight Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 58 (1985) (testimony of F. Henry Habicht II, Ass't Att'y Gen.) (emphasis added).

EPA contends otherwise, the statutory language of CERCLA and legislative history of SARA support the right of a PRP to challenge unreasonable investigatory costs.

### C. *Constitutional Issue*

The Sixth Circuit, in *J.V. Peters v. Administrator, EPA*,<sup>85</sup> also recognized that PRPs may challenge investigatory costs. The PRPs argued that because the EPA would hold them liable in the future for the EPA's response costs, due process required the court to hold a hearing to determine the propriety of the EPA's remediation plan.<sup>86</sup> The court followed SARA and refused to conduct a pre-enforcement review of the EPA's remediation plan. However, in its future suit to recover response costs, the court held that the EPA could only recover "costs . . . not inconsistent with the national contingency plan."<sup>87</sup> By allowing the PRPs to challenge the investigatory costs after the EPA completed its remediation activities, the court dispensed with the PRPs' constitutional due process argument.

Allowing a party to challenge investigatory costs is particularly important now because SARA codified the ban on pre-enforcement review of EPA remedies.<sup>88</sup> If the PRPs cannot challenge the unnecessary investigatory costs, then they will have to sit idly by while the EPA frivolously spends money. And as long as the EPA's response action is consistent with the NCP, the PRPs will be liable for all associated investigatory costs. If the courts do not allow the PRPs to challenge investigatory costs, then a due process problem arises because the PRPs are never provided the opportunity to challenge their liability or given their day in court. By allowing parties to challenge the investigatory costs, courts will avoid the due process problem.

### D. *The National Contingency Plan Requires Costs to be Reasonable*

The NCP "establishes procedures and standards for responding to releases of hazardous substances . . . ."<sup>89</sup> These procedures and standards govern the EPA's conduct when it undertakes remedial investigations, hires contractors, and develops remediation plans. Of particular interest here is section

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<sup>85</sup> 767 F.2d 263 (6th Cir. 1985).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 266.

<sup>88</sup> 42 U.S.C. § 9613(h) (1988).

<sup>89</sup> *Id.* § 9605.

300.160(c) of the NCP which regulates the EPA's expenditures during response actions.<sup>90</sup>

The NCP requires the EPA to expend funds under existing authority when it undertakes response actions.<sup>91</sup> Response actions include investigations, removal actions, and remedial activities.<sup>92</sup> The Code of Federal Regulations outlines the procedures that the federal government must follow when it procures contracts with commercial organizations and construction and engineering firms.<sup>93</sup> The EPA often hires commercial contractors to do much of its work because of a contractor's expertise in a particular area and the EPA's lack of personnel.

Before an agency can pay a commercial contractor for services or products, the agency must take several factors into account—the most relevant for the purposes of this Note being the reasonableness factor.<sup>94</sup> Expenditures for a particular service or product should not exceed the amount that a prudent person would pay for the service or product in a competitive business.<sup>95</sup> More

<sup>90</sup> 40 C.F.R. § 300.160(c) (1993).

<sup>91</sup> *Id.* "Response actions undertaken by the participating agencies shall be carried under existing programs and authorities when available. Federal agencies are to make resources available, expend funds, or participate in response to discharges and releases under their existing authority." *Id.*

<sup>92</sup> 42 U.S.C. § 9601(25) (1988).

<sup>93</sup> 48 C.F.R. §§ 31.103, 31.105 (1993).

<sup>94</sup> *Id.* § 31.201-2(a).

(a) The factors to be considered in determining whether a cost is allowable include the following:

- (1) Reasonableness.
- (2) Allocability.
- (3) Standards promulgated by the CAS Board, if applicable; otherwise, generally accepted accounting principles and practices appropriate to the particular circumstances.
- (4) Terms of the contract.
- (5) Any limitations set forth in this subpart.

*Id.*

<sup>95</sup> *Id.* § 31.201-3(a). The regulation states in full:

(a) A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of a competitive business. Reasonableness of specific costs must be examined with particular care in connection with firms or their separate divisions that may not be subject to effective competitive restraints. No presumption of reasonableness shall be attached to the incurrence of costs by a contractor. If an initial review of the facts results in a challenge of a specific cost

notably, “No presumption of reasonableness shall be attached to the incurrence of costs by a contractor.”<sup>96</sup> Factors that the EPA should consider when it determines whether a cost is reasonable are:

- 1) Whether it is the type of cost generally recognized as ordinary and necessary for the conduct of the contractor’s business or the contract performance;
- 2) Generally accepted sound business practices, arm’s length bargaining, and Federal and State laws and regulations;
- 3) The contractor’s responsibilities to the Government, other customers, the owners of the business, employees, and the public at large; and
- 4) Any significant deviations from the contractor’s established practices.<sup>97</sup>

Often the EPA’s expenditures fail the reasonableness standard. Perhaps the most egregious example of an expenditure that was not ordinary and necessary was telephone calls to 900 numbers published in *Penthouse* magazine that the EPA claimed as response costs.<sup>98</sup>

If the courts do not allow judicial review of the EPA’s investigatory costs, then the EPA has no incentive to challenge the costs that commercial contractors charge the EPA. Although the NCP requires the EPA to “examine with particular care”<sup>99</sup> contractor-incurred costs, if the EPA knows that the courts will require PRPs to indemnify the EPA for a contractor’s entire investigatory costs, then the EPA has no financial accountability. The EPA makes the determination of whether costs are reasonable or not, but it is the PRPs who eventually pay for contractors’ services. Therefore, PRPs should have the right to challenge the reasonableness of the commercial contractors’ investigatory costs.

### E. Limiting Recovery Under Section 113(j)

Section 113(j) also lends credence to the notion that parties should be able to challenge response costs when they are excessive or unreasonable. CERCLA section 9613(j)(3) states that if the “selection of the response action” is arbitrary and capricious, then the court should award only the investigatory

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by the contracting officer or the contracting officer’s representative, the burden of proof shall be upon the contractor to establish that such cost is reasonable.

*Id.*

<sup>96</sup> *Id.* (emphasis added).

<sup>97</sup> *Id.* § 31.201-3(b).

<sup>98</sup> LIGHT, *supra* note 5, at 57.

<sup>99</sup> 48 C.F.R. § 31.201-3(a) (1993).



costs that are not inconsistent with the NCP.<sup>100</sup> Thus, if the response action is arbitrary and capricious, then the EPA should not recover the investigatory costs associated with developing the arbitrary and capricious response action. Section 9613(j) conflicts with the *Hardage* court's holding that costs themselves cannot be inconsistent with the NCP.

#### F. *Equitable Remedies—The Unclean Hands Doctrine*

“[H]e who comes into equity must come with clean hands.”<sup>101</sup> Liability for response costs under section 107 of CERCLA is equitable in nature because the PRPs indemnify the EPA for its investigatory costs.<sup>102</sup> The doctrine of unclean hands dictates that a court should also consider the plaintiff's fault when it grants relief in equity. If the EPA incurs investigatory costs that are excessive or unwarranted, then a court should reduce the EPA's recovery accordingly because the EPA did not act appropriately when it incurred the unreasonable and unnecessary investigatory costs.

Although courts are divided on whether equitable defenses are available to defendants in CERCLA actions, courts should consider equitable defenses appropriate when the EPA incurs unnecessary and unreasonable investigatory costs.<sup>103</sup> If courts apply the doctrine of unclean hands when the EPA seeks to recover its investigatory costs, then the EPA will have another incentive to carry out its statutory duty of providing cost-efficient remediation of hazardous waste sites.

### IV. WHY LIMITING RECOVERY WILL HELP REALIZE THE OBJECTIVES OF CERCLA

Allowing parties to challenge the EPA's investigatory costs will further the goals of CERCLA. The legislative history of CERCLA suggests that one of the goals of the Act was the *cost-effective* remediation of hazardous waste sites. Surely Congress also anticipated cost-effective investigatory actions. The possibility of a PRP challenge to unnecessary and excessive response costs will force the EPA to scrutinize its investigatory costs and payments to contractors more closely. Such scrutiny will keep the overall CERCLA costs down, which

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<sup>100</sup> 42 U.S.C. § 9613(j)(3) (1988).

<sup>101</sup> *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 814 (1945).

<sup>102</sup> LIGHT, *supra* note 5, at 185.

<sup>103</sup> For a list of cases addressing the equitable nature of a CERCLA suit, see *supra* note 32.

is of even greater importance when the EPA does not know the identity of the PRPs or when the PRPs are insolvent. In those cases, the taxpayers are forced to pay the investigatory costs.

In addition, allowing the PRPs to challenge the investigatory costs provides an incentive for the EPA to allow the PRPs to conduct the response action. The EPA could then concentrate its efforts on those areas where PRPs choose not to conduct the response action themselves or are unable financially to conduct the response action.

## V. CONCLUSION

Allowing parties to challenge the EPA's investigatory costs will help further the goals of CERCLA. If its investigatory costs are challenged, the EPA will be forced to conduct investigations and remedial actions with an eye on fiscal responsibility, saving money for the taxpayers when responsible parties are unable to pay for the investigatory costs. Additionally, the EPA will have incentive to enter into settlements where the PRPs agree to conduct and pay for the investigations and remedial actions. Lastly, allowing PRPs to challenge unreasonable and frivolous investigatory cost would institute a notion of fairness for the litigants in CERCLA actions.