

THE EQUITABLE SOLUTION TO SUPERFUND LIABILITY: CREATING A VIABLE ALLOCATION PROCEDURE FOR BUSINESSES AT SUPERFUND SITES

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INTRODUCTION

The Comprehensive Environmental Response Compensation and Liability Act (CERCLA or Superfund) was first enacted in 1980.¹ Since that time, the effect of CERCLA on businesses in the United States has been tremendous. Businesses spend over thirty million dollars cleaning up an average Superfund site,² with larger sites costing businesses over 100 million dollars.³ By 1991, businesses spent over 11.3 billion dollars on CERCLA cleanups.⁴ Obviously, liability for even a single Superfund site has disastrous effects on a business, and the cost to businesses is going up. By even the most conservative estimates, the total cost of cleaning all Superfund hazardous waste sites in the United States will be well over 100 billion dollars.⁵

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1. See Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. §§ 9601-75 (1994). Passed in 1980, CERCLA was amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended in scattered sections of 42 U.S.C.). The Act is commonly referred to as "Superfund" in relation to the multimillion dollar tax-based trust fund that was established for hazardous waste removals and remedial actions. Throughout this Article, unless otherwise stated, for the purposes of simplicity, CERCLA, SARA, and Superfund shall be used interchangeably.

2. See KATHERINE N. PROBST ET AL., FOOTING THE BILL FOR SUPERFUND CLEANUPS: WHO PAYS AND HOW? 20 (1995) (examining the costs associated with CERCLA cleanups and indicating that some researchers estimate the cost of cleanup to average as high as fifty million dollars).

3. See JOHN A. HIRD, SUPERFUND: THE POLITICAL ECONOMY OF ENVIRONMENTAL RISK 123 (1994); see also Ridgway M. Hall, Jr. et al., *Superfund Response Cost Allocations: The Law, the Science and the Practice*, 49 BUS. LAW. 1489, 1491 (1994) (stating the Rocky Mountain Arsenal site in Colorado is projected to cost potentially responsible parties one billion dollars to clean up).

4. See JAN PAUL ACTON, UNDERSTANDING SUPERFUND: A PROGRESS REPORT, v-viii, 1, 123 (1989); JAN PAUL ACTON & LLOYD S. DIXON, SUPERFUND AND TRANSACTION COSTS: THE EXPERIENCES OF INSURER AND VERY LARGE INDUSTRIAL FIRMS 4 (1992).

5. See HIRD, *supra* note 3, at 7; PROBST ET AL., *supra* note 2, at 18, 20. See generally RESOURCES FOR THE FUTURE, ANALYZING SUPERFUND: ECONOMICS, SCIENCE, AND LAW 8 (Richard L. Revesz et al. eds., 1995) [hereinafter RESOURCES FOR THE FUTURE] (discussing the exorbitant costs of Superfund cleanups).

The impact that these hazardous waste sites have on our country cannot be overemphasized. It is estimated that eleven million people live within one mile of a Superfund site⁶ and that seventy million people live within four miles of a CERCLA site.⁷ Eighty percent of Superfund sites are located in residential areas.⁸ Eighty-five percent of Superfund sites have contaminated water across or under the site.⁹ Approximately half of all CERCLA sites cover more than twenty acres.¹⁰

Even a cursory overview of CERCLA and its liability provisions reveals the complexity of the issues facing businesses ensnared in the ever-expanding net of the Superfund. Although it is possible for a Superfund case to have only one defendant,¹¹ it is more likely to have numerous defendants.¹² A case may even have over one hundred potentially responsible parties (PRPs), all arguing against their own liability, while vehemently arguing for the liability of their co-defendants.¹³ Settlement negotiations can take several years to complete,¹⁴ and actual litigation can take even longer.¹⁵

6. See *Superfund Reassessment and Reauthorization: Hearings Before the Subcomm. on Superfund, Waste Control, and Risk Assessment of the Senate Comm. on Env't and Pub. Works*, 104th Cong. 428 (1995) [hereinafter *Superfund Reassessment and Reauthorization*] (statement of Karen Florini, Chairman, Toxic Program, Environmental Defense Fund).

7. See U.S. EPA, SYNOPSIS: SUPERFUND ADMINISTRATIVE REFORMS, ANNUAL REPORT FISCAL YEAR 1996 (1996) [hereinafter SUPERFUND ADMINISTRATIVE REFORMS]; see also *Superfund Reassessment and Reauthorization*, *supra* note 6, (statement of Carol Browner, Administrator, EPA); PROBST ET AL., *supra* note 2, at 24.

8. See PROBST ET AL., *supra* note 2, at 24.

9. See *id.*

10. See HIRD, *supra* note 3, at 19.

11. The site may not have any defendants; it may be completely abandoned. See Lynnette Boomgaarden & Charles Breer, *Surveying the Superfund Settlement Dilemma*, 27 LAND & WATER L. REV. 83, 86 (1992) (discussing the complexity of issues at Superfund sites and the necessity for settlements).

12. See *Superfund Reassessment and Reauthorization*, *supra* note 6, at 33 (statement of Kelvin Herstad, President, United Truck Body, Inc.) (stating that 1,800 business and small companies were drawn into a lawsuit that started out with thirty principal PRPs); PROBST ET AL., *supra* note 2, at 30; see also Boomgaarden & Breer, *supra* note 11, at 86.

13. See *United States v. Hooker Chem. & Plastics Corp.*, 680 F. Supp. 546 (W.D.N.Y. 1988); *United States v. Stringfellow*, 31 Env't Rep. Cas. (BNA) 1315, 1316 (C.D. Cal. 1990). See generally *Benefits and Drawbacks of the Superfund Statutes Liability Provisions: Hearing Before the Subcomm. on Superfund, Recycling, and Solid Waste Management of the Senate Comm. on Env't and Public Works*, 103d Cong. 55 (1993) [hereinafter *Benefits and Drawbacks, Senate Hearing*] (statement of Keith O. Fultz, Director, Planning & Reporting, Resources, Community, and Economic Development Division, U.S. General Accounting Office); et al., Jr., *supra* note 3, at 1491.

14. See RESOURCES FOR THE FUTURE, *supra* note 5, at 192; see also U.S. GEN. ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, SUPERFUND: STATUS, COST, AND TIMELINESS OF HAZARDOUS WASTE SITE CLEANUPS 37-38 (1994).

15. See *Superfund Reassessment and Reauthorization*, *supra* note 6, at 221 (statement of Peter B. Prestley, Attorney, Simpson, Thatcher & Bartlett) (stating his court battles dragged on for decades); see also *The Effects of Superfund Liability on Small Business: Hearing Before the House Comm. on Small Business*, 104th Cong. 34 (1995) [hereinafter *Effects of Superfund Liability on Small Business*] (statement of Edward L. Quinn, Sr., Chairman of the Board, K.J. Quinn & Co.). See generally Boomgaarden & Breer,

For years now, the idea of a statutory allocation system has been proffered by individuals and groups representing a wide range of interested parties.¹⁶ These groups all agree that the complexity of the issues in a CERCLA case—the lack of viable defenses to CERCLA liability;¹⁷ the inadequate settlement tools utilized by the U.S. Environmental Protection Agency (EPA);¹⁸ the broad categories of PRPs liable for hazardous releases at a Superfund site;¹⁹ and the imposition of strict, joint and several liability²⁰—commands a change in the current statute. If the statute is to survive the next reauthorization battle, it must be amended to include expedited methods of allocating liability and costs for all parties willing to settle their cases.

Part I of this Article gives a brief history and overview of Superfund, including the CERCLA provisions relating to the categories of PRPs, their liability, and their limited defenses. Part II discusses settlement, including the advantages of settlement and the particular problems of parties who contribute small amounts of waste to a site. Part III outlines an in-depth allocation proposal that will alleviate the problems associated with CERCLA liability.

supra note 11, at 90, 120 (discussing the lengthy process of settlement negotiations and litigation).

16. See *Benefits and Drawbacks of the Superfund Statute's Liability Provisions: Hearing Before the House Subcomm. on Env't, Energy and Natural Resources of the House Comm. on Gov't Operation*, 103d Cong. 175 (1993) [hereinafter *Benefits and Drawbacks, House Hearings*] (statement of Bernard J. Reilly, Corporate Counsel, Dupont Co.); *Superfund Reassessment and Authorization*, *supra* note 6, at 178; CLEAN SITES, A REMEDY FOR SUPERFUND: DESIGNING A BETTER WAY OF CLEANING UP AMERICA 156 (1994) [hereinafter CLEAN SITES]. See generally THE KEYSTONE CTR & THE ENVTL. LAW CTR. OF VERMONT LAW SCHOOL, NATIONAL COMMISSION ON SUPERFUND, FINAL CONSENSUS REPORT OF THE NATIONAL COMMISSION ON SUPERFUND (1994) (comprising leaders from regulated industry, environmental groups, affected communities, academia, and federal, state, and local governments).

17. See *Effects of Superfund Liability on Small Business*, *supra* note 15, at 15 (statement of Raymond J. Keating, Chief Economist, Small Business Survival Committee); see *id.* at 30 (statement of John De Vinck, De Vinck, Inc.).

18. See *Superfund and Small Business: Is the Current System Fair?: Hearing Before the Subcomm. on Dev. of Rural Enterprises, Exports, and Env't of the House Comm. on Small Business*, 103rd Cong. 3 (1993) [hereinafter *Superfund and Small Business*] (statement of Richard L. Hembra, Director, Environmental Protection Issues, Resources, Community, and Economic Development Division, U.S. General Accounting Office); *Superfund Reassessment and Reauthorization*, *supra* note 6, at 186 (statement of Peter B. Prestley, Attorney, Simpson, Thatcher & Bartlett); CLEAN SITES, *supra* note 16, at 225-26.

19. See generally David J. Engel, Casenote, *Joint and Several Liability Under Superfund: The Plight of the Small Volume Hazardous Waste Contributor*, 31 WAYNE L. REV. 1057, 1064 (1985) (detailing the broad categories of liable PRPs); *Superfund Reassessment and Reauthorization*, *supra* note 6, at 186 (statement of Peter B. Prestley, Attorney, Simpson, Thatcher & Bartlett); *Effects of Superfund Liability on Small Business*, *supra* note 15, at 17 (statement of John C. Shanahan, policy analyst, The Heritage Foundation).

20. See Engel, *supra* note 19, at 1062-63, 1065; Hall, Jr. et al., *supra* note 3, at 1490; *Benefits and Drawbacks, House Hearings*, *supra* note 16, at 175 (statement of Bernard J. Reilly, Corporate Counsel, Dupont Co.); *Effects of Superfund Liability on Small Business*, *supra* note 15, at 18 (statement of Raymond J. Keating, Chief Economist, Small Business Survival Committee); *Effects of Superfund Liability on Small Business*, *supra* note 15, at 18 (statement of John C. Shanahan, policy analyst, The Heritage Foundation).

Part IV details an allocation proposal, which mirrors draft legislation that is currently before Congress.²¹

I. CERCLA

A. History

To understand the draft legislation currently before Congress, one must first have a basic understanding of CERCLA and its history. CERCLA resulted from congressional reaction to an immense hazardous waste problem in the United States caused by decades of virtually uncontrolled disposal of hazardous substances throughout the country.²² Public concern over hazardous waste disposal culminated with a neighborhood in upstate New York called Love Canal.²³ Reports of chronic health problems and widespread contamination in the area led President Carter to declare a state of emergency at Love Canal.²⁴ In response, EPA initiated a study to determine the extent of hazardous waste contamination in the United States.²⁵ EPA discovered tens of thousands of sites throughout the United States that were contaminated with varying levels of hazardous substances.²⁶

Congress began a nationwide effort to control the handling of hazardous waste long before CERCLA's passage. In 1976, Congress passed the Resource Conservation and Recovery Act (RCRA) to deal with the generation, transportation, treatment, storage, and disposal of hazardous waste.²⁷ RCRA was created to prevent the unregulated and unchecked creation and discarding of hazardous waste.²⁸ Although RCRA confronted the issue of controlling activities at operating hazardous waste units, it was not designed to handle the immediate response actions at abandoned sites where there was a release or threatened release of hazardous substances.²⁹ RCRA was created to be primarily a regulatory statute controlling hazardous waste practices from

21. See H.R. 2750, 105th Cong. (1997); H.R. 2727, 105th Cong. (1997); S. 8, 105th Cong. (1997).

22. See Hall, Jr., *supra* note 3, at 1490; Elizabeth Ann Glass, *The Modern Snake in the Grass: An Examination of Real Estate & Commercial Liability Under Superfund & SARA and Suggested Guidelines for the Practitioner*, 14 B.C. ENVTL. AFF. L. REV. 381, 383 (1987).

23. See generally Glass, *supra* note 22, at 381 (describing health problems encountered by Love Canal residents).

24. See *id.*

25. See *id.* at 383; see also FRONA M. POWELL, LAW AND THE ENVIRONMENT I (1998).

26. See Glass, *supra* note 22, at 383.

27. See Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6921-6939 (1994).

28. See H.R. REP. NO. 94-1491, at 4 (1976), reprinted in 1976 U.S.C.C.A.N. 6238, 6241.

29. See POWELL, *supra* note 25, at 338-49.

"cradle-to-grave."³⁰ CERCLA, on the other hand, is a cleanup statute.³¹ CERCLA does not look forward, but rather looks backward to address releases or threatened releases of hazardous substances into the environment.³²

By 1979, EPA estimated that from 30,000 to 50,000 active and inactive hazardous waste sites existed in the United States.³³ In 1980, the President and Congress responded to the public demand for a means to compel expedited cleanups and for government funds to cleanup the sites by enacting CERCLA.³⁴ The statute created a massive fund of over one billion dollars (known as the Superfund) to pay for the cleanup of contaminated sites.³⁵ CERCLA empowered the United States to take any response action necessary to prevent or abate the release or threatened release of hazardous substances into the environment.³⁶ However, the congressional debates over CERCLA clearly establish that Congress was aware that the costs of response actions at CERCLA sites would greatly exceed the monetary amount authorized by Superfund.³⁷ Therefore, CERCLA also empowers the United States to force PRPs to pay for site cleanups.³⁸ Thus, CERCLA consists of two main parts: response actions and liability.³⁹

30. See H.R. REP. NO. 96-1016, pt. 1, at 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120 (describing cradle-to-grave as the regulation of hazardous waste from its initial generation to its ultimate disposal); POWELL, *supra* note 25, at 333. See generally *American Mining Congress v. United States EPA*, 824 F.2d 1177, 1178-79 (D.C. Cir. 1987) (discussing legislative history and purpose of RCRA).

31. See R. CRAIG ANDERSON, ENVIRONMENTAL LAW HANDBOOK 225 (13th ed. 1995) (discussing the history and objectives of CERCLA); ROGER W. FINDLEY & DANIEL A. FARBER, ENVIRONMENTAL LAW 532-33 (3d ed. 1991); NANCY KUBASEK & GARY S. SILVERMAN, ENVIRONMENTAL LAW 193 (2d ed. 1997); PROBST ET AL., *supra* note 2, at 12.

32. See HIRD, *supra* note 3, at 121.

33. See *Reauthorization of the Resource Conservation and Recovery Act: Hearings Before the Subcomm. on Envtl. Pollution and Resource Protection of the Senate Comm. on Envtl. and Pub. Works*, 96th Cong. 33 (1979) (statement of Thomas C. Jorling, Assistant Administrator, Water & Waste Management, U.S. EPA).

34. See generally Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982) (detailing the passage of the bill meant to respond to the public demand for cleanup).

35. Approximately ninety percent of the fund was financed through taxes on industry; the remainder is funded through general revenue taxes.

36. See 42 U.S.C. § 9604(a) (1994). CERCLA grants the President the authority to take response action at a contaminated site. The President delegated that power to the Administrator of the EPA. See Exec. Order No. 12,316, 46 Fed. Reg. 42,237 (1981); Exec. Order No. 12,580, 52 Fed. Reg. 2923 (1987). Throughout this Article, "government," the "U.S.," and "EPA" shall be used interchangeably as the governmental actor.

37. See S. REP. NO. 96-848, at 17-18 (1988); H.R. REP. NO. 96-1016, pt. 1, at 20 (1980).

38. See 42 U.S.C. § 9607(a) (1994); see also *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726, 733 (8th Cir. 1986); *Dedham Water v. Cumberland Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986).

39. See *id.* 42 U.S.C. §§ 9604, 9607 (1994).

B. Response Actions

To reiterate, the statute allows the United States to respond to prevent the release or threatened release of hazardous substances or pollutants or contaminants.⁴⁰ Like most of the statute, the terms "hazardous substances,"⁴¹ "pollutants or contaminants,"⁴² and "releases"⁴³ are very broadly defined. Hazardous substances include any substance listed or designated as hazardous pursuant to any other environmental statute (including, but not limited to RCRA, the Clean Water Act, the Clean Air Act, and the Toxic Substances Control Act).⁴⁴ Pollutants and contaminants are even more broadly defined⁴⁵ as anything that will or may reasonably be anticipated to cause certain specified health effects.⁴⁶ As with the previous two terms, the definition of release is all-encompassing.⁴⁷ Release is defined as "any spilling, leaking,

40. *See id.* § 9604(a).

41. *See id.* § 9601(14).

42. *See id.* § 9601(33).

43. *See id.* § 9601(22).

44. *See generally* 40 C.F.R. § 302 (1997) (listing some, but not all, hazardous substances covered by CERCLA).

45. The statute reads:

The term "pollutant or contaminant" shall include, but not be limited to, any element, substance, compound, or mixture, including disease-causing agents, which after release into the environment and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring

42 U.S.C. § 9601(33).

46. *See id.* Although EPA can respond to the release or threatened release of pollutants or contaminants, it cannot recover the costs it incurs relative to this type of response action.

47. The statute reads:

[A]ny spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment, (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant) but excludes (A) any release which results in exposure to persons solely within a workplace, with respect to a claim which such person may assert against the employer of such persons, (B) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine, (C) release of source, byproduct, or special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954, if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under Section 170 of such Act, or, for the purposes of Section 104 of this title or any other response action, any release of source byproduct, or special nuclear material from any processing site designated under Section 102(a)(1) or 302(a) of the Uranium Mill Tailings Radiation Control Act of 1978, and (D) the normal application of fertilizer.

pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment."⁴⁸

Superfund authorizes EPA to take actions consistent with the National Contingency Plan (NCP) to remove or remediate hazardous substances at a site whenever:

(A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare⁴⁹

The NCP is the government's basic policy directive for CERCLA. It provides the standards and procedures for responding to releases, or threatened releases, of hazardous substances. It establishes the basic framework for site evaluation and cleanup. The NCP also creates the National Priorities List (NPL).⁵⁰ The NPL lists the worst sites in the United States that require permanent remedies rather than just the removal of contaminants.⁵¹

CERCLA response actions are divided into two distinct, yet sometimes overlapping parts: removal actions and remedial actions. EPA takes removal actions at sites to eliminate immediate environmental problems in a prompt fashion.⁵² In contrast, remedial actions are long-term permanent cleanups.⁵³ Removal actions alleviate an immediate environmental threat, while remedial actions permanently eliminate the threat. Removal actions must be completed in one year;⁵⁴ remedial actions can take several years to complete.⁵⁵ By law, the cost of a removal action can not exceed two million dollars. On the other hand, remedial actions average over thirty million dollars per site.⁵⁶

42 U.S.C. § 9601(22).

48. *Id.* See also *Kelley v. Thomas Solvent Co.*, 727 F. Supp. 1532, 1546 (W.D. Mich. 1989) (stating that the leaking of hazardous substances from tanks, pipelines, drums, or containers is a release). See generally *General Elec. Co. v. Litton Bus. Sys., Inc.*, 715 F. Supp. 949, 957 (W.D. Mo. 1989) (defining release to include the dumping of hazardous substances onto the ground).

49. 42 U.S.C. § 9604(a)(1)(A)-(B) (1994).

50. See *RESOURCES FOR THE FUTURE*, *supra* note 5, at 11-12; see also *HIRD*, *supra* note 3, at 16; *PROBST ET AL.*, *supra* note 2, at 20.

51. See *RESOURCES FOR THE FUTURE*, *supra* note 5, at 11-12; see also *HIRD*, *supra* note 3, at 16. There are currently over 1,200 sites on the NPL.

52. See *KUBASEK & SILVERMAN*, *supra* note 31, at 208-09.

53. See *id.* at 209-13.

54. See *id.* at 208; see also *POWELL*, *supra* note 25, at 350 (providing definition of removal and remedial action).

55. See *PROBST ET AL.*, *supra* note 2, at 18-19.

56. See *id.* at 20; see also *RESOURCES FOR THE FUTURE*, *supra* note 5, at 14.

C. CERCLA Liability

The congressional debates over CERCLA make it clear that Congress was aware that the costs of response actions at CERCLA sites would greatly exceed the monetary amount appropriated to the Superfund.⁵⁷ Therefore, the Act was written to ensure that those responsible for any property damage, environmental harm, or personal injury resulting from hazardous substances would bear the full burden of the cleanup costs.⁵⁸ The statute ensures that monies expended by the United States during CERCLA response actions would be recovered from the responsible parties.⁵⁹ Furthermore, the statute grants the United States the authority to order responsible parties to clean contaminated sites in the case of an imminent and substantial endangerment to the public health and welfare or to the environment.⁶⁰ Failure to comply with the cleanup order can result in a fine of up to triple the amount of the United States' costs incurred during the emergency cleanup.⁶¹

Congress enacted CERCLA as a broad remedial statute designed to enhance the authority of EPA to quickly respond to toxic pollutant spills.⁶² Since CERCLA was specifically created to address the widespread concern about improper disposal of hazardous waste and to force polluters to pay for the cost associated with cleanup of their pollution,⁶³ it is not surprising to see that its liability scheme is slanted toward the United States. The statute is written to minimize the government's effort to establish liability and to maximize fast and efficient site cleanups.⁶⁴ To that end, liability at Superfund sites is strict, joint and several.⁶⁵ The problem with the current statute is that it is not conducive to the promotion of an equitable distribution of liability and costs among PRPs at a site who may not be equally liable.

57. See S. REP. NO. 96-848, at 17-18 (1980); H.R. REP. NO. 96-1016, pt. 1, at 20 (1980).

58. See *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 716 (2d Cir. 1993); *Dedham Water Co.*, 805 F.2d at 1081; *United States v. Aceto Agric. Corp.*, 872 F.2d 1373, 1377 (8th Cir. 1989); *United States v. New Castle County*, 727 F. Supp. 854, 858 (D. Del. 1989).

59. See 42 U.S.C. § 9607(a) (1994); see also *Northeastern Pharm & Chem. Co.*, 810 F.2d at 733; *Dedham Water Co.*, 805 F.2d at 1081.

60. See 42 U.S.C. § 9606 (1994) (granting EPA the authority to issue an order requiring parties to abate any imminent and substantial endangerment to the public health, welfare, or the environment because of an actual or threatened release of a hazardous substance from a facility).

61. See *id.* § 9607(c)(3) (stating that any person who is liable for a release or threat of release of hazardous substances and who fails, without sufficient cause, to properly provide removal or remedial action when ordered by the United States pursuant to sections 104 or 106, may be liable for punitive damages of up to three times the amount incurred by the United States).

62. See *National B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1197 (2d Cir. 1992).

63. See *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 257 (3d Cir. 1992).

64. See ANDERSON, *supra* note 31, at 226.

65. See POWELL, *supra* note 25, at 104-07; PROBST ET AL., *supra* note 2, at 30; FINDLEY & FARBER, *supra* note 31, at 547; HIRD, *supra* note 3, at 14, 122-23, 125, 193.

1. Strict Liability

Section 101(32) of CERCLA provides that the standard of liability in CERCLA cases will be the same as that under section 311 of the Clean Water Act—strict liability.⁶⁶ Parties responsible for contamination at a CERCLA site are strictly liable for all of the United States' response costs (removal and/or remedial costs) associated with the cleanup of the site as long as the costs incurred by the United States are not inconsistent with the NCP.⁶⁷ The amount of care utilized by the responsible party in handling the hazardous substances in question is irrelevant.⁶⁸ CERCLA requires neither intent nor negligence.⁶⁹ The PRP's mental state and knowledge are also irrelevant.⁷⁰ Quite simply, if the PRP is within one of the categories of parties that is governed by the statute,⁷¹ the PRP is strictly liable for any harm that results

66. See 42 U.S.C. § 9601 (101)(32) (1994) (stating that the standard of liability under the Act is the same as section 311 of the Clean Water Act, 33 U.S.C. § 1321 (1994)). Furthermore, 126 CONG. REC. 31,965 (1980) reads:

The liability provisions of this bill do not refer to the terms strict, joint and several liability, terms which were contained in the version of H.R. 7020 passed earlier by this body. The standard of liability in these amendments is intended to be the same as that provided in section 311 of the Federal Water Pollution Control Act; that is, strict liability. I have reviewed carefully the statutory language, the floor statements from the Senate, and the language and precedents under section 311 of the Clean Water Act. I have concluded that despite the absence of these specific terms, the strict liability standard already approved by this body is preserved. Issues of joint and several liability not resolved by this shall be governed by traditional and evolving principles of common law. The terms joint and several have been deleted with the intent that the liability of joint tortfeasors be determined under common or previous statutory law.

Id. See generally *In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 897 (5th Cir. 1993) (applying the strict liability standard to CERCLA); *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1554 (11th Cir. 1990), *reh'g denied*, 911 F.2d 742 (11th Cir. 1990) and *cert. denied*, 498 S. Ct. 752 (1991); *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1507 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057 (1990); *United States v. M/V Big Sam*, 681 F.2d 432, 457 (5th Cir. 1982) (defining the standard of liability in Clean Water Act cases as strict liability); *United States v. Lebeouf Bros. Towing Co.*, 621 F.2d 787, 789 (5th Cir. 1980), *cert. denied*, 452 U.S. 906 (1981).

67. See 42 U.S.C. § 9607(a)(4)(A) (1994); see also *Aceto Agric. Corp.*, 872 F.2d at 1379; *United States v. Kramer*, 757 F. Supp. 397, 436 (D.N.J. 1991).

68. See POWELL, *supra* note 25, at 351.

69. See *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 241 (W.D. Mo. 1985). See generally *Aceto Agric. Corp.*, 872 F.2d at 1380.

70. See generally *Idaho v. Bunker Hill*, 635 F. Supp. 665, 674 (D. Idaho 1986) (stating that under strict liability, the mental state of the defendant is irrelevant).

71. See 42 U.S.C. § 9607(a)(1)-(4) (1994). The statute reads:

(a) Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner or operator of a vessel or a facility,

(2) the person who at the time of disposal of any hazardous substance

from its activities.⁷² Strict liability under CERCLA extends to four categories of parties: (1) the current owner or operator of the facility⁷³ at which there is a release or threatened release of hazardous substances; (2) the past owner if he/she owned or operated the facility at the time of disposal of hazardous substances at the facility; (3) the person who arranged for disposal of hazardous substances at the facility; and (4) the person who transported the hazardous substances to the facility, if the transporter selected the facility as a disposal site.⁷⁴

Strict liability means liability without fault.⁷⁵

[A]s [the] term is commonly used by modern courts, [strict liability] means liability is imposed on an actor apart from either (1) an intent to interfere with a legally protected interest without legal justification for doing so, or (2) a breach of a duty to exercise reasonable care, i.e., actionable negligence.⁷⁶

"In the paradigm strict liability situation, an actor will be held liable for the harm caused by the actor even though the actor took every possible precaution and took the utmost care to prevent the harm."⁷⁷

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

Id.

72. See generally HRD, *supra* note 3, at 122-23, 125 (discussing liability under CERCLA).

73. "Facility" is defined broadly to include (among other things):

[A]ny building, structure, installation, equipment, pipe or pipeline, well, pond, pit, lagoon, ditch, landfill, or any site where a hazardous substance has been deposited, stored, disposed of, placed or otherwise come to be located.

42 U.S.C. § 9601(9) (1994).

74. See *id.* § 9607(a); see also *United States v. Monsanto Co.*, 858 F.2d 160, 168 (4th Cir. 1988).

75. See *Acushnet Co. v. Coaters, Inc.*, 937 F. Supp. 988, 999 (D. Mass. 1996) (quoting PROSSER & KEETON ON THE LAW OF TORTS § 75 at 534 (5th ed. 1984)).

76. *Id.* (quoting PROSSER & KEETON ON THE LAW OF TORTS § 75 at 534 (5th ed. 1984)).

77. *Id.* at 999-1000.

2. Joint and Several Liability

Liability at Superfund sites is also joint and several.⁷⁸ If the harm at a CERCLA site is indivisible, the responsible parties are jointly and severally liable.⁷⁹ That is, all of the parties who contributed to the contamination at the site are liable as a group (joint liability), or each contributor is individually liable for the entire harm at the site (several liability).⁸⁰

Longstanding CERCLA case law has utilized the common law principals of joint and several liability.⁸¹ As the court stated in *United States v. Monsanto Co.*:

Under common law rules, when two or more persons act independently to cause a single harm for which there is a reasonable basis of apportionment of each, each is held liable only for the portion of harm that he causes. When such persons cause a single and indivisible harm, however, they are held liable jointly and severally for the entire harm.⁸²

78. See *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 n.13 (2d Cir. 1985); *Bulk Distribution Ctrs., Inc. v. Monsanto Co.*, 589 F. Supp. 1437, 1443 (S.D. Fla. 1984); *United States v. A&F Materials Co.*, 578 F. Supp. 1249, 1255 (S.D. Ill. 1984); *United States v. Conservation Chem. Co.*, 589 F. Supp. 59, 62-63 (W.D. Mo. 1984); *United States v. Northeastern Pharm. & Chem. Co.*, 579 F. Supp. 823, 844 (W.D. Mo. 1984); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 807-08 (S.D. Ohio 1983); *United States v. Wade*, 577 F. Supp. 1326, 1338 (E.D. Pa. 1983). See also 126 CONG. REC. 14,967 (daily ed. Nov. 24, 1980); 126 CONG. REC. 15,004 (daily ed. Nov. 24, 1980); 126 CONG. REC. 11,788-89 (daily ed. Dec. 3, 1980) (discussing joint and several liability under Superfund).

79. See *Chem-Dyne Corp.*, 572 F. Supp. at 811. See generally *Alcan Aluminum Corp.*, 964 F.2d at 267; *Monsanto Co.*, 858 F.2d at 161; *O'Neil v. Picillo*, 883 F.2d 176, 178 (1st Cir. 1989). Volumetric contributions by themselves cannot determine divisible harm because the volume of waste each party contributes (by itself) is not an accurate predictor of the potential harm to the public health and environment. To accurately determine the harm that each party contributed to a site one must look at a myriad of factors including each chemical's toxicity, solubility, volatility and migratory potential.

80. See FINDLEY & FARBER, *supra* note 31, at 547 n.23; HIRD, *supra* note 3, at 10 n.21; POWELL, *supra* note 25, at 351.

81. See *Monsanto*, 858 F.2d at 171; *National B.F. Goodrich*, 958 F.2d at 1198; *R.W. Meyer, Inc.*, 889 F.2d at 1507-08; *Kramer*, 757 F. Supp. at 422; *City of New York v. Exxon Corp.*, 744 F. Supp. 474 (S.D.N.Y. 1990), *aff'd on reconsideration*, 766 F. Supp. 177, 197 (S.D.N.Y. 1991); *United States v. Kayser-Roth Corp.*, 724 F. Supp. 15, 20 (D.R.I. 1989); *Kelley v. Thomas Solvent Co.*, 714 F. Supp. 1533, 1552 (W.D. Mich. 1989); *United States v. Marisol*, 725 F. Supp. 833, 842 (M.D. Pa. 1989); *O'Neil v. Picillo*, 682 F. Supp. 706, 724 (D.R.I. 1988); *Versatile Metals, Inc. v. Union Corp.*, 693 F. Supp. 1563, 1571 (E.D. Pa. 1988).

82. See *Monsanto Co.*, 858 F.2d at 171; see also *O'Neil*, 883 F.2d at 178; *R.W. Meyer, Inc.*, 889 F.2d at 1507.

In formulating this standard, federal courts have essentially applied section 433A of the Second Restatement of Torts, entitled "Apportionment of Harm to Causes," which states:

- (1) Damages for harm are to be apportioned among two or more causes where:
 - (a) there are distinct harms, or
 - (b) there is a reasonable basis for determining the contribution of each cause to a single harm.
- (2) Damages for any other harm cannot be apportioned among two or more causes.⁸³

Similarly, section 881 of the Second Restatement of Torts entitled "Distinct or Divisible Harms," states:

[I]f two or more persons, acting independently, tortiously caused distinct harms or a single harm for which there is a reasonable basis for division according to contribution of each, each is subject to liability only for the portion of the total harm that he has himself caused.⁸⁴

CERCLA requires the PRP to shoulder the burden of establishing the divisibility of harm at the site.⁸⁵ Thus, a PRP will be jointly and severally liable unless it demonstrates either that it has caused a distinct harm, or where there is a single harm, that the harm at the site can be apportioned.⁸⁶ Although Superfund grants PRPs the right to prove that the harm at the site is divisible, this limitation of liability is usually illusory. Superfund sites are usually

83. RESTATEMENT (SECOND) OF TORTS § 433A (1965). See also *Monsanto Co.*, 858 F.2d at 172; *O'Neil*, 883 F.2d at 178; H.R. REP. NO. 99-253, pt. 1, at 74 (1985) (discussing the standard of liability and the principles of strict liability).

84. RESTATEMENT (SECOND) OF TORTS, § 881 (1965).

85. See generally *Alcan Aluminum Corp.*, 990 F.2d at 722 (stating that the polluter bears the ultimate burden of establishing a reasonable basis for apportioning liability, that the government has no burden of proof with respect to what caused the release and triggered response costs, and that it is the defendant that bears the burden); *City of New York v. Exxon Corp.*, 766 F. Supp. 177, 198 (S.D.N.Y. 1991) (stating that, to meet its burden, defendant must establish that the environmental harm was divisible among responsible parties, and, to the extent that defendant argues that imposition of joint and several liability is inequitable, equitable factors are relevant in subsequent actions for contribution, but are not pertinent to the question of joint and several liability); *Kramer*, 757 F. Supp. at 422-23 (striking defenses that related to joint and several liability that did not assert that a reasonable basis for apportioning the harm existed, and declining to strike defenses that did assert such a basis); *United States v. Mottolo*, 695 F. Supp. 615, 629 (D.N.H. 1988) (stating that defendants must prove that environmental injury is divisible and that there is a reasonable basis for apportioning the harm).

86. See *United States v. Rohm & Haas Co.*, 2 F.3d 1265, 1280 (3d Cir. 1993); *Chem-Dyne Corp.*, 572 F. Supp. at 811; *United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361, 1396 (D.N.H. 1985).

"toxic soups" and records are often scarce; divisibility of harm is often impossible to prove.⁸⁷ Therefore, the law does not require the government to fingerprint the wastes located at a CERCLA site.⁸⁸ Moreover, a PRP cannot obtain this limitation of liability by simply counting barrels;⁸⁹ EPA also considers, among other things, the substance's mobility, toxicity, volatility, and solubility.⁹⁰

To assist in settlement, EPA is permitted to utilize Nonbinding Allocations of Responsibility (NBARs) to help PRPs determine their relative liability at the site.⁹¹ However, as the name suggests, NBARs are not binding on any party, including EPA, and they cannot be used in litigation.⁹² NBARs are only advisory settlement tools and EPA almost never takes the time to use them.⁹³ As of 1993, EPA had only used NBARs at five sites, and seven EPA regions had never issued an NBAR.⁹⁴ Yet, as discussed later, the concept of NBARs can be a very good starting point for the creation of a new statutory allocation system that is both efficient and expeditious.

3. The Categories of CERCLA PRPs

CERCLA's strict, joint and several liability extends to four very broad categories of parties. First, the current owner or operator of the facility⁹⁵ at which there is a release or threatened release of hazardous substances is

87. See *Chem-Dyne Corp.*, 572 F. Supp. at 808; *Rohm & Haas Co.*, 2 F.3d at 1280; *Alcan Aluminum Corp.*, 990 F.2d at 722.

88. See *Exxon Corp.*, 766 F. Supp. at 195 (holding liability at CERCLA sites is joint and several, therefore the question of who is responsible for the release or threatened release of a particular waste at a site is irrelevant); *Wade*, 577 F. Supp. at 1332-33.

89. See *Monsanto Co.*, 858 F.2d at 172-73; *Chem-Dyne Corp.*, 572 F. Supp. at 811; *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 994 (D.S.C. 1986), *aff'd in part, vacated in part on other grounds sub nom.*

90. See *Chem-Dyne Corp.*, 572 F. Supp. 802, 811 (S.D. Ohio 1983). See generally *Mottolo*, 695 F. Supp. at 629 (explaining types of harm).

91. The statute states, "[w]hen it would expedite settlements under this section and remedial action, the President may, after completion of the remedial investigation and feasibility study, provide a nonbinding preliminary allocation of responsibility which allocates percentages of the total cost of response among potentially responsible parties at the facility." 42 U.S.C. § 9622(e)(3) (1994).

92. See *Superfund Program (Part 2): Hearings Before the Subcomm. on Transp. and Hazardous Materials of the House Comm. on Energy and Commerce*, 103d Cong. 273, 283 (1993) [hereinafter *Superfund Program (Part 2)*] (statement of Richard L. Hembra, Director, Environmental Protection Issues, Resources, Community, and Economic Development Division, U.S. General Accounting Office); HIRD, *supra* note 3, at 17-18.

93. See *Superfund Program (Part 2)*, *supra* note 92, at 283 (statement of Richard L. Hembra, Director, Environmental Protection Issues, Resources, Community, and Economic Development Division, U.S. General Accounting Office).

94. See *id.*

95. See definition of "facility" *supra* note 73.

liable.⁹⁶ Anyone who currently owns or operates a site upon which hazardous substances have been disposed is strictly liable for the cleanup.⁹⁷ Second, the past owner is liable if he/she owned or operated the facility at the time of disposal of hazardous substances at the facility.⁹⁸ Third, the person who arranged for disposal of hazardous substances at the facility is liable. Finally, the person who transported the hazardous substances to the facility, if the transporter selected the facility as a disposal site, is liable.⁹⁹

a. Current Owners/Operators

Section 107(a)(1) of CERCLA imposes liability upon current owners and operators of Superfund facilities where there is or has been a release or threatened release of hazardous substances.¹⁰⁰ The statute does not use the term "present" or "current," but the courts have held that the owner is the person who owns and/or operates the facility at the time of the EPA's response action or at the time a lawsuit is filed is liable.¹⁰¹ Conversely, courts have also held that an owner who owned a site after disposal had ceased and sold the site before an EPA response action was not liable as a current owner.¹⁰²

The term "current owner" is very extensive. For example, the term includes owners of leased warehouses and properties used by companies to dispose of hazardous substances.¹⁰³ It includes a spouse who does not participate in the operations of the facility, based on joint ownership of such property with defendant spouse.¹⁰⁴ Section 107(a)(1) liability has also been applied to successor corporations under theories of merger,¹⁰⁵ *de facto*

96. See *id.* § 9607(a)(1)-(4) (1994); see also POWELL, *supra* note 25, at 104-08, 350-52; PROBST ET AL., *supra* note 2, at 25-27, 30; RESOURCES FOR THE FUTURE *supra* note 5, at 6.

97. See PROBST ET AL., *supra* note 2, at 30; see also RESOURCES FOR THE FUTURE, *supra* note 5, at 6.

98. See 42 U.S.C. § 9607(a)(1)-(4); RESOURCES FOR THE FUTURE, *supra* note 5, at 6.

99. See 42 U.S.C. § 9607(a)(1)-(4); RESOURCES FOR THE FUTURE, *supra* note 5, at 6; see also *Monsanto Co.*, 858 F.2d at 168 (discussing site owner's liability).

100. See 42 U.S.C. § 9607(a)(1), (4) (1994).

101. See *Fleet Factors Corp.*, 901 F.2d at 1554; see also *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, 1151 n.4 (1st Cir. 1989); *Shore Realty Corp.*, 759 F.2d at 1043; *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 846 (4th Cir. 1992); *Mottolo*, 695 F. Supp. at 623; *United States v. Stringfellow*, 661 F. Supp. 1053, 1063 (C.D. Cal. 1987).

102. See *Conservation Chem. Co.*, 619 F. Supp. at 253.

103. See *United States v. Argent Corp.*, 21 Env't Rep. Cas. (BNA) 1354 (D.N.M. May 4, 1984).

104. See *United States v. Moore*, 698 F. Supp. 622, 624 (E.D. Va. 1988).

105. See generally *John Boyd Co. v. Boston Gas Co.*, 992 F.2d 401, 406 (1st Cir. 1993) (holding electric company liable as a successor by merger for contamination resulting from wastes generated by predecessor).

merger,¹⁰⁶ and substantial continuity.¹⁰⁷ Corporate officers who have authority over waste handling practices have also been held personally liable as a current owner/operator under CERCLA.¹⁰⁸ Even state agencies have been held liable as owner/operators when they exercised sufficient control over the site's activities.¹⁰⁹

b. Past Owners

Section 107(a)(2) of CERCLA imposes liability upon any person who owned or operated a facility during a time when hazardous substances were disposed of on the site.¹¹⁰ This is because CERCLA defines disposal using the same broad definition in section 1004 of RCRA.¹¹¹ The term "disposal" includes spilling and dumping of hazardous substances.¹¹² It includes the leaking and leaching of hazardous substances into the soil, surface water, and

106. See *Stringfellow*, 661 F. Supp. at 1063; see also *United States v. Crown Roll Leaf, Inc.*, 29 E.R.C. 2018, 2024 (D.N.J. 1985).

107. See *United States v. Carolina Transformer Co.*, 978 F.2d 832, 838 (4th Cir. 1992) (affirming the holding that a successor was liable under the "continuity of enterprise" or "substantial continuity" theory which considers whether there is: (1) retention of the same employees; (2) retention of the same supervisors; (3) retention of the same production facilities in the same location; (4) production of the same product; (5) retention of the same name; (6) continuity of assets; (7) continuity of general business operations; and (8) whether the successor holds itself out as the continuation of the previous enterprise); see also *Mottolo*, 695 F. Supp. at 624; *Kelley v. Thomas Solvent Co.*, 725 F. Supp. 1446, 1457 (W.D. Mich. 1989).

108. See *United States v. Mexico Feed and Seed Co.*, 980 F.2d 478, 484 (8th Cir. 1992); *Carolina Transformer Co.*, 978 F.2d at 837. See generally *Kelley v. Thomas Solvent Co.*, 727 F. Supp. 1554, 1561 (W.D. Mich. 1989) (setting forth the factors which should be weighed in determining whether corporate officers should be held liable).

109. See generally *Stringfellow*, 31 Env't Rep. Cas. (BNA) at 1319-20 (noting that a state exhibiting sufficient control over a site can be an owner); *Artesian Water Co. v. New Castle County*, 659 F. Supp. 1269, 1280 (D. Del. 1987), *aff'd on other grounds*, 851 F.2d 643 (3d Cir. 1988) (holding that a county can be liable as an owner).

110. See 42 U.S.C. § 9607(a)(2) (1994); *Mexico Feed and Seed Co.*, 980 F.2d at 484 n.4; see also *FINDLEY & FARBER*, *supra* note 31, at 547 n.17 (discussing imposition of CERCLA liability). See generally *Nurad, Inc.*, 966 F.2d at 846 (discussing past owner liability).

111. The statute reads:

The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

42 U.S.C. § 6903(3) (1994).

112. See *id.*

groundwater.¹¹³ This extensive definition of disposal also includes the unchecked movement of contaminated groundwater.¹¹⁴

A past owner's liability under CERCLA is retroactive.¹¹⁵ This means that a past owner may be held liable even if the disposal at the site occurred before CERCLA was enacted.¹¹⁶ Generally speaking, defendants have been unsuccessful in overcoming the presumption of constitutionality that attaches to CERCLA.¹¹⁷ Longstanding caselaw has held that the retroactive application of CERCLA liability is constitutional both on its face and "as applied."¹¹⁸ Although the Act imposes new liabilities for harms developed prior to its enactment, the law is justified as a rational measure to spread the costs of cleanup among the parties that played a role in creating the hazardous conditions.¹¹⁹

Many feel that retroactive application is one of the most blatant and egregious problems with CERCLA liability.¹²⁰ They feel that CERCLA liability should only extend to those PRPs who are found to have violated the statute after 1980 or 1986, the dates that CERCLA¹²¹ and the Superfund Amendments and Reauthorization Act of 1986 (SARA)¹²² were enacted,

113. See *id.*; see also *Nurad, Inc.*, 966 F.2d at 846; *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 750 (7th Cir. 1993), *cert. den.*, 510 U.S. 1044 (1994); *CPC Int'l Inc. v. Aerojet-General Corp.*, 777 F. Supp. 549, 579 (W.D. Mich. 1991).

114. See 42 U.S.C. § 6903(3); see also *United States v. Iron Mountain Mines, Inc.*, 812 F. Supp. 1528, 1541 (E.D. Cal. 1992); *CPC Int'l, Inc.*, 777 F. Supp. at 579; *Guidice v. BFG Electroplating & Mfg. Co.*, 732 F. Supp. 556, 564 (W.D. Pa. 1989); *Emhart Indus., Inc. v. Duracell Int'l, Inc.*, 665 F. Supp. 549, 574 (M.D. Tenn. 1987). But see *In re Diamond Reo Trucks, Inc.*, 115 B.R. 559, 565, (Bankr. W.D. Mich. 1990) (stating the mere ownership of a site during a period of time in which migration took place without more does not bring a defendant within the scope of section 107(a)(2) of CERCLA).

115. See *Kelly v. Thomas Solvent Co.*, 714 F. Supp. at 1443; *United States v. Hooker Chems. & Plastics Corp.*, 680 F. Supp. 546, 556 (W.D.N.Y. 1988); *United States v. Northeastern Pharm. & Chem. Co.*, 579 F. Supp. 823, 839 (W.D. Mo. 1984). See generally Amy Blaymore, *Retroactive Application of Superfund: Can Old Dogs Be Taught New Tricks?*, 12 B.C. ENVTL. AFF. L. REV. 1, 3 (1985) (discussing CERCLA's retroactive liability).

116. See KUBASEK & SILVERMAN, *supra* note 31, at 205, 207-13; POWELL, *supra* note 25, at 104; PROBST ET AL., *supra* note 2, at 13 n.4.

117. See *R.W. Meyer, Inc.*, 889 F.2d at 1505-06; *Monsanto Co.*, 858 F.2d at 173; *Iron Mountain Mines, Inc.*, 812 F. Supp. at 1544-45.

118. See generally *Kramer*, 757 F. Supp. 397, 428-33 (D.N.J. 1991) (holding that the retroactive application of CERCLA is constitutional both on its face and as applied; the entire procedural scheme of CERCLA is constitutional; CERCLA satisfies both procedural and substantive due process).

119. See FINDLEY & FARBER, *supra* note 31, at 533-35; HIRD, *supra* note 3, at 119-21; POWELL, *supra* note 25, at 104.

120. See *Benefits and Drawbacks, House Hearings*, *supra* note 16, at 223 (1993) (statement of Karen A. Mogan, Director, Environmental Affairs, National Food Processors Association); *id.* at 204 (statement of John F. Spisak, President & CEO, Industrial Compliance); *id.* at 132 (statement of Dr. Benjamin F. Chavis, Executive Director, NAACP).

121. 42 U.S.C. §§ 9601-9675 (1994).

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

respectively. The counterargument is that CERCLA is not a regulatory statute; it is a cleanup statute.¹²³ The purpose of CERCLA is not to punish or to establish blameworthiness but to assign cleanup liability among potentially responsible parties.¹²⁴ If one eliminates retroactive liability at CERCLA sites, it begs the question of who will pay for the cleanup.

c. Generators/Arrangers

Most of the controversy relating to CERCLA liability stems from cases involving generators and/or arrangers of disposal of hazardous substances. CERCLA imposes liability upon any party who arranged for treatment or disposal of a hazardous substance at another's facility.¹²⁵ The recurring arguments made by a PRP are that it is not liable under section 107(a)(3) of CERCLA as a person who "arranged for the disposal" (i.e., a generator) of hazardous substances at a site because: (1) it did not intend to dispose of the substance; (2) it did not know there had been a disposal; or (3) it did not participate in the decision on where, when, or how to dispose of the hazardous substances. Hence, the reasoning is that the PRP could not be held liable under section 107(a)(3) of CERCLA because it did not "arrange for" disposal.¹²⁶ The argument is essentially that the generator sold a spent product to a recycler, middleman, or scrap dealer and after that, the handling of the hazardous substance becomes the third parties' responsibility.¹²⁷ For the reasons that follow, the courts reject these arguments.

i. Defendant's Intent

First, a PRP may contend that it is not liable pursuant to CERCLA because it did not "intend" to dispose of hazardous waste when it sold the spent substances to a third party.¹²⁸ However, nowhere in the language of section 107(a)(3) do the words "intent" or "intend" appear.¹²⁹ Additionally,

123. See generally 42 U.S.C. §§ 9604(a), 9607(a) (1994) (defining the general statutory purpose); Engel, *supra* note 19, at 1060 n.18 (stating that RCRA was enacted in 1976 as a regulatory statute to mandate procedures for prospective hazardous waste disposal, and that CERCLA was created because Congress failed to recognize the magnitude of the hazardous waste problem in the United States when it enacted RCRA, therefore a cleanup statute was needed).

124. See POWELL, *supra* note 25, at 104; PROBST ET AL., *supra* note 2, at 12-13.

125. See RESOURCES FOR THE FUTURE, *supra* note 5, at 6.

126. See generally *Chatham Steel Corp. v. Brown*, 858 F. Supp. 1130, 1138 (N.D. Fla. 1994) (holding that a PRP unsuccessfully argued that his lack of knowledge and intent meant he did not "arrange for disposal" within the meaning of CERCLA).

127. See *id.*

128. See *id.*

129. See *id.*; see also 42 U.S.C. § 9607(a)(3) (1994).

CERCLA is a strict liability statute.¹³⁰ Thus, a PRP's lack of intent does not serve as a defense to CERCLA liability.¹³¹ Moreover, a court may look at the transaction and find that the defendant did, indeed, intend to traffic in hazardous substances.¹³² The court may find that the product sold could no longer be used for its original purpose; consequently, its only usefulness comes through the residual value of the hazardous substances remaining in the spent product (e.g., spent battery casings or spent solvents).¹³³ This is precisely the type of activity that CERCLA was created to cover.¹³⁴ Courts have found that a PRP engaging in this type of sale is selling its refuse for breaking, processing, reclamation, treatment, and ultimately for "disposal" of any remaining wastes.¹³⁵

ii. Defendant's Knowledge

A PRP may contend that it did not know where, when, or how a third party may be treating or disposing of the PRP's hazardous substances.¹³⁶ The PRP may argue that the third party "arranged for" disposal or treatment without its knowledge.¹³⁷ This argument fails for the same reason as the intent argument—CERCLA is a strict liability statute.¹³⁸ Courts have consistently held that a defendant need not know where or how a hazardous substance was to be disposed of or treated in order to be liable under section 107(a)(3).¹³⁹ As the Court stated in *United States v. Ward*:

130. See *Chatham Steel Corp.*, 858 F. Supp. at 1138; *Fleet Factors Corp.*, 901 F.2d at 1554; *In re Bell Petroleum Serv., Inc.*, 3 F.3d 889, 897 (5th Cir. 1993); see also 42 U.S.C. § 9601(32) (1994) (providing that the standard of review under CERCLA is the same as section 311 of the Clean Water Act, 33 U.S.C. § 1321; liability under section 311 of the Clean Water Act is strict); *United States v. Aceto Agric. Corp.*, 872 F.2d 1373, 1377 (8th Cir. 1989) (stating that responsible parties are strictly liable for response costs incurred); *3550 Stevens Creek Assoc. v. Barclays Bank*, 915 F.2d 1355, 1357 (N.D. Cal. 1990) (stating that CERCLA generally imposes strict liability on owners and operators of facilities at which hazardous substances were disposed); *R.W. Meyer Inc.*, 889 F.2d at 1507 (stating that CERCLA contemplates strict liability).

131. See *Chatham Steel Corp.*, 858 F. Supp. at 1139; see also *United States v. Fleet Factors Corp.*, 821 F. Supp. 707, 724 (S.D. Ga. 1993) (holding that section 9607(a)(3) liability may attach even if the potentially responsible party did not intend to dispose of the hazardous substances).

132. See *Chatham Steel Corp.*, 858 F. Supp. at 1140.

133. See *id.*

134. See *id.*

135. See *id.* See generally 42 U.S.C. §§ 9603(3), 9603(34) (defining "disposal" and "treatment").

136. See *Chatham Steel Corp.*, 858 F. Supp. at 1142.

137. See *id.*

138. See *id.*; see also 42 U.S.C. § 9607(a)(4)(A) (1994); *supra* text accompanying note 68.

139. See *Chatham Steel Corp.*, 858 F. Supp. at 1142; see also *Aceto Agric. Corp.*, 872 F.2d at 1381 (stating that CERCLA liability attaches "even when defendants did not know the substances would be deposited at that site or in fact believed they would be deposited elsewhere"); *United States v. Ward*, 618 F. Supp. 884, 895 (E.D.N.C. 1985) (holding that a generator is still strictly liable under CERCLA even if the generator does not know where the disposal takes place).

The assertion that CERCLA requires a generator who arranges for disposal to know where the disposal is to take place before liability is established is unfounded The statute merely provides that a generator who "arranged for disposal or treatment" . . . of the generator's hazardous substances at a "facility" not owned by the generator would still be strictly liable under CERCLA.¹⁴⁰

Generators cannot escape CERCLA liability by simply claiming that "they did not know."¹⁴¹ Reading a knowledge requirement into section 107(a)(3) of CERCLA would simply encourage generators to "play dumb" in order to escape liability; *ergo*, a PRP cannot eschew its responsibilities under CERCLA because it allegedly did not know the location or method of the disposal or treatment of its hazardous substances.¹⁴²

iii. Defendant's Decision

Finally, a PRP may argue that it should not be held liable under section 107(a)(3) of CERCLA because it did not ultimately make the decision regarding when or how its hazardous substances would be treated or disposed.¹⁴³ The "decision test" is relevant to the analysis of section 107(a)(3) liability.¹⁴⁴ Yet it may not be exculpatory.¹⁴⁵ Rather, a court can easily hold that a PRP did indeed make the crucial decision as to how, when, and by whom their hazardous substance would be disposed and treated when the PRP made arrangements with the third party.¹⁴⁶ If a PRP decided to whom it would sell its spent substances, the PRP is a generator of hazardous substances and is liable pursuant to CERCLA, even though the transaction involved a middleman.¹⁴⁷

d. Transporters

The last category of liability under Superfund falls upon a party who has transported hazardous substances to a site from which there has been a release

140. *Ward*, 618 F. Supp at 895.

141. *Id.*

142. *See Chatham Steel Corp.*, 858 F. Supp. at 1142.

143. *See id.*

144. *See id.*; *see also* *United States v. A&F Materials, Inc.*, 582 F. Supp. 842, 845 (S.D. Ill. 1984) (stating section 107(a)(3) liability is not endless; generators must make the crucial decision of how their hazardous substances are to be disposed of or treated).

145. *See Chatham Steel Corp.*, 858 F. Supp. at 1143.

146. *See id.*

147. *See id.* at 1144.

or threatened release.¹⁴⁸ Fortunately for these waste haulers, their liability is specifically limited by the statute.¹⁴⁹ Section 107(a)(4) of CERCLA limits a transporter's liability to only those treatment facilities, disposal facilities, or sites actually selected by the transporter.¹⁵⁰ If the transporter chooses the facility or site, the transporter is liable even if the chosen facility is the only facility in the area licensed to accept the waste.¹⁵¹ If the transporter even assists the generator in selecting the facility or site, liability may attach.¹⁵²

148. See PROBST ET AL., *supra* note 2, at 30.

149. The statute reads:

(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 costs of any health assessment or health effects study carried out under section 9604(i) of this title.

42 U.S.C. § 9607(a)(4) (1994). See also *United States v. Petersen Sand & Gravel, Inc.*, 806 F. Supp. 1346, 1356 (N.D. Ill. 1992); *United States v. Western Processing Co.*, 756 F. Supp. 1416, 1420 (W.D. Wash. 1991).

150. See 42 U.S.C. § 9607(a)(4).

151. See *United States v. Hardage*, 750 F. Supp. 1444, 1458-59 (W.D. Okla. 1990).

152. See *id.* at 1458.

D. CERCLA Defenses

Once liability is established, the statute only allows four defenses.¹⁵³ Under section 107(b) of CERCLA, a party may defend if it can establish that the release or threatened release of hazardous substances was caused by: (1) an act of God; (2) an act of war; (3) an act or omission of a third party; or (4) any combination of the previous three defenses.¹⁵⁴ No other defenses are allowed by the statute.¹⁵⁵ The four defenses are relatively useless to most defendants. There have been almost no cases related to section 107(b)(1) or 107(b)(2) defenses;¹⁵⁶ the primary attempt at defense has been pursuant to section 107(b)(3).

The third party defense is limited in three very important ways. First, the defendant cannot have a contractual relationship with the third party.¹⁵⁷ Therefore, a company that hires a transporter to haul hazardous substances to the site cannot successfully argue this defense.¹⁵⁸ Second, the defendant must

153. The statute reads:

(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; or

(4) any combination of the foregoing paragraphs.

42 U.S.C. § 9607(b) (1994).

154. *See id.*

155. *See id.*

156. The statute reads, "[t]he term 'act of God' means an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight." 42 U.S.C. § 9601(1) (1994). *See also* ANDERSON, *supra* note 31, at 26; POWELL, *supra* note 25, at 354; *United States v. M/V Santa Clara I*, 887 F. Supp. 825, 843 (D.S.C. 1995) (holding that a storm at sea is not an "act of God" within the meaning of CERCLA); *United States v. Shell Oil Co.*, 841 F. Supp. 962, 972 (C.D. Cal. 1993) (defining "act of war" as the use of retaliatory force to injure an enemy).

157. *See* 42 U.S.C. § 9607(b)(3) (1994).

158. *See Exxon Corp.*, 766 F. Supp. 177, 195 (S.D.N.Y. 1991).

prove that the third party is the *sole* cause of the harm at the site.¹⁵⁹ The courts have also rejected arguments from generators who hired transporters to dispose of hazardous substances at a site.¹⁶⁰ Moreover, they have rejected arguments from current owners who failed to prevent dumping at the site,¹⁶¹ or whose employees failed to prevent dumping at the site.¹⁶² Similarly, a company that fails to prove that *all* releases or threatened releases of the hazardous substances at a site were caused by a third party cannot use this defense.¹⁶³ Third, the defendant must prove that he exercised due care with respect to the hazardous substance in question¹⁶⁴ and took precautions against the foreseeable acts or omissions of any third party and against the foreseeable consequences of any third parties' acts or omissions.¹⁶⁵

As an offshoot of this defense, section 101(35) of CERCLA contains the "innocent landowner" defense.¹⁶⁶ This section defines the term "contractual

159. See *Mottolo*, 695 F. Supp. at 626.

160. See *O'Neil*, 682 F. Supp. at 720.

161. See *United States v. Tyson*, 25 Env't Rep. Cas. (BNA) 1897, 1906-07 (E.D. Pa. 1986).

162. See *id.*

163. See 42 U.S.C. § 9607(b)(3) (1994) (stating that the release or threatened release of the hazardous substances must be caused solely by the third party for the defense to apply).

164. See *id.*; see also *United States v. Bliss*, 667 F. Supp. 1298, 1310 (E.D. Mo. 1987).

165. See 42 U.S.C. § 9607(b)(3).

166. The statute reads:

(A) The term 'contractual relationship', for the purpose of section 9607(b)(3) of this title, includes, but is not limited to, land contracts, deeds or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence:

(i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.

(ii) The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.

(iii) The defendant acquired the facility by inheritance or bequest.

In addition to establishing the foregoing, the defendant must establish that he has satisfied the requirements of section 9607(b)(3)(a) and (b) of this title.

(B) To establish that the defendant had no reason to know, as provided in clause (i) of subparagraph (A) of this paragraph, the defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. For purposes of the preceding sentence the court shall take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection.

relationship"¹⁶⁷ for the purposes of section 107(b)(3) of CERCLA.¹⁶⁸ It does not include the transfer of real estate if the owner can prove:

- (1) At the time [he] acquired the facility [he] did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility;¹⁶⁹
- (2) [he] is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or the exercise of eminent domain authority by purchase or condemnation;¹⁷⁰ or
- (3) [he] acquired the facility by inheritance or bequest.¹⁷¹

Since this is a subset of section 107(b)(3), the defendant must also show that it exercised due care and took precautions against the foreseeable acts or omissions of third parties.¹⁷² Moreover, in order to establish that the defendant had "no reason to know" that any hazardous substances had been disposed of at the site, the defendant must show that all appropriate inquiries were made into previous ownership and uses of the property consistent with good commercial or customary practices.¹⁷³ Therefore, if the court finds that

(C) Nothing in this paragraph or in section 9607(b)(3) of this title shall diminish the liability of any previous owner or operator of such facility who would otherwise be liable under this Chapter. Notwithstanding this paragraph, if the defendant obtained actual knowledge of the release or threatened release of a hazardous substance at such facility when the defendant owned the real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge, such defendant shall be treated as liable under section 9607(a)(1) of this title and no defense under section 9607(b)(3) of this title shall be available to such defendant.

(D) Nothing in this paragraph shall affect the liability under this chapter of a defendant who, by any act or omission, caused or contributed to the release or threatened release of a hazardous substance which is the subject of the action relating to the facility.

42 U.S.C. § 9601(35) (1994).

167. *See id.*

168. *See United States v. Serafini*, 706 F. Supp. 346, 353 (M.D. Pa. 1988). *See generally* 42 U.S.C. § 9607(b)(3) (1994) (stating that the owner must prove that he made all reasonable inquiry prior to taking ownership of the property).

169. 42 U.S.C. § 9601(35)(A)(i) (1994).

170. *Id.* § 9601(35)(A)(ii).

171. *Id.* § 9601(35)(A)(iii).

172. *See In re Hemingway Transp., Inc.*, 174 B.R. 148, 166 (Bankr. D. Mass 1994).

173. *See FINDLEY & FARBER, supra* note 31, at 545; *see also Serafini*, 706 F. Supp. at 353; *United States v. A&N Cleaners & Launderers, Inc.*, 854 F. Supp. 229, 238 (S.D.N.Y. 1994); *Foster v. United States* 922 F. Supp. 642, 654 (D.D.C. 1996); *In re Hemingway Transp., Inc.*, 174 B.R. at 166; *Atlantic Richfield Co. v. Blosenski*, 847 F. Supp. 1261, 1287 (E.D. Pa. 1994).

based upon facts the defendant knew or should have known of the disposal, the innocent landowner defense is not available.¹⁷⁴

II. THE ADVANTAGES OF SETTLEMENT

The complexity of Superfund cases, the lack of feasible defenses, the magnitude of hazardous waste contamination and the resulting cleanup liability necessitates a more straightforward and streamlined method of resolving these issues. The expressed goal of the statute is to provide the beginning of an equitable solution to the environment and health problems.¹⁷⁵ Since CERCLA only allows a very limited number of defenses to liability,¹⁷⁶ the notion of expedited equitable settlements should be quite appealing to most defendants in Superfund cases.

Since the burden is on the defendant to prove that one of the defenses applies, the defendant is usually unsuccessful. Even the so-called "innocent landowner defense" only provides an illusory safe-haven for PRPs. After all, it is merely a subset of the third party defense of CERCLA section 107(b)(3).¹⁷⁷ Thus, as with the other defenses, the burden is on the defendant to prove that he is "innocent" within the meaning of the statute.¹⁷⁸ The PRP must prove that he conducted all appropriate inquiries into the environmental status of the property and that this inquiry reasonably failed to disclose the presence of the hazardous substances contaminating the property.¹⁷⁹

Add the fact that CERCLA liability is strict, joint, and several,¹⁸⁰ and most would agree that there should be some form of relief for parties who are not truly "innocent," but who are willing to pay a reasonable price for an expedited settlement, the right of contribution, contribution protection, and a release from future liability. Courts have also severely restricted the right of nonsettling PRPs to object to settlement. In fact, the courts give settlements a strong presumption of validity.¹⁸¹

174. See *Acme Printing Ink Co. v. Menard, Inc.*, 870 F. Supp. 1465, 1480 (E.D. Wis. 1994); *In re Hemingway Transp., Inc.*, 174 B.R. at 171.

175. See 42 U.S.C. § 9604 (1994); H.R. REP. NO. 96-1016, pt. 1, at 63, reprinted in 1980 U.S.C.C.A.N. 6119, 6139.

176. See 42 U.S.C. § 9607(b)(3) (1994).

177. See generally 42 U.S.C. § 9601(35) (1994) (stating that the section is defining the term "contractual relationship" contained within section 107(b)(3)).

178. See *United States v. Bliss*, 667 F. Supp. 1298, 1310 (E.D. Mo. 1987); see also *United States v. Ward*, 618 F. Supp. 884, 893 (E.D.N.C. 1985) (stating that defendant must prove availability of defenses); *United States v. Serafini*, 706 F. Supp. 346, 354 (M.D. Pa. 1988) (recognizing that defendant will have opportunity to present affirmative defenses).

179. See 42 U.S.C. § 9601(B) (1994).

180. See *United States v. Kramer*, 757 F. Supp. 397, 422-23 (D.N.J. 1991).

181. See *RESOURCES FOR THE FUTURE*, *supra* note 5, at 128; *United States v. Cannons Eng'g Corp.*,

Nevertheless, the United States historically has shown a reluctance to utilize its authority to allocate responsibility (liability) and to issue *de minimis* settlements (i.e., settle with small parties).¹⁸² According to the Congressional Budget Office, only eighty-six *de minimis* settlements had been reached through fiscal year 1992 and according to the Government Accounting Office, only 101 *de minimis* settlements had been reached by 1993.¹⁸³ This is despite the fact that eliminating *de minimis* parties from a pending or prospective case helps to simplify the case by eliminating numerous waste contributors from litigation and negotiations.¹⁸⁴ Throughout the history of CERCLA, the United States has demonstrated a reluctance to work with PRPs to expedite settlements for a site by allocating costs among the PRPs.¹⁸⁵ As discussed earlier, EPA had only accomplished five Nonbinding Allocations of Responsibility (NBARs) by 1991.¹⁸⁶ This is true despite the fact that allocating liability amongst PRPs is consistent with one of the primary purposes of Superfund, i.e., making sure the polluter pays.¹⁸⁷ The United States cannot assure that the real polluter is paying if it does not decide who should pay and how much.

Most would agree that settlements help lower transaction costs and help EPA obtain revenues sooner to aid in financing response actions at the site.¹⁸⁸

899 F.2d 79, 84 (1st Cir. 1990).

182. See *Benefits and Drawbacks*, Senate Hearing, *supra* note 13, at 51-52 (statement of Keith O. Fultz, Director, Planning & Reporting, Resources, Community, and Economic Development Division, U.S. General Accounting Office); *Superfund Reauthorization: Hearings Before the Subcomm. on Env't, Energy, and Natural Resources of the House Comm. on Gov't Relations*, 103d Cong. 720-21 (1993) (statement of Keith A. Fultz, Director, Planning & Reporting, Resources, Community, and Economic Development Division, U.S. General Accounting Office); *Effects of Superfund Liability on Small Business*, *supra* note 15, at 29-31 (statement of John De Vinck, De Vinck, Inc.); *Superfund Reassessment and Reauthorization*, *supra* note 6, at 33-34 (statement of Kelvin Herstad, President, United Truck Body, Inc.).

183. See *Superfund and Small Business*, *supra* note 18, at 3 (statement of Richard L. Hembra, Director, Environmental Protection Issues, Resources, Community, and Economic Development Division, U.S. General Accounting Office); see also *Superfund Program (Part 2)*, *supra* note 92, at 271-72 (statement of Richard L. Hembra) (stating that although EPA has made a concerted effort in the last three years to increase its *de minimis* settlements, much work must be done to rectify years of complacency).

184. See generally U.S. GEN. ACCOUNTING OFFICE, SUPERFUND: A MORE VIGOROUS AND BETTER MANAGED ENFORCEMENT PROGRAM IS NEEDED (1989).

185. See ANDERSON, *supra* note 31, at 270; HIRD, *supra* note 3, at 121.

186. See ANDERSON, *supra* note 31, at 270.

187. See *Benefits and Drawbacks*, House Hearings, *supra* note 16, at 2 (statement of Rep. Mike Synar); see also *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044-45 (2d Cir. 1985); *United States v. Summit Equip. & Supplies, Inc.*, 805 F. Supp. 1422, 1428 (N.D. Ohio 1992) (citations omitted); S. REP. NO. 96-848, at 13 (1980); POWELL, *supra* note 25, at 104; J. GORDON ARBUCKLE ET AL., GOVERNMENT INSTITUTES, INC., ENVIRONMENTAL LAW HANDBOOK 268, 288-90 (12th ed. 1993); Joel D. Newton, Note, *The Innocent Too Shall Pay: EPA's Settlement Policy Under CERCLA for De minimis Landowner Liability*, 51 U. PITT. L. REV. 727, 727-29 (1990); Peter F. Sexton, *Superfund Settlements: The EPA's Role*, 20 CONN. L. REV. 923, 927 (1988).

188. See U.S. EPA, *supra* note 7, at 33; Robert W. Frantz, *Superfund Settlements: A Vanishing*

Moreover, eliminating all PRPs who are ready and willing to pay a reasonable portion of the cleanup costs at the site in exchange for an early resolution of liability alleviates the most prevalent argument made against the Superfund program—that it is unfair.¹⁸⁹

A. Reduced Transaction Costs

The normal advantages of settlement are magnified in a CERCLA case due to its complex nature.¹⁹⁰ The average Superfund case is a multi-staged, multi-party, multimillion dollar nightmare that takes years to complete.¹⁹¹ This type of litigation can lead to extensive transaction costs.¹⁹² These are defined as costs resulting not from cleanup, but from assigning liability among the parties, usually through lengthy settlement negotiations and/or litigation.¹⁹³ It is estimated that almost one-third of the costs spent by PRPs at a site are transaction costs.¹⁹⁴

The cost of attorneys' fees in a single Superfund case can easily reach millions of dollars.¹⁹⁵ In *United States v. Conservation Chemical Company*,¹⁹⁶ the government's pretrial costs were two million dollars, and the defending PRPs spent over five million dollars.¹⁹⁷ In a "full-blown" CERCLA litigation, the transaction cost can easily reach \$200,000-\$300,000 every six months for small groups of *de minimis* or mid-volume PRPs.¹⁹⁸ PRPs can spend hundreds of thousands of dollars just answering interrogatories and taking depositions. Attorneys' costs alone can easily average \$100,000 per year.¹⁹⁹ These costs can overwhelm or even destroy a small or mid-sized company.²⁰⁰ However,

Breed, 6 NAT. RESOURCES & ENV'T 14 (1992).

189. See *Benefits and Drawbacks, House Hearings, supra* note 16, at 2 (statement of Rep. Mike Synar); *Superfund and Small Business, supra* note 18, at 25 (statement of Rep. William H. Zeliff, Jr.). See generally *Benefits and Drawbacks, House Hearings, supra* note 16, at 136 (statement of Dr. Benjamin F. Chavis, Jr., Executive Director, NAACP); *id.* at 224 (statement of Karen A. Mogan, Director of Environmental Affairs, National Food Processors Association); Glass, *supra* note 22 (discussing Superfund's over-expansive and extreme liability scheme).

190. See Frantz, *supra* note 188, at 14; Sexton, *supra* note 187, at 924.

191. See Boomgaarden & Breer, *supra* note 11, at 91; Hall, Jr., *supra* note 3, at 1491.

192. See generally Boomgaarden & Breer, *supra* note 11, at 91 (defining transaction costs as those costs not directly associated with the actual cleanup of the site).

193. See generally ACTON & DIXON, *supra* note 4, at 6, 36.

194. See *id.* at 43-45.

195. See Boomgaarden & Breer, *supra* note 11, at 91.

196. *United States v. Conservation Chem. Co.*, 589 F. Supp. 59 (W.D. Mo. 1984).

197. See Boomgaarden & Breer, *supra* note 11, at 91.

198. See *id.*

199. See *id.*

200. See *Effects of Superfund Liability on Small Business, supra* note 15, at 45 (statement of Rep. Donald A. Manzullo); see *id.* at 73 (statement of Susan Eckerly, Director of Regulatory Policy, Citizens for a Sound Economy).

adequate representation by counsel and discovery are critical elements in mounting any viable CERCLA defense. Obviously, a quick and equitable settlement could save a PRP time and money.²⁰¹

B. Control of RI/FS

Settling often allows greater control over the Remedial Investigation/Feasibility Study (RI/FS).²⁰² The RI/FS is one of the most important steps in a Superfund cleanup; it determines the scope of the remedial action to be taken at the site.²⁰³ The RI/FS assesses the site condition and evaluates the alternative remedies to clean the site.²⁰⁴ The remedial investigation (RI) defines the nature and extent of contamination at the site, determines initial cleanup goals, characterizes and assesses the risks at the site, and determines actual and potential exposure pathways.²⁰⁵ The RI is used during the feasibility study (FS) to screen and evaluate various alternatives for remedial action at the site.²⁰⁶

Sections 122(d)(1)(A) and 104(a) allow EPA to issue an Administrative Order allowing PRPs to prepare the RI/FS.²⁰⁷ This is critical to both settling and nonsettling PRPs because whoever controls the RI/FS essentially controls the method of cleanup. The RI/FS is used to prepare the record of decision (ROD).²⁰⁸ The ROD describes the relative strengths and weaknesses of each alternative remedy stated in the RI/FS²⁰⁹ and then determines the most appropriate remedy at the site.²¹⁰ Clearly, the power to direct the selection of the cleanup remedy is the power to determine the amount of money and time spent on it.

201. See *Superfund and Small Business*, *supra* note 18, at 3 (statement of Richard L. Hembra, Director, Environmental Protection Issues, Resources, Community, and Economic Development Division, U.S. General Accounting Office). See generally Newton, *supra* note 187, at 727 (discussing the impact of lengthy CERCLA cases on PRPs).

202. See Boomgaarden & Breer, *supra* note 11, at 93.

203. See 42 U.S.C. § 9620 (1994). See generally 40 C.F.R. § 300.430(a)-(e) (discussing procedures of Remedial Investigation/Feasibility Study of CERCLA and details the scope of action).

204. See 40 C.F.R. § 300.430(a)-(e) (1997).

205. See *id.*

206. See *id.*; see also RESOURCES FOR THE FUTURE, *supra* note 5, at 59.

207. See 42 U.S.C. §§ 9604(a), 9622(d)(1)(A) (1994).

208. See *id.* §§ 9604(a), 9622(d)(1)(A) (1994). See also ANDERSON, *supra* note 31, at 240.

209. See ANDERSON, *supra* note 31, at 240.

210. See 40 C.F.R. § 300.430(f) (1997).

C. *Right of Contribution/Contribution Protection, Covenants Not to Sue, and Allocation*

Settling PRPs are specifically granted the right to seek contribution against any party that has not settled.²¹¹ Section 113(f) of CERCLA states that any person who has resolved its liability to the United States or a state for some or all of its response costs may seek contribution from nonsettlers.²¹²

Sections 113(f) and 122(h) provide a windfall for settling defendants. Not only are they granted the right to obtain contribution from nonsettling PRPs, but they are also granted protection from contribution actions against them regarding matters addressed in the settlement.²¹³ Moreover, section 122(f) enables EPA to protect settling PRPs from future liability to the United States.²¹⁴ Pursuant to section 122(f), EPA has the discretion to grant a covenant not to sue for future liability, resulting from a release or threatened release of hazardous substances at the site or off-site.²¹⁵

Under CERCLA, EPA is authorized to utilize NBARs as a settlement tool.²¹⁶ Although NBARs cannot be utilized in litigation,²¹⁷ they allow settling PRPs an opportunity to avoid joint and several liability. Thus, they provide settling PRPs the opportunity to settle their case at their equitable share of responsibility.

D. *De minimis Settlements*

Many landowners and businesses are somewhat familiar with the "innocent landowner" defense contained within CERCLA.²¹⁸ Yet many are less familiar with the provision of CERCLA that requires the United States to enter into expedited low-cost settlements with small parties at Superfund sites, known as *de minimis* settlements.²¹⁹ For over a decade, Congress has recognized the necessity of relieving small parties of the full effect of joint and several liability.²²⁰ A 1985 report by the House Judiciary Committee shows that Congress recognized the utility of a settlement policy that would allow parties who are otherwise liable under CERCLA, but who are only

211. See 42 U.S.C. § 9613(f)(3)(B) (1994).

212. See *id.*

213. See *id.*; 42 U.S.C. § 9622(h)(4) (1994).

214. See *id.* § 9622(f).

215. See *id.*

216. See *id.* § 9622(e)(3)(A).

217. See *id.* § 9622(e)(3)(C).

218. See *id.* §§ 9601(35)(A), 9607(b)(3).

219. See *id.* § 9622(g).

220. See *Effects of Superfund Liability on Small Business*, *supra* note 15, at 44-45 (statement of Rep. Donald A. Manzullo).

minimally related to the hazardous substance problem at the facility, to settle their liability to the United States for a relatively small amount.²²¹

In 1986, Congress amended CERCLA to include a section allowing nominal parties to expeditiously settle their cases for a minor portion of the total cleanup costs for the site.²²² Congress recognized the inequity and potentially ruinous effects of holding small parties strictly, jointly and severally liable for the entire cleanup costs at Superfund sites as if they were larger contributors to the site. Through section 122(g) of CERCLA, Congress mandated the government to promptly reach a final settlement with *de minimis* parties whenever practicable and if it is in the public interest to do so. However, section 122(g) only allows *de minimis* settlements in instances where the following conditions are met: (1) *de minimis* contributor—the hazardous substances at the site contributed by the party seeking *de minimis* status must represent a relatively minor amount and must be relatively non-toxic,²²³ or (2) *de minimis* landowner—if the party is an owner of real property upon which hazardous substances are located, that party must not have conducted or permitted the generation, storage, treatment, or disposal of hazardous substances at the site.²²⁴ Additionally, the party must not have contributed to the release or threatened release of hazardous substances at the site through action or omission.²²⁵

Consequently, a PRP only qualifies as a *de minimis* contributor if its contribution of hazardous substances at the site are minimal (relative to the total amount and toxicity).²²⁶ Additionally, the party qualifies as a *de minimis* landowner if it did not engage in, allow, or contribute to the release of hazardous substances at the site.²²⁷

Although CERCLA specifically requires settlement with *de minimis* PRPs, it completely ignores the plight of minuscule contributors. There are PRPs whose proportional contributions of hazardous substances at a site are so small that it is blatantly unfair to characterize them as *de minimis*. These parties are called *de micromis* PRPs.²²⁸ *De micromis* PRPs are often very small businesses that are all but judgement-proof. Usually, the transaction

221. See H.R. REP. NO. 99-253, pt. 1, at 32.

222. See 42 U.S.C. § 9622(g)(1) (1994).

223. See *id.* § 9622(g)(1)(A)(i), (ii).

224. See *id.* § 9622(g)(1)(B)(i), (ii).

225. See *id.* § 9622(g)(1)(B)(i), (ii), (iii).

226. See HIRD, *supra* note 3, at 17; see also RESOURCES FOR THE FUTURE, *supra* note 5, at 19, 194-98; OFFICE OF SOLID WASTE AND ENVTL. RESPONSE, U.S. EPA, THE FIRST 125 DE MINIMIS SETTLEMENTS (1993).

227. See RESOURCES FOR THE FUTURE, *supra* note 5, at 19, 194-98.

228. See Memorandum from William A. White, Enforcement Counsel for Superfund, U.S. EPA, and Bruce M. Diamond, Director, Office of Waste Programs Enforcement, to Regional Counsels and Regional Waste Management Division Directors 2 (July 30, 1993) (on file with *Vermont Law Review*).

costs a *de micromis* PRP will incur litigating or even settling a CERCLA case will be much higher than the PRP's proportional cleanup cost. Prior to 1993, there was no comprehensive way to alleviate these parties' burden; the United States would often simply exercise its enforcement discretion and offer these PRPs a quick settlement or simply refuse to pursue them at all. In 1993, EPA formally identified these PRPs in a guidance document.²²⁹

The guidance document specified that all *de micromis* settlements would be at EPA's sole discretion and the cut off for eligibility would be .001% of the total volumetric waste contributed by the PRP to site.²³⁰ Accordingly, if a PRP contributed .001% or less of the total volume of waste at the site, the PRP would be eligible for a *de micromis* settlement and would only pay the percentage attributable to it.²³¹ In 1996, EPA issued a revised guidance document for *de micromis* parties.²³² EPA raised the cut-off to .002% and allowed *de micromis* parties to settle without paying anything.²³³ This change is a drastic improvement from the situation in which these parties found themselves five years ago.

Everyone within the regulated industries agrees upon the need for the government to do more *de minimis/de micromis* settlements and to do them much faster. The United States should become directly involved in an allocation process for *de minimis/de micromis* PRPs. To accomplish this, CERCLA should be amended to require EPA to initiate a separate expedited process allocating the percentage of liability for *de minimis/de micromis* PRPs at each site. *De minimis* PRPs should be offered the opportunity to settle with the United States at their *de minimis* allocated shares within 180 days (six months) after the site's listing on the NPL. *De micromis* PRPs should be completely exempted from CERCLA liability. Furthermore, the *de micromis* cut-off should be raised to .005% to include more small parties whose volumetric contributions are relatively insignificant. EPA should utilize its authority pursuant to section 104(e)²³⁴ to gather information to be used in the

229. *See id.*

230. *See id.* at 8.

231. *See id.*

232. *See* Memorandum from Jerry Clifford, Director, Office of Site Remediation Enforcement, U.S. EPA, and Bruce S. Gelber, Deputy Chief, Environmental Enforcement Section, Environment and Natural Resources Division, U.S. Department of Justice, to Regional Counsel, Regions I-IX, Director, Office of Site Remediation and Restoration, Region I, Director, Emergency and Remedial Response Division, Region II, Director, Hazardous Waste Management Division, Regions III, IX, Director, Waste Management Division, Region IV, Director, Superfund Division, Regions V, VI, VII, Assistant Regional Administrator, Office of Ecosystems Protection and Remediation, Region VIII, Director, Environmental Cleanup Office, Region X, Assistant Chiefs, Environmental Enforcement Section 1 (June 3, 1996) (on file with *Vermont Law Review*).

233. *See id.* at 1-2.

234. Section 104(e) of CERCLA, among other things, grants EPA the authority to request information relating to the PRPs' generation, treatment, storage, and disposal of hazardous substances. *See*

allocation process, and EPA should allow an opportunity for PRPs to provide information regarding their own liability or the liability of other PRPs who had not theretofore been named in the *de minimis/de micromis* process. However, if this process is going to work, it should be relatively "quick and dirty." The time frame for naming other *de minimis/de micromis* PRPs should be relatively short, for instance sixty days after a PRP's notification of its potential *de minimis* or *de micromis* status.

III. PROPOSED SUPERFUND SETTLEMENT CHANGES: AN OVERVIEW

Many would contend that CERCLA, as currently drafted, punishes parties who settle early and rewards recalcitrants who refuse to settle.²³⁵ Those who settle early may be held liable for the entire site cleanup while recalcitrants may simply refuse to settle or may hide, never spending a penny on response costs at the site. In order to remedy this problem, EPA should be required to offer the opportunity for early settlements with all PRPs (*de minimis* and non *de minimis*) who are willing to come to the settlement table. EPA should offer settlements regardless of the PRP's financial wherewithal (i.e., regardless of whether they are "deep pockets"). The settlement agreements would have to include a reopener for newly discovered evidence which shows that a PRP is not truly *de minimis* or that a PRP has misrepresented its share of hazardous substances at the site. Along these lines, if CERCLA is going to mandate that EPA pursue settlements more aggressively, it must also require EPA to aggressively pursue civil actions against persons who falsify or omit information from their section 104(e) responses.²³⁶ It does no good to require EPA to increase the number of settlements if it does not have a way to ensure that its decisions are based upon sound verifiable information.

Through civil enforcement actions, EPA must guarantee that if a person violates the requirements of section 104(e), he will be severely punished.²³⁷ Moreover, section 104(e) responses should be sworn under penalties of perjury to further assure the veracity of the evidence. CERCLA should require a witness responding to a section 104(e) response to swear or affirm that the information contained in the response is true and accurate to the best of the witness' knowledge. This requirement would not only help assure that

42 U.S.C. § 9604(e) (1994).

235. See Jerome M. Organ, *Superfund and the Settlement Decision: Reflections on the Relationship Between Equity and Efficiency*, 62 GEO. WASH. L. REV. 1043, 1044 (1994).

236. Section 107(c)(3) of CERCLA allows the United States to recover *treble damages* for violations of section 104. See 42 U.S.C. § 9607(c)(3) (1994). Additionally, the United States is authorized to initiate a separate civil action to recover these punitive damages. See *id.*

237. See *id.*

statements made by the PRP were true, but also help assure that statements made by third parties against the PRP were true.

Assuming that there is verifiable information concerning waste characteristics and disposal at the site, allocation of responsibility can proceed. The problem with the current statute is that it is not conducive to the promotion of an equitable distribution of liability and costs at a site among PRPs who may not be equally liable. On the contrary, the strict, joint and several liability makes it almost impossible for a defendant to obtain an equitable settlement. Additionally, the statute does not allow defendants to use their lack of knowledge or intent as a defense.

The general idea behind the proposal outlined in this Article is that the United States, its contractor, or an Administrative Law Judge (ALJ) would act as a mediator and negotiator (Allocator) to allocate comparative liability at the site. This proposal is intended to actively involve the United States, PRPs, and the affected communities in the allocation process. However, the proposal works to assure that the allocation process itself does not become so cumbersome and detailed that it *drastically increases* the current transaction costs associated with Superfund settlements.²³⁸ Moreover, this "allocation" proposal helps to protect the fund while utilizing mixed funding²³⁹ to pay a portion of the "orphan" share.²⁴⁰ During the allocation process, the Allocator would determine what share of the harm at the site is attributable to PRPs who are unknown, insolvent, or simply no longer exist.²⁴¹ Once this is done, the Superfund would pay a portion of this orphaned share.

V. THE ALLOCATION PROPOSAL

The following statutory outline incorporates the previously mentioned ideas as well as the increased (and earlier) use of Nonbinding Allocations of Responsibility (NBARs),²⁴² *de minimis/de micromis* settlements,²⁴³ alternative

238. This proposal actually incorporates the idea of an expedited nonbinding allocation process. Since the proposal is voluntary and nonbinding, it lessens the need for attorneys and the resulting transaction costs. It is basically "quick and dirty" rough justice.

239. See 42 U.S.C. § 9622(b)(1) (1994). Mixed funding is an agreement between the United States and a PRP where the United States agrees to use the Superfund to finance a portion of the cleanup costs at a site. It is called mixed funding because cleanup is funded by both the PRP and the Superfund.

240. The "orphan" share is that share attributable to non-viable or non-existent PRPs.

241. See PROBST ET AL., *supra* note 2, at 28, 30.

242. See 42 U.S.C. § 9622(e)(3) (1994) (establishing the use of NBARs).

243. See *id.* § 9622(g) (creating and mandating the use of *de minimis* settlements). *De micromis* parties are hereunto defined as any party whose volumetric contribution of hazardous substances at a site is less than .005% of the total amount of hazardous substances located at the site.

dispute resolution (ADR),²⁴⁴ and mixed funding.²⁴⁵

This outline is divided into three sections: the allocation listing process, the *de minimis/de micromis* allocation process, and non-*de minimis* allocation. The allocation listing process, which provides that an Allocator negotiates settlements between the PRPs and the government, allows PRPs to name other PRPs who have not yet been listed and to submit information regarding their liability, all within 120 days of a site's listing on the NPL. This process forces expedited settlement negotiations, thus limiting transaction costs. PRPs who negotiate settlements would receive the right of contribution, contribution protection, and release from future liability, thereby avoiding strict, joint and several liability.

The *de minimis/de micromis* allocation process provides for an early cash-out of *de minimis* PRPs. EPA would be required to provide the Allocator with an initial estimated total response cost for the site, enabling him to determine each PRP's relative share. All *de micromis* PRPs are exempt from liability, and if brought into the system, receive costs and attorneys fees. All *de minimis* PRPs are treated the same regardless of their "deep pocket." They can either settle very early at a sum certain or lock in at a given percentage, with the actual amount to be paid determined later. This process completely eliminates liability for parties who only contribute a small amount of waste to the site, regardless of their "deep pockets"; it also provides certainty in the form of standardized settlement criteria and protections to all settling *de minimis* PRPs. This process rewards those who settle early, ensuring that early settlers will not pay for the entire cleanup, but only for their fair share.

The non-*de minimis* allocation is made within ten days after the ROD. Orphan shares are distributed on a pro rata basis, with total allocated shares for the site equalling 100%. After allocation, PRPs could not bring an action against any PRP not previously identified. PRPs who agree to an allocation will have a percentage of their orphan share paid by the Superfund.

The non-*de minimis* allocation process relieves much of the burden of strict, joint and several liability, and promotes a more equitable distribution of liability and costs. This procedure enables EPA to obtain early revenues to help finance its response actions at the site. Additionally, all PRPs are given the opportunity for early settlements based upon their proportional share of liability.

244. See *id.* § 9622(h)(2).

245. See *id.* § 9622(b) (authorizing the use of the Superfund to pay partial costs for site cleanups).

The allocation proposal is as follows:

A. THE ALLOCATION LISTING PROCESS

1. Participants

All participants named by EPA, the PRPs, or subsequently identified during the allocation process.

2. The Allocator

a. EPA, its contractor, or an ALJ will be responsible for apportionment at a given Superfund site.

b. The Allocator will be reimbursed from the PRPs as a direct cost associated with the site.

3. The Development of the PRP List

a. Within sixty days after a site's listing on the NPL, EPA shall appoint an Allocator, develop a list of PRPs associated with the site and distribute the list to the Allocator and the PRPs by certified mail.

b. Within sixty days after mailing of the PRP list, the PRPs shall have the opportunity to provide the Allocator with names and information regarding PRPs (including non-viable PRPs) that have not been listed.²⁴⁶

c. Within forty-five days after the mailing of the PRP list, the Allocator must begin conferring with PRPs to allow them to provide the Allocator with information regarding their liability. This may include hearings, individual meetings, settlement conferences, and other forms of negotiation and dispute resolution. The Allocator may request EPA to obtain additional information from any PRP under section 104(e) of CERCLA.²⁴⁷

d. The Allocator must gather information from the PRPs and the government and negotiate allocation settlements. PRPs who agree to their allocation are rewarded with the right of contribution, contribution protection, release from future liability, and under certain circumstances, the government pays a portion of the settlors' orphan share.

246. Nonviable PRPs are PRPs that no longer exist or are judgment proof; they would qualify for orphan share funding.

247. See HIRD, *supra* note 3, at 14-18.

B. THE DE MINIMIS/DE MICROMIS ALLOCATION PROCESS**1. The *De Minimis* Cash-Out**

Within 180 days after listing on the NPL, EPA shall provide the Allocator with an initial estimated total response cost for the site to provide to the *de minimis* PRPs.

- a. This is necessary for an early cash-out of *de minimis* PRPs.
- b. This is also necessary to determine the percentages for *de micromis* liability.

2. The *De Minimis/De Micromis* Allocation

Within 180 days after the mailing of the PRP list, the Allocator will make an allocation among all *de minimis* and *de micromis* PRPs. Each *de minimis* PRP's allocated amount will be based upon EPA's estimated total response cost for the site.

- a. The Allocator shall determine which parties are appropriate *de minimis* or *de micromis* PRPs at the site.
- b. The Allocator shall list each *de minimis* and *de micromis* PRP and determine each of these PRP's relative shares.
- c. The Allocator shall also determine the orphan share associated with the *de minimis* and *de micromis* PRPs.
- d. The Allocator shall distribute the orphan share among all non-*de minimis* parties on a pro-rata basis.

3. The Moratorium

During the time periods allowed for this allocation and settlement, there will be a statutory moratorium during which there will be no PRP or third party litigation allowed.

- a. The EPA retains the right to issue Administrative Orders pursuant to section 106 of CERCLA in emergency situations (as currently defined by statute).²⁴⁸
- b. After the conclusion of this allocation process, the PRPs may not bring an action against any *de minimis* or *de micromis* PRP not previously identified.

4. *De Micromis* PRPs

All PRPs with an allocated share of .005% or less shall be considered "*de micromis*" PRPs, and shall be exempted from all liability under the Act.

- a. The Allocator must also find that the toxic or hazardous effects of the minuscule amount of hazardous substances

248. See 42 U.S.C. § 9606 (1994). The United States would also retain the right to recover treble damages from PRPs who fail to respond to an Unilateral Administrative Response Order (UAO) pursuant to 42 U.S.C. § 9607(c)(3).

- contributed by the *de micromis* PRP is minimal in comparison to the other hazardous substances at the site.
- b. If a PRP brings another party into the allocation system and it is later determined by the Allocator that this third party is a *de micromis* party, the PRP that brought the *de micromis* party into the system shall pay the *de micromis* party's costs and attorneys' fees.
 - c. If a PRP files a contribution action or other lawsuit against a PRP that is later found to be a *de micromis* PRP, the PRP filing suit shall be liable for the *de micromis* party's costs and attorneys' fees.
 - d. Since *de micromis* PRPs are exempt from liability under CERCLA, they do not need contribution protection, covenants not to sue, or even a formal settlement.
5. *De Minimis* PRPs
- All PRPs with an allocated share of .005-1.0% shall be considered "*de minimis*" PRPs. EPA must settle with all *de minimis* PRPs willing to settle at the allocated rate:
- a. Settlers get third party protection;
 - b. Settlers get the right to contribution from non-settlers;
 - c. Settlers get covenants not to sue and release from future liability;
 - d. Settlers can immediately settle for their allocated share plus a premium not to exceed two times the share in return for an early out and contribution protection.²⁴⁹

OR

The *de minimis* PRP has the option of immediately settling while agreeing to wait to pay its assigned percentage after the ROD when the final estimated response cost is determined. This allows the PRP to settle very early at a fixed sum or at a locked-in percentage, which will be determined at a later date.

6. Non-Settlers
- If a *de minimis* party does not agree to settle within thirty days after notification of its assigned allocation, it:
- a. Loses *de minimis* status;
 - b. Is subject to joint and several liability;
 - c. Loses contribution protection;
 - d. Loses right to contribution against settling PRPs; and
 - e. Loses covenant not to sue.

249. The premium would hedge against miscalculations of the response costs.

7. Orphan Share
Any *de minimis* shares that become orphaned after the allocation will automatically be paid for by the Superfund; any *de minimis* shares that become orphaned prior to the allocation will become part of the orphan share allocated to the PRPs.
8. Deep Pockets
All *de minimis* PRPs shall be treated the same notwithstanding their ability to pay.

C. NON-*De minimis* ALLOCATION

THE INITIAL LISTING PROCESS FOR NON-*DE MINIMIS* PRPs IS THE SAME AS FOR *DE MINIMIS* PRPs. See Section A.

1. Final Estimated Cost
At the issuance of the ROD, EPA shall provide the Allocator with a final estimated total response cost for the site to be provided to the non-*de minimis* PRPs.²⁵⁰
2. Non-*De minimis* Allocation
Within ten days after the issuance of the ROD the Allocator will make an allocation among all non-*de minimis* PRPs. Each PRP's allocated amount will be based upon EPA's final estimated total response cost for the site.
 - d. The Allocator shall determine which parties are appropriate PRPs at the site for purposes of allocation.
 - e. The Allocator shall list each PRP and determine each PRP's relative share minus the *de minimis* shares previously allocated.
 - f. The Allocator shall also determine the size of the orphan share associated with the PRPs.
 - g. The Allocator shall distribute the orphan share among all non-*de minimis* parties on a pro rata basis. Therefore, after the allocation process begins, the total allocated shares for the site must equal 100%.
3. Moratorium
During the time allowed for this allocation and settlement, there will be a statutory moratorium on PRP or third party litigation. However, the United States retains the right to issue unilateral Administrative Orders pursuant to section 106 of CERCLA in emergency situations.

250. Again, the *de minimis* PRPs have the option to settle a case while waiting for the ROD to determine its full price.

4. Unidentified PRPs
At the end of this allocation process, the PRPs will not be able to bring an action against any PRP not previously identified during the allocation process.
5. Agreement to the Allocation
Once the allocation is completed, the non-*de minimis* PRPs have 30 days to:
 - a. Agree to the allocation (and agree to perform the work at the site if the United States requires it);
 - b. Agree upon and substitute their own allocation (but the allocation still must equal 100%); or
 - c. Forego settlement and proceed through normal litigation process (i.e., joint and several liability) and thereby:
 - i. Lose any right to contribution against settling PRPs;
 - ii. Lose any right to contribution protection;
 - iii. Bear the burden of proving that the Allocator's apportionment was incorrect during any contribution action brought by settling PRPs against them; and
 - iv. Pay costs and attorneys' fees if they lose a contribution claim to the settling PRPs.
6. Rights Granted
If a non-*de minimis* PRP agrees to pay its allocated share within the specified time period:
 - a. It is granted the right to contribution;
 - b. It is granted the right to contribution protection; and
 - c. The Superfund will pay a percentage of the settling PRP's allocated orphan share (as specified below).
7. Inadmissibility of Allocation
The allocation shall be inadmissible as evidence and no court shall have jurisdiction to review the allocation except in respect to contribution actions as referenced in sections 12(b) and 20(c)(3).
8. Limitation on United States' Authority
Nothing herein shall limit the United States' authority to undertake response or enforcement actions, except as provided in the sections relating to the Moratorium.

D. THE ORPHAN SHARE

1. Payment

The Superfund will pay a percentage of the non-*de minimis* settling PRPs' allocated orphan share.

2. Caps on Orphan Share Payments

The Superfund will pay a percentage of the orphan share if the following conditions are met:

- a. *Site Cap*—if the total orphan share at the site is 25% or more, the Superfund will pay 1-10% of the settling PRPs' allocated orphan amount.
 - i. The exact amount shall be determined by the Allocator (in its sole unreviewable discretion) based in part upon the reliability and strength of the evidence relating to the size of the orphan share.
 - ii. Therefore, the better the evidence regarding the size of the orphan share the higher the percentage the Superfund would pay.
- b. *General Superfund Cap on Orphan Share Payments*—In no event shall the total amount of money spent throughout the country on orphan shares in any given fiscal year exceed 20% of the total funds appropriated for that fiscal year. This prevents the Superfund from being depleted by the payment of orphan shares.
- c. *Categorical Cap on Orphan Share Payment*—This entails the Superfund paying an additional set amount of certain categories of orphan shares.
 - i. For instance, the Superfund would pay no less than 1% of the orphan share created by non-viable municipal owners/operators at a site.
 - ii. The Superfund would pay no less than 1% of the orphan share created by an unknown generator at a site.
 - iii. The Categorical Cap would ensure that a portion of the orphan share would always be paid at certain CERCLA sites.
 - iv. The Categorical Cap would be limited by the General Superfund Cap.

V. CONCLUSION

Overall, CERCLA is a well intentioned statute enacted in response to public concern over the problem of hazardous contamination throughout the country. The statute was written in a way that was intended to make polluters pay for the expedited cleanup of their hazardous activities. However, despite its noble intent, Congress failed to create a law in which the liability scheme matched the stated purpose. To some, the potential reach of CERCLA liability seems unlimited. Liability under CERCLA goes beyond the simple principle of "polluter pays." The scope of liability, the standard of liability, and the limited defenses in a CERCLA case all far exceed the aforementioned axiom.

The Superfund debate consistently center on two key issues—the cost of cleanup and the fairness of liability for cleanup. If one assumes that technology and experience will eventually lead to lower cleanup costs,²⁵¹ one is still left with the problem of fairness. The allocation outline proposed in this paper addresses this problem. It creates one settlement scheme that EPA is required to use at every Superfund site and incorporates many of the underutilized settlement sections of CERCLA.²⁵² The proposal addresses the issue of fairness by requiring the government to allocate liability for cleanup among all parties at every Superfund site. The proposal also rewards those polluters willing to step forward and pay for their portion of the site cleanup and punishes those who attempt to delay cleanup through lengthy litigation. Only through increased implementation of *de minimis/de micromis* settlement provisions can we expect CERCLA to achieve the overarching goal requiring that the polluter pays.

251. See SUPERFUND ADMINISTRATIVE REFORMS, *supra* note 7, at 6.

252. See Sexton, *supra* note 187, at 923, 950.