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The Availability of Attorneys' Fees as a Necessary Cost of Response in Private Cost-Recovery Actions Under CERCLA

Heather M. Harvey
University of Richmond

NOTES

THE AVAILABILITY OF ATTORNEYS' FEES AS A NECESSARY COST OF RESPONSE IN PRIVATE COST-RECOVERY ACTIONS UNDER CERCLA

I. INTRODUCTION

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").[1] Its purpose was to remedy the environmental problems caused by abandoned hazardous waste sites.[2] Prior to 1980, hazardous waste[3] had been regulated primarily by the Resource Conservation and Recovery Act ("RCRA")[4] and, to a

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1. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (1988)).

2. H.R. REP. No. 1016, 96th Cong., 2d Sess. 18, pt. 1, at 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6119-20; *see also* Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1455 (9th Cir. 1986) (citing 126 CONG. REC. 31,964 (1980) (statement of Rep. Florio)) ("[CERCLA's] purpose was to ensure the prompt and effective cleanup of waste disposal sites, and to assure that parties responsible for hazardous substances bore the cost of remedying the conditions they created.").

3. CERCLA defines a "hazardous substance" as:

> (A) any substance designated pursuant to section 1321(b)(2)(A) of title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C. § 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator [of the Environmental Protection Agency] has taken action pursuant to section 2606 of title 15.

42 U.S.C. § 9601(14) (1988). Section 9602 further classifies as hazardous substances "such elements, compounds, mixtures, solutions, and substances which, when released into the environment may present substantial danger to the public health, welfare or the environment. . . ." *Id.* § 9602(a).

4. Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended at 42 U.S.C. §§ 6901-6992k (1988)). Congress enacted RCRA to remedy the problems associated with inadequate and environmentally unsound methods of solid and hazardous waste disposal. *See* 42 U.S.C. § 6902 (1988). The specific provisions pertain-

lesser extent, by the Toxic Substances Control Act ("TSCA").[5] These statutes focused on the prevention of hazardous waste problems.[6] Consequently, they proved inadequate to deal with the increasing threats posed by existing hazardous waste sites.[7] Congress drafted CERCLA to fill in the gap left by prior legislation.[8]

To ensure the prompt and effective cleanup of hazardous waste sites,

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ing to hazardous waste management are included in chapter 82 subchapter III of Title 42 of the United States Code. *Id.* §§ 6921-6939b. RCRA addresses the problem of hazardous waste from the time of their creation until disposal by providing standards applicable to: generators of hazardous waste, *id.* § 6922; transporters of hazardous waste, *id.* § 6923; and owners and operators of hazardous waste treatment, storage, and disposal facilities, *id.* § 6924. These sections also give the Administrator of the Environmental Protection Agency ("EPA") the power to promulgate further standards. *Id.* §§ 6922-24.

5. Toxic Substances Control Act of 1976, Pub. L. No. 94-469, 90 Stat. 2003 (1976) (codified generally as amended at 15 U.S.C. §§ 2601-2629 (1988)). Congress enacted TSCA for the purpose of regulating chemical substances and mixtures that subject individuals and the environment to unreasonable risks of injury. *See* 15 U.S.C. § 2601 (1988). Specifically, TSCA requires the testing of certain chemical substances and mixtures, *id.* § 2603; requires premanufacturing and processing notices for new substances or new uses for old substances, *id.* § 2604; and provides regulations pertaining to hazardous substances and mixtures, *id.* § 2605. In addition, TSCA provides the Administrator of the EPA with the authority to take civil action against the responsible parties when chemical substances and mixtures present imminent hazards. *Id.* § 2606.

6. *See id.* § 2601; 42 U.S.C. § 6902. RCRA does contain some provision pertaining to existing hazardous waste sites. Section 6945 states that existing sites are subject to measures promulgated by the Administrator of the EPA to "eliminate health hazards and minimize potential health hazards." 42 U.S.C. § 6945 (1988). This provision does not give the Administrator the authority to enforce the law through litigation. However, section 6973 does give the Administrator the authority to bring suit against a wrongdoer if the site presents an imminent and substantial danger to health or the environment. *Id.* § 6973 (1991). This standard is often difficult to meet. *See* Joseph K. Brenner, Note, *Liability for Generators of Hazardous Waste: The Failure of Existing Enforcement Mechanisms*, 69 GEO. L.J. 1047, 1055 n.50 (1981).

7. The House Report described the problem in the following manner:

> Over the past two decades, the Congress has enacted strong environmental legislation in recognition of the danger to human health and the environment posed by a host of environmental pollutants. This field of environmental legislation has expanded to address newly discovered sources of such danger as the frontiers of medical and scientific knowledge have been broadened.
>
> After having previously focused on air and water pollutants, the Congress, in the Resource Conservation and Recovery Act of 1976, provided a prospective cradle-to-grave regulatory regime governing the movement of hazardous waste in our society. Since enactment of that law, a major new source of environmental concern has surfaced: the tragic consequences of improperly, negligently, and recklessly hazardous waste disposal practices known as the "inactive hazardous waste site problem." The unfortunate human health and environmental consequence of these practices has received national attention amidst growing public and Congressional concern over the magnitude of the problem and the appropriate course of response that should be pursued. Existing law is clearly inadequate to deal with this massive problem.

H.R. REP. No. 1016, *supra* note 2, at 17-18, *reprinted in* 1980 U.S.C.C.A.N. at 6120.

8. *See id.* at 17, *reprinted in* 1980 U.S.C.C.A.N. at 6119-20.

CERCLA provides the government with various avenues of enforcement and recovery. The government may issue an administrative order compelling private parties to clean up a site,[9] or it may undertake cleanup efforts itself.[10] When the government elects the latter option, it finances the cleanup using money from the Hazardous Substance Trust Fund ("Superfund").[11] After the cleanup, the government may bring an action against the responsible parties to recover money it expended and to replenish the Superfund.[12] CERCLA's list of potentially responsible parties

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9. 42 U.S.C. § 9606(a) (1988). The President may issue administrative orders compelling cleanup when he determines that there may be an imminent and substantial danger to the public health or welfare, or to the environment because of an actual or threatened release of a hazardous substance from a facility. *Id.* The term "release" means "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment. . . ." *Id.* § 9601(22). The term "facility" means:

> (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

Id. § 9601(9). By Executive Order, the President delegated the majority of his presidential authority under CERCLA to the Administrator of the EPA. Exec. Order No. 12580, 3 C.F.R. 193 (1987), *reprinted in* 42 U.S.C. § 9615 (1988). § 300.2 (1986).

10. 42 U.S.C. § 9604(a) (1988). Section 9604(a)(1) provides in pertinent part:

> Whenever (A) any hazardous substance is released [into the environment] 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 welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment. When the President determines that such action will be done properly and promptly by the owner or operator of the facility or vessel or by any other responsible party, the President may allow such person to carry out the action, conduct the remedial investigation, or conduct the feasibility study in accordance with section 9622 of this title.

Id. § 9604(a)(1).

11. *See* 26 U.S.C. § 9507 (1988). The "Superfund," also known as the Hazardous Substance Trust Fund, is an 8.5 billion dollar fund created to finance the cleanup of hazardous waste sites. H.R. REP. No. 253, 99th Cong. 2d Sess., pt. 1, at 54 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2836. Title forty-two, section 9611 of the United States Code specifies the purposes for which Superfund money may be used. 42 U.S.C. § 9611 (1988). One such purpose is the payment of governmental response costs incurred pursuant to section 9604. *Id.* § 9611(a)(1).

12. 42 U.S.C. §§ 9604(b), 9607(a)(4)(A) (1988). Section 9604(b) provides in pertinent part: Whenever the President is authorized to act pursuant to subsection(a) of this section [when a hazardous substance presents, an imminent and substantial danger] . . . [he] may undertake such planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations as he may deem necessary or appropriate to plan and

includes past and present owners and operators of a site, as well as any generators and transporters who contributed hazardous substances to the site.[13] CERCLA holds these individuals strictly liable for the ensuing environmental damage[14] and allows them only a limited number of defenses.[15]

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direct response actions, *to recover the costs thereof*, and to enforce the provisions of this chapter.

Id. § 9604(b) (emphasis added).

Section 9607(a)(4)(B) allows the government to recover all costs of removal or remedial action that were incurred not inconsistent with the national contingency plan. *Id.* § 9607(a)(4)(A). *See infra* note 13 for text of section 9607(a). The national contingency plan ("NCP") establishes procedures and standards for responding to releases of hazardous substances and contaminants. *See* 42 U.S.C. § 9605 (1988). It is codified at 40 C.F.R. Part 300 (1985). For cases involving government cost recovery actions see, e.g., United States v. Hardage, 750 F. Supp. 1460 (W.D. Okla. 1990); United States v. Mottolo, 695 F. Supp. 615 (D.N.H. 1988); United States v. Conservation Chem. Co., 628 F. Supp. 391 (W.D. Mo. 1985); United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823 (W.D. Mo. 1984).

13. Section 9607 is CERCLA's liability provision. Subsection (a) subjects the following parties to liability for response costs:

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

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs . . .

42 U.S.C. § 9607(a) (1988).

Another group of individuals increasingly being held liable as responsible parties includes corporate officers who supervised waste disposal operations with knowledge of waste composition and its ultimate destination. *See* Vermont v. Staco, Inc., 684 F. Supp. 822, 831-32 (D. Vt. 1988) (finding that managing shareholders of a mercury thermometer plant were liable for a release of mercury from the plant); United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 848-49 (W.D. Mo. 1984) (classifying a vice-president and major stockholder of a manufacturing plant as an owner/operator due to his ability to control the disposal of hazardous wastes, and therefore holding his liable for releases of hazardous waste).

14. Section 9601(32) provides that the standard of liability under CERCLA should be the same as that under section 1321 of Title 33. 42 U.S.C. § 9601(32) (1988). Courts have consistently construed these sections as mandating strict liability. *See* Bulk Distrib. Ctrs., Inc. v. Monsanto Co., 589 F. Supp. 1437, 1442-43 (S.D. Fla. 1984); *Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. at 843-844; City of Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135, 1140 n.4 (E.D. Pa. 1982).

15. Persons otherwise liable may be absolved from liability only if damage was caused solely by an act of God, an act of war, or an act or omission of a third party. 42 U.S.C. § 9607(b) (1988). The defendant can be absolved of liability by an act of a third party only if that third party is someone other than an employee or agent of the defendant, or is someone

CERCLA also provides nongovernmental entities with options for enforcement and recovery. It allows private parties to undertake cleanup activities and recoup their expenses from the Superfund.[16] In addition, CERCLA states that any person who has incurred necessary costs of response, consistent with the national contingency plan,[17] may bring an action to recover these costs from responsible parties.[18] This Note focuses upon the latter alternative. Although the private cause of action is widely recognized,[19] courts have failed to delineate exactly what expenditures constitute necessary costs of response. In particular, federal courts have divided sharply over the issue of whether CERCLA permits a private party to recover attorneys' fees as a necessary cost of response.[20]

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in a contractual relationship with the defendant, and only if the defendant exercised due care and "took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result. . . ." *Id.*

16. 42 U.S.C. § 9611(a)(2) (1988). Section 9611(a)(2) authorizes the use of Superfund money for the "[p]ayment of any claim for necessary response costs incurred by any other person [other than the government] as a result of carrying out the national contingency plan . . ." as long as such costs were approved under the plan and certified by the responsible federal official. *Id. See generally* Jeffrey M. Gaba, *Recovering Hazardous Waste Cleanup Costs: The Private Cause of Action Under CERCLA*, 13 ECOLOGY L.Q. 181, 195-96 (1986); Kenneth J. Bulko, Comment, *Private Right of Action to Recover Cleanup Costs from Superfund*, 49 ALB. L. REV. 616 (1985).

17. 42 U.S.C. § 9605 (1988). The national contingency plan is a plan prepared and published by the President which establishes "procedures and standards for responding to releases of hazardous substances, pollutants, and contaminants." *Id.* § 9605(a); *see* 40 C.F.R. 300.1 et seq. (1985).

18. 42 U.S.C. § 9607(a)(4)(B) (1988). CERCLA defines "person" to include "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." *Id.* § 9601(21).

19. The first case to hold that private parties may recover the costs of hazardous substance cleanup from responsible parties was City of Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135 (E.D. Pa. 1982). The court permitted the city to recover its response costs from various companies that had been illegally dumping hazardous substances at the city's landfill. *Id.*

20. *See, e.g.*, General Elec. Co. v. Litton Indus. Sys., 920 F.2d 1415 (8th Cir. 1990) (holding that CERCLA allows a private party to recover attorneys' fees "incurred in bringing a cost recovery action"), *cert. denied*, 111 S. Ct. 1390 (1991). Bolin v. Cessna Aircraft Co., 759 F. Supp. 692 (D. Kan. 1991) (finding attorneys' fees and expenses incurred by private party in litigating CERCLA claim recoverable); Gopher Oil Co. v. Union Oil Co., 757 F. Supp. 998 (D. Minn. 1991) (holding that CERCLA authorizes recovery by private parties of attorneys' fees and expenses); Pease & Curren Ref., Inc. v. Spectrolab, Inc., 744 F. Supp. 945 (C.D. Cal. 1990) (holding that recovery of attorneys' fees pursuant to CERCLA is consistent with Congressional intent); Shapiro v. Alexanderson, 741 F. Supp. 472 (S.D.N.Y. 1990) (holding that attorneys' fees are recoverable by private parties for proper response activities); Bulk Distrib. Ctrs., Inc. v. Monsanto Co., 589 F. Supp. 1437 (S.D. Fla. 1984) (holding that a private litigant may recover costs of response once cleanup action has begun). *But see* United States v. Hardage, 750 F. Supp. 1460 (W.D. Okla. 1990) (holding that attorneys' fees and costs of litigation not recoverable by private litigant under CERCLA); Mesiti v. Microdot, Inc., 739 F. Supp. 57 (D.N.H. 1990) (dismissing a private claim for attorneys' fees under CERCLA); Fallowfield v. Strunk, No. 89 Civ. 8644 (E.D. Pa. Apr. 23, 1990) (holding that recovery by

This Note explores the issue of whether private parties may recover attorneys' fees in cost-recovery actions. The resolution of this issue would further Congress' goal of accomplishing the prompt, effective cleanup of hazardous waste sites. It would eliminate much time-consuming and expensive litigation and would enable private parties to assess, in advance of cleanup, the economic feasibility of undertaking response measures.

This Note begins by defining the phrase "costs of response."[21] It briefly highlights the "American Rule" regarding the recovery of attorneys' fees[22] and examines the government cost-recovery action.[23] Next, it compares the cost-recovery provisions applicable to the government with those applicable to private parties[24] and analyzes the issue of whether attorneys' fees are available to private parties as a cost of enforcement.[25] This Note discusses a strict interpretation of the SARA amendments[26] and concludes with a forecast of the future of private cost-recovery actions.[27]

II. Defining "Costs of Response"

CERCLA does not define the phrase "costs of response." It does, however, define the term "response" to include removal and remedial actions.[28] As one court explained, " 'removal' actions are primarily those intended for the short-term abatement of toxic waste hazards, while 'remedial' actions are typically those intended to restore long-term environmental quality."[29]

CERCLA defines "removal actions" as those actions necessary to clean up or remove hazardous substances from the environment; to monitor, assess and evaluate the release of hazardous substances; to dispose of removed material; and to prevent, minimize, or mitigate damage to the

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private individuals of attorneys' fees is not consistent with congressional intent); Regan v. Cherry Corp., 706 F. Supp. 145 (D.R.I. 1989) (stating that Congress did not intend to allow citizens seeking response costs to recover attorneys' fees); BCW Assoc., Ltd. v. Occidental Chem. Corp., No. 88 Civ. 5947 (E.D. Pa. Sept. 29, 1988) (awarding attorneys' fees incurred to respond to threatened relapse, but declined to award attorneys' fees for litigation); T & E Indus. v. Safety Light Corp., 680 F. Supp. 696 (D.N.J. 1988) (holding that a private party had no right to recover attorneys' fees when bringing an action to recover response costs).

21. *See infra* notes 28-34 and accompanying text.

22. *See infra* notes 35-43 and accompanying text.

23. *See infra* notes 44-59 and accompanying text.

24. *See infra* notes 60-90 and accompanying text.

25. *See infra* notes 91-122 and accompanying text.

26. *See infra* notes 122-27 and accompanying text.

27. *See infra* notes 128-32 and accompanying text.

28. 42 U.S.C. § 9601(25) (1988). The terms "respond" and "response" mean remove, removal, remedy, and remedial action; all such terms (including "removal" and "remedial action") include enforcement activities related thereto. *Id.*

29. City of New York v. Exxon Corp., 633 F. Supp. 609, 614 (S.D.N.Y. 1986) (citing New York v. Shore Realty Corp., 759 F.2d 1032, 1040 (2d Cir. 1985)).

public health or welfare, or to the environment.[30] This broad definition encompasses such activities as constructing security fences or other measures to limit access to a hazardous waste site, providing alternative water supplies, evacuating and housing individuals threatened by exposure to the hazardous substances, and other emergency measures.[31]

CERCLA defines "remedial actions" as those actions consistent with a permanent remedy that are taken instead of, or in addition to, removal actions in order to prevent endangering the public health or welfare, or the environment.[32] Examples include storage, confinement, perimeter protection, neutralization, recycling, and diversion.[33] Presumably, since

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30. 42 U.S.C. § 9601(23) (1988). That section provides in full:
[R]emove" or "removal" means the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary [sic] taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act [42 U.S.C. § 5121 et seq.].

Id. (footnote omitted).

31. *Id.*

32. 42 U.S.C. § 9601(24) (1988). That section provides:
"[R]emedy" or "remedial action" means those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or welfare; the term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances
and associated contaminated materials.

Id. (footnote omitted).

33. *Id.*

the term "response" includes removal or remedial actions, "costs of response" are costs associated with removal and remedial actions such as those listed above.[34]

III. Attorneys' Fees as a Cost of Response

A. *The American Rule*

To ascertain whether private parties may recover attorneys' fees as a cost of response under CERCLA, it is necessary first to review the "American Rule" regarding the recovery of attorneys' fees in general.[35] This rule prescribes that a prevailing litigant ordinarily is not entitled to collect reasonable attorneys' fees from the losing party absent explicit legislative authorization.[36] A statute must provide more than a generalized command authorizing the recovery of attorneys' fees before a successful party may actually recover those fees.[37]

The American Rule would seem to bar the recovery of attorneys' fees in cost-recovery actions because CERCLA does not specifically state that prevailing parties may recover these costs.[38] Nevertheless, federal courts have uniformly allowed the government to recover its attorneys' fees in cost-recovery actions taken pursuant to CERCLA.[39] Some courts have even extended this right to private parties.[40] The opinions in these latter cases suggest two reasons why courts have allowed the private recovery of

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34. Courts have permitted litigants to recover a variety of expenses under the heading "costs of response." Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887, 892 (9th Cir. 1986) (allowing the recovery of investigatory and testing expenses); New York v. Shore Realty Corp., 759 F.2d 1032, 1043 (2d Cir. 1985) (allowing the recovery of the costs of site assessment and supervisory expenses); Brewer v. Ravan, 680 F. Supp. 1176, 1179 (M.D. Tenn. 1988) (allowing the recovery of the costs of studies, investigation, soil testing, and water monitoring); United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 851-52 (W.D. Mo. 1984) (allowing the recovery of . . . litigation costs, attorneys' fees, salaries and expenses associated with monitoring, assessing and evaluating releases and taking ameliorative action).

35. Gopher Oil Co. v. Union Oil Co, 757 F. Supp. 998, 1005 (D. Minn. 1991) (stating that "[w]henever it is faced with a request for attorneys' fees, a court must start with the 'American Rule' ").

36. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975). The "American Rule" is distinguished from the "English Rule," wherein counsel fees are regularly awarded to the prevailing party. *Id.* (footnote omitted).

37. *See* Runyon v. McCrary, 427 U.S. 160, 185 (1976).

38. *See* 42 U.S.C. §§ 9604(b), 9607(a)(4)(A), (B)(1988).

39. *See, e.g.*, United States v. Hardage, 750 F. Supp. 1460, 1511 (W.D. Okla. 1990); United States v. Mottolo, 695 F. Supp. 615, 630-31 (D.N.H. 1988); United States v. Northernaire Plating Co., 685 F. Supp. 1410, 1417 (W.D. Mich. 1988); United States v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984, 1009 (D.S.C. 1984); United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, at 850 (W.D. Mo. 1984).

40. *See supra* note 20.

attorneys' fees despite the absence of explicit congressional authorization. Some courts have concluded that CERCLA authorizes such recovery with the degree of explicitness sufficient to satisfy the American Rule.[41] Other courts have argued that the haste with which Congress drafted CERCLA accounts for many oversights in its provisions.[42] This fact may have led many courts to construe CERCLA's provisions liberally in borderline cases.[43]

B. *Government Cost-Recovery Actions*

The government's right to recover its attorneys' fees in cost-recovery actions is well established.[44] Courts have construed sections 9604(a), 9604(b) and 9607(a)(4)(A) of CERCLA as collectively authorizing the award of attorneys' fees to the government.[45]

Section 9604(a) allows the President to take action whenever there is an actual or threatened release of any hazardous substance, or of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare.[46] Specifically, the President may take whatever removal or remedial action is necessary to protect the public health or welfare, unless he determines that a responsible party could properly handle such an action.[47]

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41. *See, e.g.*, General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1422 (8th Cir. 1990); Gopher Oil Co. v. Union Oil Co., 757 F. Supp. 998, at 1006 (D. Minn. 1991).

42. In Artesian Water Co. v. Government of New Castle County, 851 F.2d 643 (3rd Cir. 1988), the court remarked: "CERCLA is not a paradigm of clarity or precision. It has been criticized frequently for unartful drafting and numerous ambiguities attributable to its precipitous passage. Problems of interpretation have arisen from the Act's use of inadequately defined terms, a difficulty particularly apparent in the response costs area." *Id.* at 648; *see also* Bolin v. Cessna Aircraft Co., 759 F. Supp 692, 710 (D. Kan. 1991) ("[T]here are a myriad of issues that are not expressly resolved by the statute, which has been criticized for failing to provide a satisfactory definition of response costs."); Pease & Curren Ref., Inc. v. Spectrolab, Inc., 744 F. Supp. 945, 951 (C.D. Cal. 1990) ("Problems of interpretation have arisen from the Act's use of inadequately defined terms. . . ."); Fallowfield v. Strunk, No. 89 Civ. 8644, slip op. at 5 (E.D. Pa. Apr. 23, 1990) ("Few would maintain that CERCLA is a model of legislative draftsmanship. . . ."); City of Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135, 1142 (E.D. Pa. 1982) (describing CERCLA as "a severely diminished piece of compromise legislation from which a number of significant features were deleted").

43. Some courts have advocated a general rule for construing CERCLA liberally: "CERCLA is essentially a remedial statute designed by Congress to protect and preserve public health and the environment. . . . Its provisions therefore should [be] construed . . . liberally to avoid frustration of the beneficial legislative purposes." *Pease & Curren*, 744 F. Supp. at 951 (quoting Dedham Water Co. v. Cumberland Farm Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986) (alteration in original)).

44. *Id.* at 950 ("It is well established that the federal government can recover its attorney's fees pursuant to CERCLA.").

45. *See supra* note 39 and accompanying text.

46. *See supra* note 10.

47. *Id.*

Section 9604(b) provides that whenever the President is authorized to act pursuant to section 9604(a), he may undertake such legal studies and investigations as he deems necessary to plan and direct response actions, and then may recover the costs thereof.[48]

Section 9607(a)(4)(A) confirms the government's right to recover these legal costs. It holds responsible parties liable for all costs of removal or remedial action that the government incurs not inconsistent with the national contingency plan.[49] The definition of "removal" includes action taken pursuant to section 9604(b).[50]

The case which began the precedent of allowing the government to recover its attorneys' fees in cost-recovery actions was *United States v. Northeastern Pharmaceutical & Chemical Co. (NEPACCO)*.[51] In that case, the United States brought an action against a chemical manufacturer, a transporter of chemical waste products, and others to recover the costs it had incurred in cleaning up a hazardous waste site.[52] The chemical company, a manufacturer of hexachlorophene, had buried a large quantity of toxic by-products on a farm near its plant.[53] The court held the defendants jointly and severally liable for all response costs, including attorneys' fees.[54]

The *NEPACCO* court prefaced its decision by reciting the American Rule that a prevailing party cannot recover its attorneys' fees unless a contract or statute explicitly authorizes such an award. The court then held that CERCLA specifically allows the government to recover its attorneys' fees.[55]

In support of this proposition, the court relied upon sections 9607(a)(4)(A) and 9604(b). It pointed out that section 9607 (a)(4)(A) holds responsible parties liable for all costs of removal or remedial action and that the definition of removal includes action taken pursuant to section 9604(b).[56] Section 9604(b), in turn, provides that when the government has taken action under section 9604(a) to respond to the release of hazardous substances into the environment, it may undertake legal studies or investigations and recover the costs thereof.[57] The court concluded that, since the government had acted pursuant to section 9604(a), the de-

48. *See supra* note 12.
49. 42 U.S.C. § 9607(a)(4)(A) (1988).
50. *See supra* note 30.
51. 579 F. Supp. 823 (W.D. Mo. 1984).
52. *Id.* at 833.
53. *Id.* at 830.
54. *Id.* at 851.
55. *Id.*
56. *Id.*
57. *Id.* at 851-52.

fendants were liable for all of the government's costs of response.[58]

Construed together, sections 9604(a), 9604(b), and 9607(a)(4)(A) seem to provide a logical rationale for awarding the government its attorneys' fees in cost-recovery actions. No court, however, has addressed the fact that section 9604(b) merely allows the government to recover costs associated with legal *studies and investigations*, not legal actions.[59] Apparently, the courts that have permitted the government to recover its attorneys' fees considered this difference to be insignificant.

C. *Private Cost-Recovery Actions*

In contrast to their holdings in government cost-recovery actions, federal courts have not been as generous in awarding attorneys' fees to prevailing litigants in private cost-recovery actions.[60] Some courts have held that CERCLA contemplates a different standard of recovery for nongovernmental entities.[61] To determine whether a different standard actually applies, one must ascertain the congressional intent behind CERCLA.[62] Gleaning this intent from the legislative history proves a difficult task. Since Congress hastily drafted CERCLA at the close of the ninety-sixth Congress, the legislative history is almost non-existent.[63] The lack of legislative history makes it necessary to examine closely the wording of the statute.[64]

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58. *Id.*

59. Charles H. Tisdale, *Current Issues in Superfund Litigation, in* HAZARDOUS WASTE LITIGATION 1985, at 61, 86 (PLI Litig. & Admin. Practice Course Handbook Series No. 283 (1985)) (stating that recovery actions should not be characterized as a legal study or investigation).

60. *See supra* note 20.

61. *See* New York v. General Elec. Co. 592 F. Supp. 291, 298 (N.D.N.Y. 1984) ("[Section 107(a)(4)(B)] is applicable to parties other than federal or state governments and establishes significantly different cost recovery criteria."); United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 850 (W.D. Mo. 1984) ("On its face, section 107(a)(4)(B) intends that a different standard apply to cost recovery by nongovernmental entities. . . .").

62. *See* Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1458 (9th Cir. 1986) (stating that courts should be guided by congressional intent when interpreting a federal statute); *cf.* Burks v. Lasker, 441 U.S. 471, 478 (1979) (looking at what Congress indicated in a federal statute); De Sylva v. Ballentine, 351 U.S. 570, 580 (1956) (looking to the legislative scheme of the statute).

63. Gaba, *supra* note 16, at 184 n.6 (citing ENVTL. L. INST., 1 SUPERFUND: A LEGISLATIVE HISTORY xiii-xxii (1982); 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); Robert C. Eckhardt, *The Unfinished Business of Hazardous Waste Control*, 33 BAYLOR L. REV. 253 (1981)).

64. *See* Pease & Curren Ref., Inc. v. Spectrolab, Inc., 744 F. Supp. 945, 951 (C.D. Cal. 1990) ("It is a well recognized principle of statutory construction that the primary rule of implementing legislative intent 'is to ascertain and give effect to the plain meaning of the language used.' ")

1. A Comparison of CERCLA's Two Cost-Recovery Provisions: Sections 9607(a)(4)(A) and (B)

Section 9607(a)(4), embodying CERCLA's two cost-recovery provisions, authorizes the government and private parties to recoup their cleanup expenses from responsible parties.[65] It mandates that responsible parties shall be liable for:

> (A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan, [and]
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan . . .[66]

Subsections (A) and (B) differ in three major respects. None of these differences, however, justifies awarding attorneys' fees to the government, but not to a private party.

First, CERCLA's two cost-recovery provisions use different language to mandate consistency with the national contingency plan.[67] Subsection (A) of section 9607(a)(4) specifies that the government's costs of response must not be inconsistent with the national contingency plan.[68]

In *NEPACCO*, the court interpreted this subsection as requiring the defendant in a government cost-recovery action to prove that the government incurred costs inconsistent with the national contingency plan.[69] It construed the insertion of the word "not" immediately preceding the word "inconsistent" to indicate that the defendants are presumed liable for all response costs incurred by the government, unless they can present evidence of inconsistency.[70]

In contrast, subsection(B) states that a private party's costs of response must be consistent with the national contingency plan.[71] According to the *NEPACCO* court, this subsection contemplates a different standard of recovery for nongovernmental entities. These parties must affirmatively establish that their actions were consistent with the national contingency

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65. 42 U.S.C. § 9607(a)(4) (1988).

66. *Id.*

67. *See supra* note 17 and accompanying text.

68. 42 U.S.C. § 9607(a)(4)(4)(A) (1988).

69. United States v. Northeastern Pharmaceutical & Chem. Co. *("NEPACCO")*, 579 F. Supp. 823, 850 (W.D. Mo. 1984); *see also* New York v. General Elec. Co., 592 F. Supp. 291, 304 (N.D.N.Y. 1984) (stating that the burden of proof is on the defendant to show costs inconsistent with the national contingency plan). *But see* Bulk Distrib. Ctrs., Inc. v. Monsanto Co., 589 F. Supp. 1437, 1444 (S.D. Fla. 1984) (stating that the burden of proof is on the government to show costs not inconsistent with the national contingency plan).

70. *NEPACCO*, 579 F. Supp. at 850.

71. 42 U.S.C. § 9607(a)(4)(B) (1988).

plan.[72] Although this distinction places an additional burden of proof on private plaintiffs, this burden should not preclude them from recovering attorneys' fees as long as they can prove that these costs were incurred consistent with the national contingency plan.

Subsections (A) and (B) also use different terms to distinguish between the types of costs recoverable by the government and those recoverable by private parties. The government may recover "all costs,"[73] whereas private parties may recover "any other necessary costs."[74] As this language implies, private parties bear the extra burden of proving that their costs were "necessary." CERCLA places no comparable burden on the government. Instead, courts presume that costs incurred by the government are reasonable and therefore recoverable.[75]

The *NEPACCO* court explained the rationale behind this presumption. The court emphasized that had Congress intended for the government to prove the necessity of its costs, Congress would have employed the phrase "all reasonable costs" in subsection (A) instead of "all costs."[76] The fact that courts presume that costs incurred by the government are reasonable* should not prevent private parties from recovering attorneys' fees under "all reasonable costs." Private parties must simply prove the necessity of these costs.

One final difference in the language of CERCLA's cost- recovery provisions is that the government may recover costs associated with "removal and remedial action,"[77] but private parties may recover their costs of "response."[78] This distinction is irrelevant since the definition of "response" includes the terms "removal and remedial action."[79] Consequently, these provisions authorize recovery of exactly the same expenses. Furthermore, nothing in the definitional section of CERCLA indicates that Congress intended to apply the definitions of removal and remedial action solely to actions taken by the federal government.[80]

2. The Recovery of Legal Costs Pursuant to Section 9604(b)

Although there is no direct evidence that Congress meant to distinguish

72. *NEPACCO*, 579 F. Supp. at 850.
73. 42 U.S.C. § 9607(a)(4)(A).
74. *Id.* § 9607(a)(4)(B).
75. *See NEPACCO*, 579 F. Supp. at 851.
76. *Id.*
77. 42 U.S.C. § 9607(a)(4)(A) (1988).
78. *Id.* § 9607(a)(4)(B).
79. *Id.* § 9601(25).
80. *See id.* §§ 9607(a)(4)(A)-(B), 9601(23)-(25); *see also* Pease & Curren Ref., Inc. v. Spectrolab, Inc., 744 F. Supp. 945, 951 (C.D. Cal. 1990) ("[T]he definition for 'response' provided in Section 101(25) nevertheless applies to section 107(a)(4)(B); Congress has not expressly limited the definitions set forth in [section 9601(25)] to federal parties.")

between costs recoverable by the government and those recoverable by private parties, some courts still award attorney's fees only in government cost-recovery actions.[81] These courts point to the fact that CERCLA permits the recovery of legal costs in a section relating to governmental action but provides no analogous section permitting a similar recovery by private parties.[82] Section 9604(b) specifically authorizes the President to recover the costs of whatever legal studies or investigations are necessary to plan and direct response actions.[83] In contrast, none of the provisions pertaining to private parties explicitly authorizes the recovery of these same costs.

In *T & E Industries, Inc. v. Safety Light Corp.*,[84] the court relied heavily on this dichotomy in refusing to award attorneys' fees in a private cost-recovery action. T & E Industries ("T & E") had purchased land contaminated with radioactive tailings, a by-product generated in radium extraction operations.[85] When T & E discovered the contamination, it initiated immediate corrective action. T & E then sued United States Radium Corporation and its corporate successor, Safety Light Corporation, to recover the monies expended in cleaning the environmental damage allegedly caused by United States Radium's hazardous dumping practices.[86] The court awarded T & E certain response costs but specifically denied T & E's claim for attorneys' fees.[87]

The court first restated the familiar American Rule that attorneys' fees may not be awarded to a prevailing litigant unless those costs are specifically provided for by contract or statute.[88] The *T & E* court found no specific language in CERCLA authorizing the award of attorneys' fees to a private party.

The court did acknowledge that CERCLA contains no evidence of a general legislative intent to distinguish between costs recoverable by governmental and nongovernmental entities. Nevertheless, the court emphasized that Congress had specifically addressed legal costs in a section dealing solely with governmental action.[89] The court observed that section 9604(b) provides for the recovery of the costs of legal studies and investigations necessary to plan and direct government response actions. But, because it found no analogous portion of the statute expressly entitling a private party to recover for legal action taken, it refused to create

81. *See supra* note 20.
82. *See* 42 U.S.C. § 9604(b) (1988).
83. *See supra* note 12.
84. 680 F. Supp. 696 (D.N.J. 1988).
85. *Id.* at 698.
86. *Id.* at 699.
87. *Id.* at 707-08.
88. *Id.* at 707.
89. *Id.* at 707-08.

such a right.[90]

Certainly, Congress could have drafted a provision analogous to section 9604(b), if it had intended for private parties to recover costs associated with legal studies and investigations. The absence of such a provision, however, should not preclude private parties from recovering their attorneys' fees if other sections of CERCLA reveal with sufficient explicitness Congress' intent to award such costs.

3. Attorneys' Fees as a Cost of Enforcement

CERCLA authorizes the recovery of costs of private enforcement activities related to removal and remedial actions. Section 9607(a)(4)(B) allows private parties to recover their "necessary costs of response."[91] The definition of "response" includes removal and remedial action as well as "*enforcement activities related thereto.*"[92]

In order for private parties to recover their attorneys' fees as a cost of enforcement, two conditions must be met. First, Congress must have intended for the phrase "enforcement activities related thereto" to apply to nongovernmental entities. Second, a private cost-recovery action must qualify as an "enforcement activity" within the meaning of the statute.

a. The Applicability of CERCLA's Enforcement Language to Nongovernmental Entities

The phrase "enforcement activities related thereto" was not included in the original definition of "response."[93] Rather, it was added in 1986 by the Superfund Amendments and Reauthorization Act ("SARA").[94] To determine whether private parties may recover attorneys' fees under the rubric of costs associated with the enforcement of removal and remedial actions, it is essential to know whether Congress intended for the new phrase to apply to nongovernmental entities. The legislative history offers little guidance in this regard. In House Report Number 99-253(I), the Committee on Energy and Commerce commented that "[t]he change [in the definition of response] will confirm the EPA's authority to recover

90. *Id.* Other courts have followed the reasoning of *T & E* in not allowing private parties to recover attorneys' fees. *E.g.*, United States v. Hardage, 750 F. Supp. 1460, 1511 (W.D. Okla. 1990); *see also* Mesiti v. Microdot, Inc., 739 F. Supp. 57, 62-63 (D.N.H. 1990); BCW Assocs., Ltd. v. Occidental Chem. Corp., No. 86 Civ. 5947, slip op. at 34, 40, 58 (E.D. Pa. Sept. 29, 1988).

91. 42 U.S.C. § 9607(a)(4)(B) (1985).

92. *Id.* § 9601(25) (emphasis added).

93. Comprehensive Environmental Response, Compensation & Liability Act ("CERCLA"), Pub. L. No. 96-510, § 101(25), 94 Stat. 2767, 2771 (1980).

94. Superfund Amendments and Reauthorization Act ("SARA"), Pub. L. No. 99-499, Sec. 101(e), 1985 U.S.C.C.A.N. (100 Stat.) 1613, 1615 (codified at 42 U.S.C. § 9601(25) (1988)).

costs for enforcement actions taken against responsible parties."[95]

This wording was strictly construed against private parties in *Fallowfield v. Strunk*.[96] In that case, private parties brought a claim for response costs against a couple from whom they had bought a piece of property contaminated with hazardous waste. The court dismissed the plaintiffs' claim for attorneys' fees.[97] After examining the legislative history of the SARA amendments, the court concluded that Congress had not intended for private parties to collect attorneys' fees in cost-recovery actions.[98] The court emphasized that the House Report confirmed only the Environmental Protection Agency (EPA)'s authority to recover costs for enforcement actions taken against responsible parties.[99] Consequently, it concluded that Congress, by expanding the definition of "response" to include "enforcement activities" did not intend to allow private parties to collect attorneys' fees in private cost-recovery actions.[100] The court construed the committee's reference solely to the EPA's authority to recover enforcement costs as thereby creating a negative implication that private parties may not recover such costs.[101]

Although the *Fallowfield* court's strict interpretation of SARA's legislative history seems logical, Congress did not amend the definition of "response" specifically to exclude the definition's application to private parties. Instead, the definition of "response" allows for the recovery of costs related to the enforcement of removal and remedial actions without differentiating between costs recoverable by the government and those recoverable by private parties.[102] According to the plain language of the statute, therefore, Congress did not intend for the EPA alone to recover its enforcement costs.

This latter interpretation of section 9601(25) was adopted by the court in *Pease & Curren Refining, Inc. v. Spectrolab, Inc.*[103] In that case, a company which extracts and refines precious metals from chemical waste brought suit against one of its waste suppliers. The supplier had provided the company with a contaminated waste product that caused an explosion on the company's premises. The court awarded the company its attorneys' fees as a cost of response.[104]

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95. H.R. REP. No. 253, 99th Congress, 2nd Sess., pt. 1, at 66-67 (1985), *reprinted in* U.S.C.C.A.N., 2835, 2848-49.

96. No. 89 Civ. 8644, slip op. at 16 (E.D. Pa. Apr. 23, 1990); *reconsideration denied*, 766 F. Supp. 335 (E.D. Pa. 1991).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. 42 U.S.C. § 9601(25) (1988).

103. 744 F. Supp. 945 (C.D. Cal. 1990).

104. *Id.* at 951-52.

The *Pease & Curren* court strongly questioned the notion that Congress had intended to allow only the federal government to claim attorneys' fees under the rubric of "enforcement activities." The court noted that the definition of "response" provided in section 9601(25) also applies to section 9607(a)(4)(B) and that Congress expressly did not restrict application of the definitions set forth in section 9601(25) solely to federal parties.[105] The court held that it was bound by the plain language of the text and could not take it upon itself to limit the statute's application.[106]

b. Private Cost-Recovery Actions as Enforcement Actions

The language of CERCLA and its case history indicate that the phrase "enforcement activities related thereto" should apply to nongovernmental entities. But courts are divided on the issue of whether private cost-recovery actions constitute "enforcement activities."[107] Because CERCLA does not define the term "enforcement," courts have had to formulate their own definition of the phrase.

In *T & E Industries, Inc. v. Safety Light Corp.**, the court ruled that private cost-recovery actions are not enforcement activities.[108] It recognized that, although plaintiffs may bring actions to recover their response costs, they may not bring actions against another private entity to enforce CERCLA's cleanup provisions. Consequently, the court concluded that private parties do not incur "enforcement costs" as contemplated by CERCLA.[109]

To test the validity of this theory, it is useful to compare section 9607(a)(4)(B), CERCLA's private cost-recovery provision, with another CERCLA provision that clearly authorizes private enforcement. Section 9659, CERCLA's citizens' suit provision, allows private parties to bring actions to enforce the cleanup of hazardous waste sites.[110] Specifically, it provides that a party may commence a civil action against another party "alleged to be in violation of any standard, regulation, condition, [or] requirement" of CERCLA.[111] In such suits, federal district courts have ju-

105. *Id.* at 951.

106. *Id.*

107. For cases holding that private cost recovery actions are enforcement activities, see General Elec. Co. v. Litton Indus. Automation Sys., 920 F.2d at 1422; Gopher Oil Co. v. Union Oil Co., 757 F. Supp. at 1006-07; Pease & Curren Ref., Inc. v. Spectrolab, Inc., 744 F. Supp. at 951-52; Shapiro v. Alexanderson, 741 F. Supp. 472, 480 (S.D.N.Y. 1990). *But see* T & E Indus. v. Safety Light Corp., 680 F. Supp. at 708 n.13 (D.N.J. 1988) (holding private parties do not incur enforcement costs in CERCLA actions).

108. 680 F. Supp. at 708 n.13.

109. *Id.*

110. 42 U.S.C. § 9659 (1988).

111. *Id.* § 9659(a)(1). Subsection (a)(1) specifically provides:

> [A]ny person may commence a civil action on his own behalf:
>
> (1) against any person (including the United States and any other governmental

risdiction to order whatever action is necessary to correct the violation and to impose civil penalties on violators.[112] Since people who file citizens' suits do not undertake cleanup, section 9659 does not provide a right of action for response costs.[113] This is the main difference between sections 9607(a)(4)(A) and 9659.

These two sections do, however, serve a similar purpose. The goal of CERCLA's citizens' suit provision is "to goad stricter compliance with, and enforcement of, hazardous waste laws."[114] Private cost-recovery actions accomplish the same purpose. By holding responsible parties liable for the costs of cleaning up hazardous waste, section 9607(a)(4)(B) does not simply encourage compliance with CERCLA's hazardous waste laws, it mandates it. In addition, section 9659 authorizes the award of attorneys' fees to the prevailing party in a citizens' suit.[115] Certainly, Congress could not have intended to grant private parties their attorneys' fees in citizens' suits, but deny recovery of those same costs when the parties actually finance the cleanup of a hazardous waste site!

The view that private cost-recovery actions are not enforcement actions[116] has not been uniformly accepted. For example, in *Pease & Curren Refining, Inc. v. Spectrolab, Inc.*,[117] the court relied on the "plain meaning" of the phrase "enforcement activities" and determined that it encompasses all actions taken to induce a responsible party to comply with the remedial actions mandated by CERCLA. It held that private cost-recovery actions are necessarily "enforcement activities," because they ac-

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> instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter. . . .

Id.

112. 42 U.S.C. § 9659(c). Subsection (c) provides inpertinent part:

> The district court shall have jurisdiction in actions brought under subsection (a)(1) of this section to enforce the standard, regulation, condition, requirement, or order concerned (including any provision of an agreement under section 9620 of this title), to order such action as may be necessary to correct the violation, and to impose any civil penalty provided for the violation.

Id.

113. Regan v. Cherry Corp., 706 F. Supp. at 148-50.

114. *Id.* at 148. ("Both the statutory language and legislative history of [section 9659] as well as an examination of other CERCLA provisions demonstrates [sic] that [section 9659] was merely intended to goad stricter compliance with, and enforcement of, hazardous waste laws").

115. 42 U.S.C. § 9659(f) (1988). Subsection (f) provides that "[t]he court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or the substantially prevailing party whenever the court determines such an award is appropriate." *Id.*

116. *See* cases cited *supra* note 90.

117. 744 F. Supp. 945 (C.D. Cal. 1990).

complish this objective.[118] The court could not ascertain any other logical interpretation that would give effect to the phrase, without rendering the phrase superfluous.[119]

This latter interpretation of the phrase "enforcement activities" represents the better reasoned view because it furthers the two main purposes of CERCLA: the prompt cleanup of hazardous waste sites, and the imposition of all cleanup costs placed on responsible parties.[120] When Congress provided private parties with a federal cause of action for the recovery of their response costs, it intended that these parties initially would expend their own funds without waiting for the responsible persons to take action.[121] Congress' goal of encouraging prompt action would be defeated, however, if private parties were required to shoulder the financial burden of the litigation necessary to recover such costs.[122]

4. The Strict Interpretation of SARA

The decision in *Regan v. Cherry Corp.*[123] underscores the division among the federal courts over the proper construction of section 9607(a)(4)(B). The *Regan* court strictly interpreted SARA as prohibiting the recovery of attorneys' fees in private cost-recovery actions.

In *Regan*, property owners had sued several electrical products corporations and their predecessors in interest to recover the costs of cleaning up improperly disposed hazardous waste. The court stated that "[i]f Congress had intended to permit citizens seeking response costs to recover attorneys' fees, it simply would have amended [section 9607] to allow the recovery of these litigation costs."[124] The court emphasized that because SARA represented a comprehensive overhaul of CERCLA, Congress could easily have amended section 9607 to allow the recovery of attorneys' fees.[125]

The logic of this argument has some appeal. Congress had the opportunity to draft a provision allowing for the recovery of attorneys' fees when it enacted SARA. But the case law on this issue was not particularly well

118. *Id.* at 951.
119. *Id.*
120. *See supra* note 2.
121. *See* Bolin v. Cessna Aircraft Co., 759 F. Supp 692, 710 (D. Kans. 1991) (citing Pennsylvania v. Union Gas Co. 491 U.S. 1, 21-22 (1989)); Artesian Water Co. v. Government of New Castle County, 659 F. Supp. 1269, 1288 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3rd Cir. 1988); City of New York v. Exxon Corp., 633 F. Supp. 609, 616-17 (S.D.N.Y. 1986); Pinole Point Properties, Inc. v. Bethlehem Steel Corp., 596 F. Supp. 283, 288 (N.D. Cal. 1984); State *ex rel.* Brown v. Georgeoff, 562 F. Supp. 1300, 1311-14 (N.D. Ohio 1983)).
122. *See* cases cited *supra* note 121.
123. 706 F. Supp. 145, 149 (D.R.I. 1989).
124. *Id.* at 149.
125. *Id.*

developed before SARA. As a result, Congress may not have anticipated that the courts would interpret CERCLA as disallowing private parties from recovering attorneys' fees.[126] In fact, most of the cases that have addressed the recovery of attorneys' fees in private cost-recovery actions were decided after 1986, the year in which SARA was enacted.[127]

IV. The Future of Private Cost-Recovery Actions and Requests for Attorneys' Fees

It is difficult to assess the magnitude of the environmental damage caused by abandoned hazardous waste sites. The EPA has estimated that there are about 27,000 sites contaminated with hazardous waste, but a congressional report puts the figure at 130,340.[128] In addition, the Office of Technology Assessment has estimated that it will cost $100 billion and take 50 years to clean up these sites.[129] A report for the insurance industry, however, places this cost at $700 billion.[130] Even the best estimates reveal a staggering problem that will take years and a fortune to rectify. It is especially important, therefore, that courts tailor their remedies to promote the most expedient, efficient cleanup of hazardous waste.

If courts refuse to allow private parties to recover their attorneys' fees as a cost of response, they will remove a powerful incentive for private parties to initiate response actions. Fewer parties will undertake cleanup activities if they know that they will be required to pay the costs of the litigation necessary to recover their expenses.[131] An examination of the current decisions in private cost-recovery actions indicates that courts are aware of this fact. Of the five most recent decisions, four have awarded attorneys' fees to private parties as a necessary cost of response.[132]

V. Conclusion

Abandoned hazardous waste sites pose a serious threat to the public health and the environment. In order to accomplish the prompt, effective cleanup of these sites, courts must come to a consensus on disputed issues pertaining to the cleanup of such sites. One such issue concerns the right

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126. Gopher Oil Co. v. Union Oil Co., 757 F. Supp. 998, 1006.5 (D. Minn. 1991) (citing General Elec. Co. v. Litton Indus. Automation Sys., 920 F.2d 1415, 1422 n.10 (8th Cir. 1990)).

127. *See supra* note 20.

128. Frederick Anderson. et al., Environmental Protection:
Law and Policy 614 (2d ed. 1990) (citing General Accounting Office, Superfund, Extent of Nation's Problem Still Unknown (1988)).

129. *Id.*

130. *Id.* (citing Dimond, *The $700 Billion Cleaning Bill*, Ins. Rev., Jan. 1989, at 30).

131. *See* Pease & Curren Ref., Inc. v. Spectrolab, Inc., 744 F. Supp. 945, 951 (D.C. Cal. 1990).

132. *See supra* note 20.

of private parties to recover their attorneys' fees as a necessary cost of response in private cost-recovery actions. This Note asserts that there is nothing in CERCLA or in its legislative history that justifies awarding such costs to the government, but not to private parties. CERCLA's statutory language does not provide specifically for the recovery of attorneys' fees by private parties. But Congress did indicate with sufficient explicitness its intent for private parties to recover this expense as a cost associated with the enforcement of removal and remedial actions. This interpretation furthers CERCLA's purposes of effecting the prompt cleanup of hazardous wastes and imposing cleanup costs on responsible parties.

Heather M. Harvey