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EXECUTIVE SUMMARY

Note: The purpose of this summary is to provide the judges with a concise explanation of the issues and the possible arguments. To best effect this purpose, citations have been

omitted from this summary. Please refer to the main portion of the judge's bench memorandum for all citations.

The first issue which the court will face is whether CERCLA may be used to recover costs incurred in cleaning up property contaminated by actions taken prior to the enactment of CERCLA. If CERCLA cannot be applied to this case, the remainder of the issues become moot and the decision of the lower court must be reversed. As the following discussion will illustrate, CERCLA may be applied retroactively in this case.

The court must determine the proper test for ascertaining whether a retroactive application of a statute is permissible. The Supreme Court decision in *Landgraf v. USI Film Products* has set forth a three-part test which must be satisfied in order to apply a statute to pre-enactment conduct. Although the Southern District of Alabama has claimed in *United States v. Olin* that *Landgraf* alters the test used by prior courts in CERCLA cases, this rationale is without merit.

In order for a statute to be applied retroactively in the absence of an express authorization, a court must first decide if a retroactive application is necessary. If so, the court must apply the traditional presumption against retroactivity unless the statute is immune to this presumption because it confers or ousts jurisdiction or is merely procedural. If the presumption applies, the court must find clear evidence of Congress's intent to permit a retroactive application of the statute. This evidence can come from either the language of the statute, the legislative history, or a combination of the two.

In the present case, the requirements of the test are met and CERCLA may be applied. First, CERCLA will be applied retroactively in this case since the conduct which has caused the contamination occurred before CERCLA was passed. Since CERCLA is not one of the types of statutes normally immune to the presumption against retroactivity, the presumption must be rebutted.

Several statutory provisions as well as the legislative history work to rebut the presumption. First, § 107(f) specifically states that CERCLA may not be used to recover damages to natural resources where the conduct causing the damage predates the enactment of CERCLA. Although a similar negative implication argument was rejected by the Supreme Court in *Landgraf*, the two provisions considered in *Landgraf* were, by the Court's own admission, minor provisions related to very specific situations. Such is not the case here. Another section of CERCLA which provides evidence of congressional intent is § 103(c) which requires owners and operators who disposed of hazardous substances or accepted such substances for transport to notify EPA within six months of enactment. The most natural use for this information would be to locate sites which potentially require cleanup, the cost of which would be recovered under CERCLA. Third, the statute uses the past tense when referring to owners and operators and the activities which resulted in the contamination. Finally, the legislative history makes reference to CERCLA's purpose of providing authority for the cleanup of abandoned or inactive hazardous waste sites. It is unlikely that Congress meant for the EPA to sit around and wait for sites to become inactive or abandoned rather than cleaning up problem sites that already existed.

All the above factors work together to demonstrate that Congress meant for CERCLA to apply to contamination caused by pre-enactment conduct. Thus, CERCLA may be applied in this case. Since the statute imposes only a monetary burden on the parties who created the contamination, CERCLA need only satisfy the rational basis test in order to pass constitutional muster under the Due Process clause of the Fifth Amendment to the Constitution.

The second issue to be decided is whether applying CERCLA in this case would exceed Congress's authority under the Commerce Clause. In *United States v. Lopez*, the Court stated that Congress can regulate activities which substantially affect interstate commerce, even if those activities are purely local in nature. Although the Southern District of Alabama in *United States v. Olin* has interpreted *Lopez* as sig-

naling a sharp curtailment of Congress's powers under the Commerce Clause, this interpretation is unfounded. In the present case, CERCLA is regulating industries which dispose of or transport hazardous waste. Although a single incident may not affect interstate commerce, adding together the effects of all disposals which result in contamination likely results in a major impact on interstate commerce.

The Supreme Court specifically reaffirmed its modern Commerce Clause jurisprudence in *Lopez*. Thus, cases like *Wickard v. Filburn*, which permitted regulation of local activities which would affect interstate commerce when all similar activities where considered in the aggregate, are still good law. Although the *Lopez* Court refused to uphold a statute prohibiting the possession of a gun (undoubtedly an article of commerce) in a school zone, the distinguishing factor of the *Lopez* situation is the fact that the statute was criminal in nature and regulated only the possession of the gun rather than its sale or movement in interstate commerce. The situation here is quite different. Furthermore, although the *Lopez* Court looked for a jurisdictional element with which to conduct a case-by-case inquiry of the statute's effect on interstate commerce, such an element has only been necessary in criminal cases, not civil cases such as CERCLA cost recovery actions.

In addition to determining whether the *Lopez* case has had any effect on Congress's power under the Commerce Clause, the court must also examine whether GUVS may be sued under CERCLA in light of the Supreme Court decision in *Seminole Tribe of Florida v. Florida* which held that Congress cannot use the Commerce Clause to abrogate a state's sovereign immunity. In *Seminole*, the Court decided that Congress could not authorize suits by Indian tribes against a state for the state's failure to bargain in good faith regarding gaming on Indian lands. GUVS claims that the *Seminole* decision supports the proposition that GUVS should not be sued under CERCLA since the school was created by the state. However, the Attorney General of the State of New Union has issued a legal opinion stating that GUVS is not an arm of the state government. In light of this opinion and consider-

ing the broad powers Congress has under the Commerce Clause, GUVS's argument should be found to have no merit.

The third issue to be addressed is whether WUWPS, a PRP by virtue of its present ownership of the contaminated property, may bring a cost recovery action against GUVS, another PRP, or whether WUWPS may only bring a claim for contribution. The resolution of this question will determine whether WUWPS can escape liability for the orphan share of another bankrupt PRP by imposing joint and several liability on GUVS or whether WUWPS is limited to a contribution action which would allocate that orphan share equitably among all PRPs.

Since CERCLA itself does not expressly address this issue and the Supreme Court has not decided the question, it is necessary to determine Congress's intent from the language of the statute and, if necessary, the legislative history. The two main provisions to examine are the liability section, § 107, and the contribution section, § 113. Section 107 states that "any other person [not a government or a Indian tribe]" may bring a cost recovery action. There is no language indicating that the plaintiff must be an "innocent" party and many courts have refused to infer such a requirement. On the other hand, § 113 creates a claim for contribution and contribution is generally used to allocate costs among two or more liable parties.

Sections 107 and 113 can both be given effect by a ruling that a plaintiff PRP who has not been ordered to clean up or has not been formally found to be liable may bring a cost recovery action under § 107 subject to the defendant's right to counterclaim under § 113. This is the situation here, where WUWPS voluntarily undertook to clean up the contamination and should be rewarded for its diligence by avoiding liability for any orphan shares. This result best serves CERCLA's purpose of cleaning up contaminated sites as quickly and effectively as possible.

The final issue to be decided is whether SNUHSA may recover the costs it has incurred in monitoring the Marinas for adverse health effects due to the contamination. In order to be recoverable under CERCLA, these medical monitoring

costs must be "necessary costs of response." Such costs include "monitoring reasonably required" to protect public health and welfare and any other actions to "prevent, minimize, or mitigate damage to the public health or welfare." Although some cases allow recovery of medical monitoring costs, most do not.

Several factors that support the proposition that medical monitoring costs are not recoverable in this case. First, § 104(i) of CERCLA creates the Agency for Toxic Substances and Disease Registry (ATSDR) which is given the task of performing medical monitoring on persons exposed to contamination. The ATSDR may undertake such monitoring on its own or may act on a petition for monitoring. The fact that medical monitoring is expressly provided for in this manner strongly suggests that Congress did not intend to authorize private causes of action for medical monitoring costs. In addition, the legislative history includes statements that a cause of action for personal injuries was considered in the Superfund Amendments and Reauthorization Act (SARA) but was ultimately deleted. Finally, since the contamination was so localized, one cannot argue that the public health is in jeopardy. Considering all these factors, it seems clear that medical monitoring performed without the consent of the ATSDR is not a recoverable cost under CERCLA. The result should be the same whether the plaintiff is a private individual or a government agency such as SNUHSA.

In summary, the court should find that the application of CERCLA to this case does not run afoul of the presumption against retroactive application of a statute and is a proper exercise of Congress's authority under the Commerce Clause. The court should also permit WUWPS to sue under either § 107 or § 113. Finally, SHUHSA should not be able to recover the costs it has incurred in initiating a program of medical monitoring for the Marinas.

Sample Questions on the Retroactivity Issue

1. Explain what is meant by "retroactive" application of a statute.
2. Why is retroactive application of a statute disfavored?

3. Does permitting a retroactive application of a statute comport with the constitutional ban on *ex post facto* laws?
4. What test has the Supreme Court used to determine if a statute may be applied retroactively?
5. Is this test different from previous tests and what are those differences?
6. If Congress has not specifically stated that a statute may be applied retroactively, is even possible to find enough evidence to show a clear intent to permit retroactive application?
7. Is a retroactive application of CERCLA being sought here, particularly in light of the fact that the contamination of the land continued for several years after CERCLA was enacted?
8. (If a party makes the argument that, since CERCLA specifically disallows a retroactive application to recover damages to natural resources, it is implied that other allowable costs may be recovered even if the contamination resulted from pre-enactment conduct) Has the Supreme Court specifically rejected in *Landgraf* the negative implication argument to demonstrate congressional intent of retroactive application?
9. If Congress did not intent CERCLA to be applied to pre-enactment conduct, why was reference made to using CERCLA as a tool to clean up abandoned or inactive hazardous waste sites if those sites existing immediately before enactment would be beyond CERCLA's reach?
10. Does the fact that there is very little useful legislative history cut for or against retroactive application? One on hand, Congress may have wanted the courts to use their equitable powers to apply CERCLA as fairly as possible. On the other hand, perhaps Congress wanted the statute applied only as written.
11. Does applying CERCLA to pre-enactment conduct violate Due Process? Why or why not?

Sample Questions on the Commerce Clause Issue

1. How broad are Congress's powers under the Commerce Clause and has that power been enlarged or diminished over the last decade or two?

2. The Supreme Court has grouped acceptable regulation under the Commerce Clause into three groups. Which group does CERCLA fit in and why?
3. What relationship to commerce must the regulation have?
4. What is an "economic activity" and is it necessary that the regulated activity be an economic activity?
5. Give some examples of non-economic activities that might fit into one of the Supreme Court's three categories.
6. Has the Supreme Court implicitly overruled any prior cases in its *Lopez* decision?
7. The *Olin* court has concluded that *Lopez* requires that Congress provide for a jurisdictional element to allow a case-by-case inquiry into whether the activity to be regulated is within the commerce power. Is this conclusion supported by the language in *Lopez* and what is that language?
8. In this case, what is the connection to interstate commerce which satisfies the Supreme Court's test in *Lopez*? How can the test be satisfied when the Marinas were the only ones affected and the contamination was so localized?
9. Since GUVS was created by the state of New Union and funded by the state, is it protected from suit under the doctrine of sovereign immunity?
10. Does the *Seminole* case require closer scrutiny when the entity being sued has a connection to state government even if it is not a state agency itself?

Sample Questions on the Contribution/Cost Recovery Issue

1. That is the difference between a contribution action and a cost recovery action under CERCLA? Does it matter which action is used?
2. How is WUWPS liable under CERCLA since it has not been formally ordered to clean up or sued by anyone else? If WUWPS had been formally found liable, would your argument change?
3. Does the fact that Congress provided several defenses to a cost recovery action indicate that not all PRPs were meant to be held responsible for cleanup costs and, hence, were enti-

tled to full recovery of any expenses they themselves incurred?
4. Does the Supreme Court's apparent acceptance of a dual recovery system in *Key Tronic* indicate a resolution of the issue?
5. What did Congress mean when it stated in § 107 that "any other person" could bring a cost recovery action? Is "any other person" different from "any person"? What does this difference mean?
6. Is the language of the statute dispositive of the issue or is it necessary to look at the legislative history?
7. Is there one interpretation of the statute which would produce the most harmonious result and would give effect to the whole statute? What is this interpretation?
8. What interpretation of the statute best serves the purposes for which CERCLA was enacted?

Sample Questions on the Medical Monitoring Issue

1. What types of costs are generally recoverable under CERCLA?
2. Are medical monitoring costs specifically mentioned anywhere in the statute?
3. If medical monitoring costs are not expressly covered, what other language suggests that such costs are recoverable?
4. Does the creation of the Agency for Toxic Substances and Disease Registry under the Superfund Amendments and Reauthorization Act support the argument that medical monitoring costs incurred by private individuals are not recoverable? Why or why not?
5. Is there anything in the legislative history which speaks to the issue of whether medical monitoring costs are recoverable?
6. Is the issue fact-sensitive, that is, are there any situations in which medical monitoring costs would be recoverable even though such costs would not be recoverable in other situations? In what type of case could recovery of these costs be justified? Are these facts present here?

7. Should the courts take into consideration who the plaintiff is when deciding whether to award reimbursement for medical monitoring costs? Why or why not?
8. Does the recovery of medical monitoring costs fit in with the stated purposes for enacting CERCLA?

I. MAY CERCLA BE APPLIED RETROACTIVELY IN THIS CASE?

The issue most logically addressed first by the court is whether CERCLA may be applied retroactively in this case. This challenge to the lower court's decision should be decided first since a decision that CERCLA may not be applied to pre-enactment conduct will render the rest of the analysis unnecessary. Furthermore, this issue should be addressed before the Commerce Clause argument because a court should dispose of a case on non-constitutional grounds rather than constitutional grounds if possible. *See* Ashwander v. TVA, 297 U.S. 288, 347 (1936).

As the following analysis will demonstrate, CERCLA does operate retroactively in this case. However, despite that fact that statutes are presumed to not apply retroactively, this effect was specifically intended by Congress. Furthermore, imposing liability in this case does not offend Due Process.

A. What is the proper test to determine if a statute may be applied retroactively?

The Supreme Court has had many opportunities to discuss when and whether to apply a law retroactively to conduct taking place before the effective date. *See e.g.* Landgraf v. USI Film Products, 114 S. Ct. 1483 (1994) (deciding that an amendment to the Civil Rights Act which took effect after a trial court judgment but before appellate review and created a right to recover compensatory damages could not be applied to the case on appeal); Thorpe v. Housing Authority of City of Durham, 393 U.S. 268 (1969) (holding that an agency requirement mandating certain particular notice prior to an eviction from a public housing project could be ap-

plied to an eviction notice issued before the requirement was adopted); Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988) (deciding that a retroactive application of a wage-index rule for a hospital treating Medicare patients was improper); Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974) (holding that an amendment providing for the awarding of reasonable attorney fees to prevailing party could be applied to fees incurred before enactment); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) (holding that requiring former employer to pay Black Lung benefits to former employee is not a violation of Due Process even though the employment was terminated prior to passage of the authorizing statute). Although the Supreme Court has not yet considered whether CERCLA should be applied retroactively, other federal courts have squarely addressed this issue. *See e.g.* United States v. Northeastern Pharmaceutical & Chemical Co., 810 F.2d 726 (8th Cir. 1986); Nevada v. United States, 925 F. Supp. 691 (D. Nev. 1996); United States v. Shell Oil Co., 605 F. Supp. 1064 (D. Colo. 1985); United States v. South Carolina Recycling and Disposal, Inc., 653 F. Supp. 984 (D.S.C. 1984); Ohio *ex rel.* Brown v. Georgeoff, 562 F. Supp. 1300 (N.D. Ohio 1983). The only decision which has refused to apply CERCLA because the application would be retroactive is *United States v. Olin*, 927 F. Supp. 1502, 1507 (S.D. Ala. 1996).

Although all of the cases dealing with CERCLA, except for *Olin*, have reached the same result, there has been some confusion about the proper test to apply to determine if a retroactive application of a statute is permissible. The confusion results from somewhat contradictory Supreme Court precedent. One the one hand, the Supreme Court has stated that "[r]etroactivity is not favored in the law." *See Bowen*, 488 U.S. 204, 208 (1988). However, the Supreme Court has also asserted that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *See Bradley*, 416 U.S. at 711; *Thorpe*, 393 U.S. at 281. In *Ohio ex rel Brown v. Georgeoff*, the court considered the possibility that *Thorpe* and *Bradley* modified

the rule stated in *Bowen*. *See* 562 F. Supp. at 1308 n.9. In fact, the Supreme Court itself indicated in *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994), that there is some "tension" between the statements made in *Bowen*, *Bradley*, and *Thorpe*. *See* 114 S. Ct. at 1496. While *Landgraf* attempted to reconcile those three cases and reaffirmed their holdings, *see* 114 S. Ct. at 1523 (Scalia, J. concurring), the Court also stated that "under either view, where congressional intent is clear, it governs." *Landgraf*, 114 S. Ct. at 1496.

Pre-*Landgraf* cases involving CERCLA have applied a three-part test to resolve the retroactivity dilemma. *See Georgeoff*, 562 F. Supp. at 1302. Under this test, the court first looks to see if the complaint seeks a retroactive application of the law. *See id.* If so, then the court applies the presumption against retroactivity. *See id.* In order to rebut the presumption, the court examines the statutory language and, if necessary, the legislative history to determine if Congress has evinced a clear intent that the statute be applied retroactively. *See id.*

The Supreme Court in *Landgraf* set forth a four part test which is quite similar to the *Georgeoff* test. Under *Landgraf*, the first question to be answered is whether the legislature "has expressly prescribed the statute's proper reach." 114 S. Ct. at 1505. If not, the next step is to ascertain whether applying the statute in the case at bar would result in a retroactive application. *See id.* If so, the court presumes that Congress did not intend such a result. *See id.* Finally, the court undertakes to determine if Congress clearly intended a retroactive application. *See id.*

The *Olin* court, citing the fact that *Georgeoff* was decided prior to *Landgraf*, dismisses the entire *Georgeoff* analysis and sets forth its own interpretation of the proper test. The *Olin* test also consists of three steps. Under the *Olin* method, a court begins its analysis by determining whether Congress has expressly stated, either in the text of the statute or its legislative history, if the law is to be applied retroactively. *See Olin*, 927 F. Supp. at 1511. If not, the court must then decide if the statute has a retroactive effect under the partic-

ular facts of the case. *See id.* If such an effect is present, the court must "apply the traditional presumption against retroactivity - absent a clear congressional intent to the contrary." *Id.*

The only other post-*Landgraf* case addressing CERCLA retroactivity has stated that *Landgraf* did not affect the rules set out in *Bowen*, *Thorpe*, and *Bradley*, but merely reconciled those decisions. *See* Nevada v. United States. 925 F. Supp. at 693. In *Nevada v. United States*, the district court adopted the findings and conclusions of a Magistrate, including the statement that "as *Landgraf* makes clear, the general presumption against retrospective application of statutes remains unless the new statute simply affects procedure (*Thorpe*) or matters secondary to the principal cause of action (*Bradley*)." *See* 925 F. Supp. at 696, 698. The Magistrate went on to note that, in order to apply CERCLA retroactively, there must be "*clear congressional intent*" that retroactive application is proper. *See* 925 F. Supp. at 702 (noting that an express retroactivity provision is unnecessary to meet the intent requirements of *Landgraf*).

Considering the authorities discussed above, it is clear that there is indeed a three-part test to be used in determining whether a statute may be applied to conduct occurring before enactment. However, the *Olin* court mistakenly concludes that the test has changed over the past twenty-seven years since the *Thorpe* decision. On the contrary, *Landgraf* made clear that the Supreme Court's prior decisions are all consistent with one another. Thus, the *Olin* court's summary disposal of the *Georgeoff* case as inapplicable in light of the *Landgraf* opinion was unwarranted. In fact, the *Georgeoff* test is effectively the same test pronounced by the *Landgraf* court. The only difference between the two tests is that the *Georgeoff* test presumes a lack of express statutory language stating that the provisions of the law apply retroactively while *Landgraf* lists this finding as its first step. Furthermore, the *Landgraf* test combines the application of the presumption with the examination of evidence which may rebut the presumption. *Georgeoff* lists these two requirements as

separate steps. The substantive analyses undertaken by the courts are, however, identical.

Therefore, in order to determine whether CERCLA liability attaches to contamination caused by pre-enactment conduct in the absence of express language sanctioning such a result, the court must apply a three-part test. The court must determine if the statute must be applied retroactively. If so, the presumption against retroactive application is invoked. In order to rebut this presumption, it must be shown, either in the language of the statute, the legislative history, or both, that Congress clearly intended a retroactive application of CERCLA.

B. Application of the three-part test

1. Is a retroactive application of the statute required?

Before the court begins determining if a statute may be applied retroactively, it must first discern whether such an application is even necessary. This determination presupposes an understanding of what makes a statute retroactive. Courts have understood that a retroactive effect is "one which '. . . creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past . . . .'" *Georgeoff*, 562 F. Supp. at 1303 (citing Justice Story in *Society for Propagating the Gospel v. Wheeler*, 22 F.Cas. 756 (C.C.D.N.H. 1814)). "A statute does not operate retroactively merely because it is applied in a case arising from conduct antedating the statute's enactment . . . or upsets expectations based on prior law." *Landgraf*, 114 S. Ct. at 1499. The court must determine if conduct occurring prior to enactment now forms the basis of a new type of liability. *See id.*

An example of the type of relief that is undoubtedly retroactive is compensatory damages. *See Landgraf*, 114 S. Ct. at 1506 ("compensatory damages are quintessentially backward-looking"). This is because such damages are, in the case of private parties, paid out the pocket of the defendant, rather than from the public fisc. *See id.* Even if a party was entitled to some relief prior to the enactment of a statute, the

addition of a new form of relief, such as a cause of action for compensatory damages in addition to backpay, may constitute retroactive application of a statute if the conduct causing the harm occurred entirely before compensatory damage claims were authorized. *See* 114 S. Ct. at 1506-07.

The *Olin* court makes an analogy to compensatory damages regarding CERCLA. The court proposes that CERCLA costs fall somewhere between compensatory damages and punitive damages since, in addition to having to pay cleanup costs, a party could be fined for failing to obey an EPA order or be subject to treble damages under § 107(c). *See* 927 F. Supp. at 1517. With respect to the fines and punitive damages, the court notes that *Landgraf* indicated that imposing punitive damages retroactively involves a constitutional *ex post facto* concern. *See id.*

In the past, the government has attempted to argue that CERCLA is not retroactive even if the conduct which caused the contamination occurred wholly before the enactment date. *See Olin*, 927 F. Supp. at 1513. In *Georgeoff*, the Justice Department (Justice) argued that CERCLA is not being applied retroactively even if the conduct occurred before enactment because the condition causing the liability was a "continuing release" that persisted after CERCLA was enacted. *See Georgeoff*, 562 F. Supp. at 1303. The court rejected Justice's argument, ruling that there must be some post-enactment conduct on the defendants' part in order to consider non-retroactive application of CERCLA. 562 F. Supp. at 1304. The court went on the say that because there was no "control or use of the Dump by [the defendants] after the December 1980 passage of CERCLA," 562 F. Supp. at 1305, CERCLA was being applied retroactively. *See id.* The *Olin* case illustrates that Justice has abandoned its "continuing release" argument in light of the overwhelming judicial authority that permitted CERCLA liability to be imposed retroactively. *See* 927 F. Supp. at 1508 ("The Justice Department has responded somewhat cavalierly to the issue of CERCLA's retroactivity, contending the matter is 'well-settled' and unaffected by *Landgraf*.").

It seems clear from the definition of retroactivity and the abandonment of Justice's "continuing release" argument that CERCLA is being applied retroactively when liability is premised upon conduct which occurred wholly before the enactment date. CERCLA creates a new duty with respect to disposal actions taken prior to enactment. That new duty is to either voluntarily clean up the contamination or face a possible cost recovery action by the government or a private party.

Furthermore, a cost recovery action is very similar to a claim for compensatory damages. A clean-up undertaken by the government or a private party results in a cost to that party. When the responding party sues for recovery of its costs, it is seeking compensation from the entity responsible for the contamination. *Olin* makes this analogy rather clearly.

Although WUWPS and SNUHSA claim that there is no retroactive application here since the costs were incurred after enactment, the fact is that the conduct which caused the expenditure of response costs took place prior to the passage of CERCLA. The definitions of retroactivity seem to speak to the conduct of the defendant, not when the plaintiff incurred a monetary loss. Furthermore, *Landgraf* teaches that the court must consider the conduct which forms the *basis* for the liability. Although GUVS is being sued by WUWPS, the EPA could have just as easily ordered GUVS to clean up. Such an order would be *based* on GUVS's pre-enactment disposal.

In the present case, both SUPS and GUVS engaged in on-site disposal prior to the enactment of CERCLA. In addition, the sale of the site to WUWPS was effected on September 30, 1980, over two months before CERCLA was enacted. Nothing in the facts indicates that either SUPS or GUVS had any contact with the site after the sale to WUWPS. Furthermore, since WUWPS took its waste to an off-site disposal facility, it appears that the chemicals were lying dormant until the contamination was discovered in 1993. Therefore, application of CERCLA to GUVS in this case would clearly be an imposition of retroactive liability subject to the requirements of the three-part test discussed above.

2. Application of the presumption

Once it is determined that a plaintiff seeks to apply a statute retroactively in the absence of express authority to do so, it is generally presumed that Congress did not intend the statute to operate retroactively. *See Landgraf*, 114 S. Ct. at 1505. The presumption serves to assure that Congress will not seek to appease its constituents by passing retroactive laws that unfairly impose liability on "unpopular groups or individuals." *See* 114 S. Ct. at 1497. By requiring clear intent of retroactive effect, the court is merely checking to see if Congress has weighed the benefits of retroactivity against the burdens to be imposed on potential defendants. *See* 114 S. Ct. at 1501.

Some statutes are immune to this presumption. For instance, statutes "conferring or ousting jurisdiction" have been applied retroactively as have laws effecting procedural changes. *See Landgraf*, 114 S. Ct. at 1501-02. The *Georgeoff* court also states that "remedial statutes have always been excepted from this [presumption] and have been applied retroactively." 562 F. Supp. at 1306 n.7. The court then noted that "'[a] remedial statute is generally defined as one which neither enlarges nor impairs substantive rights, but rather relates to the means and procedure for enforcing those rights.'" *Id.* (quoting *Bagsarian v. Parker Metal Co.*, 282 F. Supp. 766, 769-70 (N.D. Ohio 1968)). Despite this definition, some courts, in justifying a broad interpretation, have stated that CERCLA is a remedial statute, though not in the context of a retroactivity analysis. *See e.g.* Catellus Development Corp. v. United States, 34 F.3d 748, 751 (9th Cir. 1994) (noting the remedial nature of CERCLA when considering the scope wastes covered under the statute); United States v. Northeastern Pharmaceutical & Chemical Co., 810 F.2d 726, 743 (8th Cir. 1986) (stating that imposition of strict liability comports with CERCLA's broad remedial purpose).

In this case, the presumption against retroactivity appears to apply to the imposition of CERCLA liability on GUVS. CERCLA is not merely jurisdictional or procedural. Rather, CERCLA creates a potentially heavy liability burden

based on conduct which may have been permissible, even commonplace, prior to enactment. The fact that CERCLA has been characterized as a "remedial" statute does not seem to be consistent with the definition of a remedial statute as that definition has been invoked with respect to retroactive applications. Moreover, the *Landgraf* Court declined to mention remedial statutes as being exempt from this presumption against retroactivity. Therefore, the most prudent course of action for the court to take is to apply the presumption against retroactivity and search the statute and legislative history for enough evidence to rebut the presumption.

3. Has Congress effectively rebutted the presumption?

a. Language of the statute

The presumption against retroactive application of a statute may be rebutted by clear evidence of congressional intent. *See Landgraf*, 114 S. Ct. at 1505 ("If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result."). The court in *Nevada v. United States*, 925 F. Supp. 691 (D. Nev. 1996), clarified this statement by noting that clear congressional intent "does not require a clear statement of congressional intent." *Id.* at 693. The first place to look for evidence of congressional intent is the language of the statute itself. *See Georgeoff*, 562 F. Supp. at 1309. The legislative history should be consulted only if the statutory provisions do not adequately resolve the issue. *See id.*

There are several sections of CERCLA that may be of assistance in determining whether Congress intended CERCLA to have a retroactive effect. The most obvious place to start may seem to be the effective date. President Carter signed CERCLA into law on December 11, 1980. *See* Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability Act ("Superfund") of 1980*, 8 Colum. J. Envt'l L. 1, 35 (1982). CERCLA § 302(a), 42 U.S.C. § 9652(a), states that "[u]nless otherwise provided, all provisions of this chapter shall be ef-

fective on December 11, 1980." *Id.* The Supreme Court asserted in *Landgraf* that such a provision "does not even arguably suggest that it has any application to conduct that occurred at an earlier date." 114 S. Ct. at 1493. However, other courts have noted that CERCLA's enactment date was merely inserted as a reference for ascertaining when certain regulations had to be passed and to dictate when an action may be brought under the statute. *See* United States v. Northeastern Pharmaceutical & Chemical Co., 810 F.2d 726, 733 (8th Cir. 1986).

Another provision which may be used as evidence of congressional intent is § 107, the liability provision. Section 107(f) specifically states that "[t]here shall be no recovery under the authority of subparagraph (C) of subsection (a) [dealing with PRP liability for natural resource damages] of this section where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before December 11, 1980." CERCLA § 107(f)(1), 42 U.S.C. § 9607(f)(1). Sections 107(a)(1)(A), (B), and (D) dealing with recovery of response costs are not so limited. *See* 42 U.S.C. § 9607(a)(1)(A), (B), and (D). In addition, § 111(d) prohibits the use of Superfund monies to remedy natural resources damages where the damage occurred prior to enactment. *See* 42 U.S.C. 9611(d). Some court have accepted the proposition that this negative 9611(d). Some court have accepted the proposition that this negative implication is strong evidence that Congress intended retroactive application of CERCLA with regard to response costs but not natural resources damages. *See e.g.* Nevada v. United States, 925 F. Supp. at 702; United States v. Shell Oil Co., 605 F. Supp. at 1076-77. With respect to the difference in treatment of cleanup costs and natural resources damages, the District of Colorado noted that, since CERCLA's main purpose is to avoid further deterioration of contaminated sites rather than to compensate individuals for completed harms, it made sense to apply CERCLA retroactively to cleanups and not to actions for natural resources damages. *See* United States v. Shell Oil Co, 605 F. Supp. at 1076.

The *Landgraf* Court encountered a negative implication argument similar to the one proffered in CERCLA cases. *Landgraf* involved statutory language to the effect that "unless otherwise provided" the act would take effect "upon enactment." *See* 114 S. Ct. at 1493. Both the petitioner and the Court agreed that the "unless otherwise provided" language of the Civil Rights Act of 1991 referred to a section dealing with a specific disparate impact case and a section dealing with overseas employers. *See* 114 S. Ct. at 1493, 1494. The petitioner argued that this statutory set-up indicated that all other sections not specifically stating when they were effective could be applied retroactively. *See id.* The Court rejected this reading of the statute because "it would be surprising for Congress to have chosen to resolve that question [of retroactivity] through negative inferences drawn from two provisions of quite limited effect." 114 S. Ct. 1493-94.

The *Olin* court decided that the "negative implication" argument was totally rejected by the Supreme Court in *Landgraf*. *See Olin*, 927 F. Supp. at 1509 n.36. Thus, the court refused to consider the inclusion of specific prospective language regarding natural resources as evidence that Congress intended retroactive applicability for cleanup costs. *See id.*

Other language in the statute also provides some guidance. For instance, § 103(c) requires that "any person who owns or operates or who at the time of disposal owned or operated, or who accepted hazardous substances for transport and selected[ ] a facility at which hazardous substances . . . are or have been stored, treated, or disposed of [without a permit or interim status]" notify EPA of "the existence of the facility, specifying the amount and type of hazardous substance[s] to be found there, and any known, suspected, or likely releases . . . ." 42 U.S.C. § 9603(c).

One final statutory source of information regarding the retroactivity of CERCLA is the tense of the verbs used in § 107(a). In *United States v. Northeastern Pharmaceutical & Chemical Co.*, the Eighth Circuit considered the fact that Congress chose to impose liability on any person who "owned or operated" a contaminated facility, "arranged" for transport, or "accepted" hazardous substances to be indicative of

intent to apply CERCLA to actions wholly prior to enactment. *See* 810 F.2d at 733. Other courts have specifically rejected this argument. *See e.g.* Nevada v. United States, 925 F. Supp. at 699 (stating that "[g]iven the especially amorphous legislative development of this section, this Court agrees that comparing verb tenses within the statutory sections does little to advance the retroactivity analysis").

In spite of cases like *Nevada v. United States*, courts should not be so quick to dismiss the use of the past tense. CERCLA was passed, in part, to address contamination resulting from inactive sites. *See* H. Rep. No. 96-1016, pt. 1, at 1 (1980) (noting that the purpose of CERCLA was to "provide authorities to respond to releases of hazardous waste from inactive, hazardous waste sites which endanger public health and the environment . . . [and] to provide for the liability of persons responsible for releases of hazardous waste at such sites"); *see also* Grad, *supra*, at 2. This consideration gives the past tense argument some merit. It does not appear that Congress intended to reach "inactive" sites that had been dumped on the day after enactment, but not those that had been dumped on for the last time the day before enactment.

All of the above-mentioned factors provide some fairly substantial evidence that Congress meant for the statute to have a retroactive effect. The fact that Congress specifically refused to allow for retroactive application where natural resources damage occurred as a result of pre-enactment conduct is particularly persuasive, despite *Olin*'s contention that this argument has been rejected by the Supreme Court. The Supreme Court specifically noted that the two provisions involved in the negative implication regarding the Civil Rights Act were minor provisions. The natural resources recovery authority is, on the other hand, a potentially major source of liability under CERCLA § 107. Furthermore, it seems as though the notification requirements of § 103(c) would lose much of their purpose if Congress did not intend the information to be used to identify contaminated sites and potentially responsible parties. Because notification is necessary only six months after enactment, it is logical to conclude that CERCLA would apply to conduct before enactment.

In sum, the statutory provisions provide fairly strong evidence that Congress intended to reach conduct which occurred before December 11, 1980 when it passed CERCLA. However, a court may not find a clear intent emerging from the above discussion. Therefore, it is necessary to turn to the legislative history for additional guidance. *See Georgeoff*, 562 F. Supp. at 1311.

b. Legislative history

Although the *Olin* court found the legislative history to be of no help, *see* 927 F. Supp. at 1515 (stating that "[t]he most that can be said from the legislative history is that Congress left many questions, including retroactivity, as open ones to be decided later"), other courts have found clear congressional intent among the pre-enactment documents. For example, the court in *Shell Oil* noted that earlier Senate amendments to the bill explicitly permitted recovery of pre-enactment response costs. *See* 605 F. Supp. at 1078. Although this amendment was never adopted, the court noted that its main effect is present in the limitation on recovery of natural resources damages. *See* 605 F. Supp. at 1079. Furthermore, the *Nevada* court pointed out that the House and the Senate used the failure of existing statutes regulating hazardous waste to deal with "abandoned and inactive hazardous waste sites" and the policy against having the public pay for the cleanup as the reason for enacting CERCLA. *See* 925 F. Supp. at 703, 704.

The *Georgeoff* court provided a few examples of legislative history which may shed some light on the retroactivity issue. First, the court noted that the legislative history demonstrates that Congress specifically included "inactive" hazardous waste sites within the scope of CERCLA. *See* 562 F. Supp. at 1311. Finally, the *Georgeoff* decision looked to the fact that lawsuits involving contamination resulting from pre-enactment conduct would be necessary to avoid depleting the Superfund too rapidly as evidence that Congress meant to apply CERCLA retroactively. *See* 562 F. Supp. at 1313. *Georgeoff* also relied on numerous statements from members of Congress which indicated that sites that were contaminated

prior to enactment were to be cleaned up using industry as the funding source. *See* 562 F. Supp. at 1312. It may also be noted that an early House version of CERCLA, H.R. 7020, originally contained a statement that the statute was to apply retroactively. However, the final version of CERCLA, the language of which came principally from the Senate, *see e.g.* United States v. Shell Oil, 605 F. Supp. at 1077, did not contain this provision. *See id.*

In sum, the court should conclude that a retroactive application of CERCLA in this case is not only requested, but is also properly authorized by Congress. Taken in conjunction with the language of the statute, the legislative history supports a finding that Congress clearly intended a retroactive application of CERCLA where contamination resulted from pre-enactment conduct. Although Congress could have made its aim easier to discern, given the fact that it was written and passed quickly, this lack of clarity is not surprising. Retroactive application of CERCLA was a consideration, however, and it appears Congress intended this result with respect to costs incurred cleaning up pre-enactment contamination.

C. Due Process Concerns

Even if it is clear that Congress intended a statute to have retroactive effect, the application of the statute cannot violate the defendant's rights under the Due Process clause of the Fifth Amendment. The Fifth Amendment states that a person shall not "be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

"Legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and [ ] the burden is on the one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational manner." Usery v. Turner Elkhorn Mining Co. 428 U.S. 1, 15 (1976). Even if a statute operates retroactively, that retroactive effect does not necessarily offend due process. *See id.* at 16. In order to pass constitutional muster, the statute merely need be "rationally

related to a valid constitutional purpose." *See* United States v. South Carolina Recycling & Disposal, Inc., 563 F. Supp. 984, 997 (D.S.C. 1984).

At least two courts have squarely addressed whether a retroactive application of CERCLA violates due process. In *United States v. South Carolina Recycling & Disposal, Inc.*, the court held that CERCLA satisfied the rational basis requirements set out by the Supreme Court in *Turner Elkhorn*. First, the court noted that CERCLA's purpose was to deal with the environmental dangers posed by inactive hazardous waste sites. *See* 563 F. Supp. at 997-98. Second, the court pointed to the fact that the legislature intended the primary financial burden of cleaning up these sites to be borne by the parties responsible for the contamination. *See* 563 F. Supp. at 998. Finally, the court concluded that CERCLA's scheme represents a rational method of achieving the goals developed by the legislature. *See id.* In reaching its conclusion, the court was conscious of the fact that it is not a function of the judiciary to second guess whether the legislature passed the best statute to address the problem, but only whether the statute was constitutional. *See id.* A similar result was reached by the Eighth Circuit in *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726 (8th Cir. 1986).

The reasoning of the *South Carolina* and *Northeastern Pharmaceutical* courts is sound. The rational basis test is a fairly easy one to meet. While the parties may not have anticipated the exact liability incurred under CERCLA, it is reasonable to expect to have to compensate another for injuries caused by one's actions. While Congress could have paid for the cleanups through a new tax imposed on everyone, it is not for a court to determine if Congress chose the best method possible; any permissible method passes the test set out by the Supreme Court in *Turner Elkhorn*.

II. DOES APPLYING CERCLA IN THIS CASE VIOLATE THE COMMERCE CLAUSE OF UNITED STATES CONSTITUTION?

The second issue to be considered by the court is whether applying CERCLA to the facts in this case exceeds Congress's authority under the Commerce Clause, particularly in light of the recent Supreme Court decisions in *United States v. Lopez*, 115 S. Ct. 1624 (1995) and *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996). The court should probably conclude that applying CERCLA here is constitutional since the activity at issue is an economic activity regulated as part of a comprehensive scheme of regulation of hazardous waste. The fact that the contamination here did not and likely never will not cross state lines does not require a different result. The *Lopez* decision did not signify a change in Commerce Clause jurisprudence, which permits incident regulation of local activities substantially affecting interstate commerce if taken in the aggregate. Instead, *Lopez* reaffirmed the Court's prior cases and merely refused to allow further expansion of its interpretation of the Constitution. Finally, since GUVS is not an instrumentality of the State of New Union, the sovereign immunity issues raised in the *Seminole* case are not present here.

A. May Congress require an entity to remediate a site under CERCLA where the contamination allegedly caused by that entity is purely local in its effects?

The United States Constitution grants to Congress the power to "regulate Commerce . . . among the several states . . . ." U.S. CONST., art. I, § 8, cl. 3. Over the years, courts have struggled over how to interpret this particular grant of power. *See Lopez*, 115 S. Ct. at 1634 (Kennedy, J. concurring). Prior to 1937, Congress's commerce power was restricted to regulation of only activities which were directly related to interstate commerce. *See* Lopez, 115 S. Ct. at 1628. However, the Supreme Court's decision in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), broadened the power substantially when it held that intrastate activities which

"have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions' are within Congress' power to regulate." Lopez, 115 S. Ct at 1628 (quoting NLRB v. Jones & Laughlin Steel, 301 U.S. at 37). Moreover, the Supreme Court has stated that "[l]egislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality . . . ." Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976).

A few years after establishing the new standard by which to judge laws enacted by Congress pursuant to its Commerce Clause authority, the Court clarified the true reach of the *Jones & Laughlin* test in *Wickard v. Filburn*, 317 U.S. 111 (1942). In *Wickard*, a farmer had set aside, for his own personal consumption, a portion of his wheat crop. *See* 317 U.S. 114. When the Secretary of Agriculture attempted to penalize the farmer for exceeding an assigned quota limiting the amount of wheat he could grow, the farmer countered that the law was an unconstitutional exercise of Congress's commerce power. *See* 317 U.S. at 113-14. The substance of the farmer's claim was that his use of the wheat amounted merely to an indirect effect on commerce because his activities had only local effects. *See* 317 U.S. at 119.

The *Wickard* Court rejected the farmer's attempts to distinguish between direct and indirect effects on interstate commerce and between production or manufacture and sale of goods. *See* 317 U.S. at 119-20. Instead, the court explained that

> even if . . . [the] activity is local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this is irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."

317 U.S. at 125. Regarding the allegation that the farmer's actions had only local effects, the Court replied that even though the farmer's "contribution to the demand for wheat may be trivial by itself, [that] is not enough to remove him

from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." 317 U.S. at 127-28. The Court concluded its Commerce Clause discussion by noting that with the "wisdom, workability, or fairness of the plan of regulation [the Court has] nothing to do." *See* 317 U.S. at 129.

In 1968, the Court responded to the concern that the *Wickard* decision worked to justify any regulation of intrastate activities, no matter how little they impacted interstate commerce. *See* Maryland v. Wirtz, 392 U.S. 183, *overruled on other grounds*, National League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by*, Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985). In *Maryland v. Wirtz*, the Court explained that "[n]either here nor in *Wickard* has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities . . . [however] where a general regulatory scheme bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence" 392 U.S. at 197 n.3.

In 1995, the Supreme Court in *United States v. Lopez*, 115 S. Ct. 1624 (1995), reviewed the history of Commerce Clause jurisprudence and categorized Congress's authority into three broad areas. *See* 115 S. Ct. at 1627-30. According to the *Lopez* Court, Congress may pass laws regulating "the use of the channels of interstate commerce." *See* 115 S. Ct. at 1629 (citing Perez v. United States, 402 U.S. 146 (1971)). "Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." *Id.* Third, Congress can legislate regarding "activities having a substantial relation to interstate commerce." *See* 115 S. Ct. at 1629-30 (citing *Jones & Laughlin Steel*, 301 U.S. at 37). With respect to this last category, the Court held that the activity must "'substantially affect[ ]' interstate commerce." *See* 115 S. Ct. at 1630.

The statute at issue in the *Lopez* case was section 922(q) of the Gun-Free School Zones Act of 1990 which criminalized

possession of a gun in a defined school zone. *See* 115 S. Ct. at 1626. Following its discussion of areas within Congress's commerce power to regulate, the Court concluded that the challenged statutory provision did not regulate the channels of interstate commerce or people or things in interstate commerce, but would have to be covered under the third category to pass constitutional muster. *See* 115 S. Ct. at 1630. The Court noted that most areas covered under this last category were economic activities such as mining (*Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 U.S 254 (1981)) and home-grown wheat (*Wickard v. Filburn*, *supra*). 115 S. Ct. at 1630 (noting that *Wickard* represented the outer boundary of Congress's authority under the Commerce Clause). The Court decided that section 922(q) did not involve commerce in any way and was not "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *See* 115 S. Ct. at 1630-31. Thus, the Court concluded that the statute could not be found constitutional "under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *See* 115 S. Ct. at 1631.

The *Lopez* Court also found that the statute criminalizing possession of a gun in a school zone did not provide for a "jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." *See id.* As an example of such a "jurisdictional element," the *Court* pointed to the statute at issue in *United States v. Bass*, 404 U.S. 336 (1971). *See* 115 S. Ct. at 1631. In *Bass*, the defendant was arrested under a statute which criminalized the "recei[pt], possess[ion], or transport[ation] in interstate commerce . . . any firearm" by certain classes of persons. *See* 404 U.S. at 337. With regard to the connection to interstate commerce, the *Bass* Court stated that such a showing was required in each case since criminal matters were traditionally within the realm of state regulation. *See* 404 U.S. at 349-50. The *Bass* Court gave as an example of a situation which would meet this requirement a

case involving the receipt of a firearm which had "previously traveled in interstate commerce." *See* 404 U.S. at 350. In the final sentence of its opinion, the *Bass* Court closed with the reminder that "consistent with our regard for the sensitive relation between federal and state criminal jurisdiction, our reading preserves as an element of all the offenses a requirement suited to criminal jurisdiction alone." 404 U.S. at 351.

After noting the absence of a jurisdictional element that the *Bass* Court required for criminal statutes, the *Lopez* Court considered that there were no express legislative findings that the possession of guns in school zones affects interstate commerce. *See* 115 S. Ct. at 1631. The Court was careful to caution that such findings were not necessary, but would merely be helpful in cases where the connection to interstate commerce was not apparent. *See* 115 S. Ct. at 1631-32.

Turning to the specifics of the Gun-Free School Zones Act, the Court considered the government's claims that possession of a gun in a school zone substantially affected interstate commerce through (1) an increase in insurance costs and (2) a fear of crime that curbs travel and diminishes the ability of the educational process to create productive citizens who will stimulate the economy. *See* 115 S. Ct. at 1632. The *Lopez* Court found that this type of analysis would place virtually no limit on Congress's powers because nearly everything could then somehow be connected to commerce. *See id.*

In the concluding paragraph of its analysis, the *Lopez* Court addressed the current status of Commerce Clause jurisprudence. *See* 115 S. Ct. at 1634. The Court noted that, although courts have become increasingly liberal in permitting Congress to regulate under the Commerce Clause, a further broadening of that power was inappropriate. *See id.*

The Southern District of Alabama recently had the chance to consider whether the Supreme Court's opinion in *United States v. Lopez* signaled a significant enough change in Commerce Clause jurisprudence to sustain a finding that the application of CERCLA in cases where there were no obvious effects on interstate commerce was unconstitutional. *See* United States v. Olin Corp., 927 F. Supp. 1502 (S.D. Ala.

1996). In *United States v. Olin Corp.*, the court held that where contamination resulting from a release of hazardous substances was so localized that it would not likely spread beyond the boundaries of the defendant's property, the defendant was not subject to liability under CERCLA. *See id.* The constitutionality of applying CERCLA in the *Olin* case was not initially raised by the parties; rather, the court, *sua sponte* required that the parties brief the issue before the court would even consider approving a consent decree jointly proposed by EPA and Olin Corp. *See* 927 F. Supp. at 1506-07.

The proposed consent decree addressing the contamination gave nearly unlimited power to EPA to supervise the remediation. *See id.* at 1505. Olin claimed that it agreed to this lopsided arrangement for purely business reasons, eager to get the job completed. *See id.* Although the state's Department of Environmental Management sought to oversee the cleanup, EPA declined to yield its authority. *See id.* When the parties sought to have the consent decree entered, the court requested a briefing of the issue of CERCLA's retroactive application and whether applying CERCLA in this case violated the Commerce Clause. *See* 927 F. Supp. at 1507.

The court addressed the Commerce Clause question following its discussion of retroactive effects. After an overview of Commerce Clause cases, the *Olin* court proceeded to analyze CERCLA in light of the *Lopez* decision. The court first concluded that CERCLA liability fell under the third category of Commerce Clause regulation, activities which affect interstate commerce. *See* 927 F. Supp. at 1531. With respect to this category of regulation, the court concluded, however, that the activity must not only substantially affect interstate commerce, but that *Lopez* also required that the activity be an economic activity. *See* 927 F. Supp. at 1532. The court also found significant the fact that the *Lopez* Court did not find that section 922(q) was a constitutional regulation of things in interstate commerce or that the total effect of all possessions of guns in school zones substantially affects interstate commerce. *See id.* Finally, without discussion, the *Olin* court decided that *Lopez* also required a jurisdictional ele-

ment for case-by-case consideration of the effect on interstate commerce. *See id.*

With respect to the facts in its own case, the *Olin* court found that none of the requirements of its test were met. First, the court held that, since the plants at issue were not operational anymore, there was no economic activity. *See id.* Second, the court decided that the application of CERCLA in this case was really an exercise of a "kind of national police power rejected by *Lopez*." *See* 927 F. Supp. at 1533. Finally, the court ruled that, even if the above requirements were met, the lack of a jurisdictional element was fatal. *See id.*

At least one court has found the reasoning in *Olin* to be completely erroneous. In *United States v. NL Industries, Inc.*, 936 F. Supp. 545 (S.D. Ill. 1996), the Southern District of Illinois critically analyzed the *Olin* court's opinion and concluded that CERCLA does not violate the Commerce Clause. *See* 936 F. Supp. at 563. The *NL Industries* court found that CERCLA did indeed regulate an economic activity since disposal of hazardous waste was part of a larger economic enterprise, such as the manufacture of goods. *See* 936 F. Supp. at 963. Furthermore, the court decided that CERCLA "establishes a comprehensive program establishing a mechanism for responding to releases of hazardous waste and assessing liability for such releases." *See* 936 F. Supp. at 557. Thus, concluded the court, the application of CERCLA is not like criminal liability under the Gun Free School Zone's Act. *See* 936 F. Supp. at 562-63.

The court in *NL Industries* also took exception to the *Olin* court's finding that *Lopez* required a jurisdictional element for case-by-case analysis of effects on interstate commerce. *See* 936 F. Supp. at 560. Contrary to *Olin*'s assertion, the court reasoned that "had such a jurisdictional element been required, the *Lopez* Court's inquiry regarding the legislative findings related to interstate commerce would have been superfluous." *Id.* Furthermore, the *NL Industries* court noted that one of the reasons Congress enacted CERCLA was to combat "midnight dumping," which often involved dumping in other states. *See* 936 F. Supp. at 562.

Overall, the *NL Industries* court concluded that CERCLA did not violate the Commerce Clause and that *Olin* seriously misconstrued the *Lopez* decision. In sum, the court found that CERCLA was part of a comprehensive system to regulate hazardous waste resulting from economic activities and that these activities had a substantial effect on interstate commerce.

Turning to the facts of the action filed by WUWPS against GUVS, the first task is to ascertain the correct test for evaluating Congress's attempt to regulate under the Commerce Clause, noting that an economic regulation is presumed to be constitutional. *Lopez* makes this test rather clear. First, Congress can control the channels of interstate commerce. Second, Congress may regulate people and things in interstate commerce. Finally, Congress has the power to pass legislation which regulates any activity which substantially affects interstate commerce, even though an individual effect is minuscule and has only local ramifications. In this latter situation, it is enough if all of the individual activities together would have a substantial effect on interstate commerce.

Contrary to the *Olin* court's conclusion, the Supreme Court has not stated that these activities must be economic activities. The regulated activity can be covered as part of an overall scheme of regulation; in fact, the *Lopez* Court indicated that it could have upheld section 922(q) of the Gun Free School Zones Act on this basis. Furthermore, as pointed out by the court in *NL Industries*, the disposal of hazardous wastes is inherently economic. Under the *Olin* court's assertion that there is no economic activity since the plants are no longer in use, there could be no liability where a company dumps all of its hazardous waste in its backyard and abandons its facilities and the contamination is not discovered before the abandonment. Under the same reasoning, the farmer that consumes his wheat immediately after harvest and then sells his farm cannot later be held liable for exceeding his quota. Such a result makes no sense.

As for the requirement of a jurisdictional element, the *NL Industries* court correctly observes that such an inquiry is

undertaken as an additional test if the connection to interstate commerce is unclear. The *Bass* Court made clear that such a requirement is only necessary to find a criminal statute constitutional. CERCLA is a civil statute imposing only monetary burdens. Hence, a jurisdictional element is not needed to pass constitutional muster.

Finally, the fact that the contamination of the property at 123 Laurel Street is purely local and GUVS's activities at the site had only local effects is not enough to render application of CERCLA unconstitutional. The *Lopez* Court specifically approved of cases such as *Wickard v. Filburn* where purely local effects aggregated together affect interstate commerce. Regarding CERCLA, it cannot be said that only local contamination does not substantially affect interstate commerce. If a small company which does no business in interstate commerce dumps hazardous substances on its property, it is avoiding the substantial cost of disposing of those substances properly. Taken together, each such instance could have a profound effect on interstate commerce when these small businesses are able to offer their product or services at a lower cost. Putting just a few of these businesses in each of the fifty states could cause economic effects in the national market.

B. Does the Supreme Court's decision in *Seminole Tribe of Florida v. Florida* require a finding that GUVS may not be sued by a private party under CERCLA?

Even if government is not exceeding its authority under the Commerce Clause by imposing CERCLA liability when contamination is purely local in scope and effect, the question still remains whether GUVS, a state-chartered entity may be sued under CERCLA following the Supreme Court's decision in *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996) which overturned a prior plurality decision permitting a state to be sued under CERCLA by a private citizen. Although GUVS has raised this issue, GUVS has also agreed that it is not an agency of the State of New Union and that the State could have chosen to make GUVS such an instrumentality.

Therefore, the *Seminole* case is inapplicable to the current situation.

In *Seminole*, a federal law requiring Indian tribes and states to enter into compacts regarding gambling on Indian lands was at issue. *See* 116 S. Ct. at 1119. The law permitted an Indian tribe to sue a state which refused to bargain in good faith to create a compact. *See id.* The Seminole Tribe attempted to enter into a compact with the state of Florida, and, when Florida refused to negotiate, brought a lawsuit against the state. *See* 116 S. Ct. 1121. Florida argued that it had sovereign immunity under the Eleventh Amendment and could not be sued. *See id.*

The Court stated that in order for Congress to abrogate the states' sovereign immunity, it must (1) make its intent clear and (2) be exercising a valid power under the Constitution. *See* 116 S. Ct. at 1123. Given the plain language of the statute authorizing suits by tribes against states, the Court concluded that this first part of the test had been met. *See* 116 S. Ct. at 1124. With respect to the second part of the test, the Court noted that the only time the Court had held the Congress could abrogate sovereign immunity was under the Fourteenth Amendment (*Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)) and the Interstate Commerce Clause (*Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)). *See* 116 S. Ct. at 1125. The Seminole Tribe was asking the Court to add the Indian Commerce Clause to the list of powers through which Congress could abrogate sovereign immunity. *See id.*

Rather than accepting the tribe's invitation to extend Congress's abrogation power, the Court instead overruled the plurality *Pennsylvania v. Union Gas Co.*. In *Union Gas*, the Court had permitted a state to be sued under CERCLA by a private party. *See* Pennsylvania v. Union Gas, 491 U.S. 1 (1989). The *Union Gas* plurality reasoned that, since Congress was given a broad power under the Interstate Commerce Clause, then it followed that it could take away the states' sovereign immunity in order to exercise that power. *See* 491 U.S. at 19-20. The justification given for this finding of congressional authority was that the states agreed to be sued when they ratified the Constitution. *See* 491 U.S. at 20.

In overturning *Union Gas*, the *Seminole* Court stated that "[e]ven when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." 116 S. Ct. at 1131. Furthermore, the Court found that permitting an abrogation of sovereign immunity under the Commerce Clause would amount to an impermissible expansion of federal jurisdiction under Article III. *See* 116 S. Ct. at 1128.

In this case, however, the State of New Union is not being directly affected. There has been a legal opinion that GUVS is not an arm of the State of New Union and that the State could have created such an institution but chose not to. Therefore, the *Seminole* case has no direct bearing on this case. Moreover, the fact that New Union could have made GUVS a state agency but chose not to indicates that New Union did not wish to provide GUVS with any immunity from litigation. Finally, although GUVS argues that *Seminole* implies that a court should think twice before allowing an entity chartered by a state to be sued, the Court did not appear to extend its ruling beyond an actual governmental entity.

III. MAY WUWPS, A PRP, BRING A COST RECOVERY ACTION OR IS IT LIMITED TO A CONTRIBUTION ACTION?

The third issue to be considered by the court is whether WUWPS, a potentially responsible party (PRP) under CERCLA by virtue of its ownership of contaminated property, may bring a costs recovery action under CERCLA § 107 against GUVS, the former owner of the land and another PRP, for expenses incurred in responding to the contamination or whether GUVS is limited to a contribution claim under CERCLA § 113(f). Specifically, the court must decide if a PRP may avail itself of CERCLA § 107(a) when that section permits "any other person" (besides a federal, state, or local governmental entity) who has incurred response costs to bring a cost recovery action.

Resolution of this issue will determine whether WUWPS can impose joint and several liability on GUVS, thereby allocating to GUVS total liability for the orphan shares created by bankrupt SUPS. If the claim is determined to be solely a § 107 claim, § 107(a) seems to provide WUWPS with full recovery since no mention is made of diminishment of recovery due to plaintiff's liability. As discussed below, this argument has not been generally accepted. If the claim is found to be purely a § 113 claim, § 113(f) provides for equitable allocation of costs, including orphan shares, among all liable parties. Finally, if the claim involves both § 107 and § 113, the orphan shares can be attributed to the plaintiff and defendant PRPs or just the defendant PRPs. Thus, the real problem is whether the plaintiff PRP can escape liability for orphan shares by voluntarily cleaning up and then suing the other PRPs.

It is important to note that WUWPS voluntarily initiated a cleanup of the contaminated site, has not been ordered by the EPA or any other governmental entity to perform any cleanup action, and has not been formally adjudged to be liable under CERCLA. WUWPS would be a PRP solely by virtue of the fact that it is the current owner of the contaminated property. GUVS, on the other hand, contributed to the contamination by dumping the hazardous chemicals in a ditch on the land it formerly owned.

A. Is the CERCLA § 107 language clear and unambiguous on its face and when read in context with the contribution provisions of § 113?

The Supreme Court has never actually decided whether a PRP can bring a cost recovery action under CERCLA § 107. *Cf.* Pinal Creek Group v. Newmont Mining Corp., 926 F. Supp. 1400 (D. Ariz. 1996). However, the Court has indicated in dicta that CERCLA § 107 and CERCLA § 113 both provide remedies for a PRP. *See* Key Tronic Corp. v. United States, 114 S. Ct. 1960, 1966 (1994). In *Key Tronic*, the petitioner brought an action for contribution to recover part of its payment to EPA in settlement of EPA's § 107 claims for recovery of remedial costs incurred at a contaminated site. *See* 114 S.

Ct at 1963. In addition, the petitioner also brought a cost recovery action for funds it had expended prior to the settlement. *Id.* The cost recovery claims included requests for recovery of attorney fees and litigation costs. *Id.* The main issue in the case was whether attorney fees were recoverable under CERCLA, *see* 114 S. Ct at 1964, but the court outlined the history of the creation of private causes of action under CERCLA as part of its decision. *See* 114 S. Ct. at 1965-66. In the course of this discussion, the Court observed:

> [a]n amendment to § 107 itself, for example, refers to 'amounts recoverable in an action under this section.' . . . The new contribution section also contains a reference to a 'civil action . . . under section 107(a).' . . . Thus the statute now expressly authorizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in § 107.

Id. (citations omitted).

The Court did not illuminate, however, on the extent of the overlap of §§ 107 and 113. That question is presented here.

The analysis of the issue must begin with an examination of the plain meaning of the statute. *See* Bailey v. United States, 116 S. Ct. 501, 506 (1995). When the terms of a statute are not defined, they are to be given their ordinary meanings. *See* Smith v. United States, 508 U.S. 223, 228 (1993). Furthermore, if the statute is remedial in nature, then a broad interpretation is called for to give effect to the remedial purpose of the law. *See* Peyton v. Rowe, 391 U.S. 54, 65 (1968). However, words do not exist in a vacuum; a statutory provision must be examined in the context of the statute as a whole and no section should be construed a way that would render another section meaningless. *See* Richards v. United States, 369 U.S. 1, 11 (1962).

In wrestling with the issue of whether a PRP may sue under § 107, four basic approaches to interpreting the language of CERCLA have been used. Courts have (1) looked to the language of § 107(a)(4) in isolation, (2) examined § 107(a)(4) in combination with § 113(f), (3) placed priority on

the language in § 113(f), and (4) analyzed the problem by attempting to reconcile the language in the statute of limitations provisions of § 113(g). While some courts adopt only one of these approaches, others use two or more in combination.

One case which used the first method and examined the "any . . . person" language of § 107(a)(4) in isolation was the District of Arizona in *Pinal Creek Group v. Newmont Mining Corp.*, 926 F. Supp. 1400 (D. Ariz. 1996). With regard to the language of CERCLA § 107(a)(4)(B), the court stated that "any other person" means "any other person" and the word "innocent" should not be interposed between the words "any" and "person," particularly since no such restriction appears in reference to government plaintiffs granted standing to sue under § 107(a)(4)(A) or with respect to any enumerated defenses. *See* 926 F. Supp. at 1405-06. This rationale is similar to that employed by several other courts, such as *Barmey Aluminum Corp. v. Doug Brantley & Sons, Inc.*, 914 F. Supp. 159 (W.D. Ky. 1995) (noting that since remedial statutes are to be construed broadly, PRPs should be permitted to sue under § 107); *Idylwoods Assoc. v. Mader Capital, Inc.*, 915 F. Supp. 1290 (W.D.N.Y. 1996); *neumo Abex Corp. v. Bessemer and Lake Erie R.R. Co., Inc.*, 921 F. Supp. 336 (E.D.Va. 1996) (holding defendants jointly and severally liable for all but plaintiff's share, including orphan shares); *Charter Township of Oshtemo v. American Cyanamid Co.*, 910 F. Supp. 332 (W.D.Mich. 1995); and *Companies for Fair Allocation v. Axil Corp.*, 853 F. Supp. 575 (D. Conn. 1994).

The second method of statutory analysis used to determine who has standing to sue under § 107 is to look at §§ 107 and 113 in combination to try to determine how those provisions relate to each other. There appears to be three schools of thought in this respect. Some courts maintain that PRPs may bring cost recovery actions under § 107 but remain subject to contribution claims by other PRPs. *See* Companies for Fair Allocation v. Axil Corp., 853 F. Supp. 575, 580 (D. Conn. 1994). Another group holds that only "innocent parties" may sue under § 107. These courts have varying definitions of the term "innocent parties." *See e.g.* United Technologies Corp. v.

Browning-Ferris Industries, Inc., 33 F.3d 96, 99 & n.8 (1st Cir. 1994), *cert. denied* 115 S. Ct. 1176 (1995) (generally, a PRP is limited to contribution, however, "a PRP who spontaneously initiates a cleanup without governmental prodding might be able to pursue an implied right of action for contribution under 42 U.S.C. § 9607(c)"); Akzo Coatings v. Aigner Corp., 30 F.3d 761, 764 (7th Cir. 1994) (defendant limited to contribution action under § 113 because it "is not, for example, a landowner forced to clean up hazardous materials that a third party spilled onto its property or that migrated there from adjacent lands"); Borough of Sayerville v. Union Carbide Corp., 923 F. Supp. 671, 679 (D.N.J. 1996) ("response cost recovery action under section 107(a) is available only to an innocent party, a plaintiff who does not bear CERCLA liability). Finally, one last group permits a PRP to sue under § 107 but holds that the court itself must allocate costs on an equitable basis as permitted under § 113. *See e.g.* Control Data Corp. v. S.C.S.C. Corp., 53 F.3d 930 (8th Cir. 1995) ("Recovery of response costs by a private party under CERCLA is a two-step process); In re Dant & Russell, Inc., 951 F.2d 246, 249 (9th Cir. 1991). ("Initially, a plaintiff must prove that the defendant is a liable party under CERCLA. Once that is accomplished, the defendant's share of liability is apportioned in an equitable manner."); Amoco Oil Co. v. Borden, Inc., 889 F.2d 664 (5th Cir. 1990) (stating that "once liability is established, the court must determine . . . which costs are recoverable . . . [and] ascertain, under CERCLA's contribution provision, each responsible party's equitable share of the cleanup costs").

The third method of analyzing CERCLA to determine if a PRP may bring a cost recovery action under § 107 is to give the language of § 113 priority. Courts using this method reason that the plain legal meaning of the term "contribution" in § 113 stands for a suit brought by one liable party against another liable party in order to equitably allocate the damages between the plaintiff and the defendant. *See e.g.* United Technologies Corp. v. Browning-Ferris Industries, Inc., 33 F.3d 96, 99 (1st Cir. 1996) (contribution action "refers to a claim 'by and between jointly and severally liable parties for

an appropriate division of payment one of them has been compelled to make'"); United States v. Colorado & E. R.R. Co., 50 F.3d 1530, 1536 (10th Cir. 1995) (when "both parties are PRPs by virtue of their past or present ownership of the site [ ], any claim that would reapportion costs between these parties is the quintessential claim for contribution").

Finally, some courts have reviewed the statutes of limitations imposed by § 113 (g)(2)-(3) to determine if a PRP was intended to have standing to sue under § 107. However, this method has led to inconsistent results. For example, it may be argued that if PRPs who voluntarily clean up are limited to suing under § 113, there is no time limitation applicable to their claim because the three-year period for § 113 runs from the date of a judgment, order, or settlement, none of which had occurred. *See* Pinal Creek Group v. Newmont Mining Corp., 926 F. Supp. 1400, 1406 (D. Ariz. 1996). On the other hand, one might reason that permitting PRPs to use the six-year statute of limitations for § 107 actions renders the three-year period for contribution actions meaningless. *See e.g.* United Technologies Corp. v. Browning-Ferris Indus., 33 F.3d 96, 101 (1st Cir. 1994).

Despite several cases which adopt a more narrow approach, it is clear that a proper statutory analysis will involve looking at the plain meaning of the words in §§ 107 and 113(f)-(g) and attempting to determine how those provisions fit together harmoniously. It is possible to arrive at a solution where all the words are given their plain meanings and no provisions are rendered superfluous. That solution involves permitting a PRP who initiates a clean-up to sue other PRPs under § 107 and obtain joint and several liability, but requiring a court, upon assertion of a counterclaim for contribution, to equitably allocate the costs not attributable to the plaintiff PRP's actions among the defendants.

The above interpretation of the statute works best for several reasons. First, it recognizes that a cost recovery action can be brought by "any . . . person" who incurred response costs, but preserves a defendant's right to seek contribution from its co-defendants, other PRPs not sued by the plaintiff, and the plaintiff itself. Thus, both § 107 and

§ 113 have a purpose and one section is not eradicated by the other. The plaintiff would utilize § 107 in an initial complaint and the defendant would use § 113 in a counterclaim, cross claim, third party claim, or any combination of the three. Second, the statutes of limitations are both effective. The remediating plaintiff that actually incurred the clean-up costs would have six years to sue other PRPs while those defendants who are sued would have three years from the date of the judgment to search for other PRPs with whom to share the burden. Finally, providing some protection to the PRP who voluntarily cleans up provides an incentive for quick action by those responsible for the contamination. *See e.g.* Pneumo Abex Corp. v. Bessemer & Lake Erie R.R. Co., 921 F. Supp. 336, 347 (E.D.Va. 1996); Companies for Fair Allocation v. Axil Corp., 853 F. Supp. 575, 579 (D. Conn. 1994).

B. Does the legislative history of CERCLA provide any guidance as to Congress's intent in enacting § 107 and § 113?

If the language itself does not fully resolve an issue of statutory interpretation, courts must look to legislative history for guidance. *See* Blum v. Stenson, 465 U.S. 886, 896 (1984). Although the language of CERCLA §§ 107 and 113 can be reconciled to produce a harmonious result, the lack of a clear mandate from Congress necessitates a check of the legislative history to determine whether the legislature intended a specific result.

CERCLA was initially enacted in December 1980. *See* Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L No. 96-510, 94 Stat. 2808 (December 11, 1980). The purpose of CERCLA was to "provide authorities to respond to releases of hazardous waste from inactive, hazardous waste sites which endanger public health and the environment . . . [and] to provide for liability of persons responsible for releases of hazardous waste at such sites." H. Rep. No. 96-1016, pt. 1, at 1 (1980). Due to the harshness of imposing joint and several liability on PRPs (a PRP responsible for one percent of the contamination at a site might end up liable for all the remedial costs incurred at that

site), courts implied a right to contribution under § 107 so that liable parties might seek to shift some of the monetary burden to other liable parties. *See e.g.* Pinal Creek Group v. Newmont Mining Corp., 926 F. Supp. at 1404. In 1986, Congress included a contribution provision (CERCLA § 113) in the Superfund Amendments and Reauthorization Act (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified as amended in various sections of Title 42 of the United States Code).

The legislative history of § 113 indicates an acceptance of prior judicial attempts to resolve the § 107/§ 113 problem. The House Energy and Commerce Committee stated that § 113 "clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the cleanup or cost that may be greater than its equitable share under the circumstances." H.R. Rep. 99-253, pt. 1 at 79, *reprinted in* 1986 U.S.C.C.A.N. 2835, 2861.

Generally, courts have not looked to the legislative history to ascertain whether a PRP may bring a cost recovery action. Courts supporting such a cost recovery action have found the wording of the statute to be dispositive and rely little, if at all, on the legislative history . *See e.g. Pinal Creek*, 926 F. Supp. at 1405 (CERCLA "unequivocally grants standing to 'any . . . person' who has incurred necessary response costs . . ."). Likewise, courts finding no right of action for a PRP under § 107 generally reason that the contribution provision speaks for itself and the plain meaning of "contribution" governs. *See e.g.* United States v. Colorado & E. R.R. Co., 50 F.3d 1530, 1535 (when "both parties are PRPs . . . any claim that would reapportion costs . . . is the quintessential claim for contribution"). However, at least one court turned to the legislative history for additional support. *See* United Technologies v. Browning-Ferris, 33 F.3d at 100 (noting that "Congress, in enacting SARA, sought to codify case law . . . and the cases decided to that point without exception, employed the legal term contribution in its traditional sense to cover an action [between PRPs]").

Although the cases have failed to rely on the legislative history and have, instead, based their rulings upon the language of CERCLA, one might argue that the fact that courts have reached varied results indicates that the language is unclear. Such disparate results may justify consideration of the legislative history. Unfortunately, this history does little to help the situation. On the one hand, the point made by the *United Technologies* court that pre-SARA case law implied a right to contribution and not cost recovery and that Congress sanctioned this result in enacting § 113(f) as part of SARA is persuasive. On the other hand, the fact that the legislative history mentions contribution in the context of a person who "has been held jointly and severally liable" indicates that a PRP who has not had any liability formally imposed upon him through an order or adjudication is not limited to contribution. The latter position, which is the situation in the present case, seems to be the best reading of the legislative history.

In conclusion, the most natural reading of the statute and its legislative history seems to indicate that a PRP, such as WUWPS, which has not had any liability formally imposed upon it, may bring a cost recovery action against another PRP under § 107 of CERCLA. Regardless of whether the defendant PRP institutes a counterclaim for contribution, the court should use its equitable powers to allocate to defendant all those costs not specifically attributable to the actions of the plaintiff. This interpretation of the statute gives effect to both the cost recovery and contribution sections as well as both the three-year and six-year statutes of limitation. Such a result also comports with public policy by furthering the aim of CERCLA to promote quick cleanup of contaminated sites. *See e.g. Pinal Creek*, 926 F. Supp. 1407 (noting that "this two-step framework satisfies both of CERCLA's goal: it provides an array of incentives for private parties to initiate prompt environmental cleanups; and it ensures that cleanup costs will be equitably allocated among responsible parties").

IV. MAY SNUHSA RECOVER ITS MEDICAL MONITORING COSTS?

The fourth and final issue to be decided by the court is whether SNUHSA may recover the costs it has incurred in monitoring the Marinas for ill health effects resulting from exposure to water and soil contaminated with photo processing chemicals. The key to the analysis is whether medical monitoring costs are "response costs" within the meaning of CERCLA.

A careful examination of the statutory language and legislative history reveals that medical monitoring costs are not recoverable by any party when the monitoring was not approved by the Agency for Toxic Substances and Disease Registry (ATSDR). The provisions of § 104(i) related to the ATSDR are comprehensive and specifically cover medical monitoring. In light of the fact that the legislative history indicates that CERCLA does not provide for recovery of personal injury expenses, it is logical to conclude that Congress meant for medical monitoring to fall exclusively within the realm of § 104(i). Furthermore, the scope of response costs, as evidenced by the definitions of "removal" and "remedial action" indicates that only expenses incurred for cleaning up are recoverable unless other costs are necessary to assess the effect of the contamination on the public in general. Here, the Marinas are the only people potentially affected since the spread of the contamination was ascertained and the threat eliminated.

A. Are medical monitoring costs "necessary costs of response"?

The true issue is whether medical monitoring costs are "necessary costs of response" recoverable under CERCLA § 107(a)(4)(B). Thus, the provision to be interpreted is the definition of "response." As indicated above, a "response" is either a "removal" or "remedial action" as those terms are defined in CERCLA. *See* CERCLA § 101(25). The definitions of "removal" and "remedial action" set out specific examples of the type of actions which properly fall within the statute,

none of which refer to medical monitoring costs. But the definitions make clear that the lists are merely illustrative. *See* CERCLA §§ 101(23), 101(24), 42 U.S.C. §§ 9601(23), 9601(24).

When faced with the task of interpreting a statute, the court must begin with the language of the statute. *See* Bailey v. United States, 116 S. Ct. 501, 506 (1995). When a statute contains words that are not explicitly defined, these words are to be given their plain meaning. *See* Smith v. United States, 508 U.S. 223, 228 (1993). Furthermore, when a statutory provision or definition contains specific terms that have a common theme, the other general terms in that list should be interpreted consistent with that theme. *See* Beecham v. United States, 114 S. Ct. 1669, 1671 (1994) (utilizing the doctrine of *ejusdem generis*).

Only two United States Courts of Appeals have actually decided whether medical monitoring costs are "response costs" which may be recovered under CERCLA and both have denied recovery. *See* Daigle v. Shell Oil Co., 972 F.2d 1527, 1537 (10th Cir. 1992); Price v. United States Navy, 39 F.3d 1011, 1017 (9th Cir. 1994). In *Daigle*, the court undertook an interpretation of the terms "response costs," "removal," and "remedial action." The plaintiffs argued that medical monitoring costs met the portion of the definition of "remedial action" which included "any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment." 972 F.2d at 1534 (quoting CERCLA § 101(24), 42 U.S.C. § 9601(24)). In addition, the plaintiffs claimed that medical monitoring costs fit the definition of removal as "the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare." 972 F.2d at 1534 (quoting CERCLA § 101(23), 42 U.S.C. § 9601(23)).

The Tenth Circuit held that inclusion of medical monitoring costs as a "removal" or "remedial action" expense would give those terms a much broader interpretation than was warranted by the language of the statute. 972 F.2d at 1535. The court noted that the examples of removal and response actions in the definitions related only to reducing the spread

of contaminants, implying that any other action must be related to that purpose to qualify as a response action. *See id.*

The only other Court of Appeals to consider whether medical monitoring costs fell under the definition of "removal" or "remedial action," *Price v. United States Navy*, 39 F.3d 1011 (9th Cir. 1994), simply followed and adopted the reasoning of the *Daigle* court. *See* 39 F.3d at 1017.

While a few district courts considered medical monitoring costs to be consistent with a "removal" or "remedial action," most courts which have undertaken the statutory analysis set forth the same reasoning given by the *Daigle* court. However, one court which determined that medical monitoring costs are response costs is *Jones v. Inmont Corp.*, 584 F. Supp. 1425 (S.D. Ohio 1984). In this case, the plaintiffs were owners of property adjacent to an illegal dump site. 584 F. Supp. at 1427. The complaint alleged that the plaintiffs had incurred costs for medical testing. *See* 584 F. Supp. at 1429. With regard to the recovery of these medical testing costs, the court stated that, "[t]hese damages appear to meet the definition of 'removal' expressed in section 9601(23) . . . [and] we cannot say as a matter of law that the plaintiffs are not so entitled [to recover these costs]." 584 F. Supp. at 1429-30.

A post-SARA case which reached the same conclusion as *Jones* was *Brewer v. Ravan*, 680 F. Supp. 1176 (M.D. Tenn. 1988). The *Brewer* court recognized that costs for medical treatment are not recoverable under CERCLA, but stated that "[t]o the extent that plaintiffs seek to recover the cost of medical testing and screening to assess the effect of the release or discharge on public health or to identify potential public health problems presented by the release, however, they present a cognizable claim under section 9607(a)." 680 F. Supp. at 1179. The court asserted that "[p]ublic health related medical tests and screening clearly are necessary to 'monitor, assess, [or] evaluate a release' and therefore constitute 'removal' under section 9601(23)." 680 F. Supp. at 1179.

While there is authority on both sides of the issue, the Court of Appeals cases clearly are more authoritative. In addition, the court may find persuasive the *Daigle* court's rea-

soning that the terms in the definitions of "removal" and "remedial action" contemplate only those actions which work to physically contain the contamination and minimize its adverse effects. Since it has been stipulated that the Marinas are the only people affected and the contamination has been removed, the reasoning in *Brewer* is inapplicable to the current situation. In *Brewer*, the court specifically addressed medical monitoring in the context of assessing damage to public health. Here, that assessment has already been made and the members of the Marina family are the only ones affected.

B. Does creation of the ATSDR support the recovery of medical monitoring costs by SNUHSA?

In SARA, Congress created the ATSDR for the purpose of examining the health effects of contamination at sites placed on the National Priorities List (NPL) of contaminated sites requiring cleanup. *See* Daigle v. Shell Oil, 972 F.2d 1527, 1536 (10th Cir. 1992). ATSDR actions are covered under section 104(i) of CERCLA. 42 U.S.C. § 9604(i). In addition to ATSDR's statutory duty of conducting health assessments at all NPL sites, CERCLA § 104(i)(6), 42 U.S.C. § 9604(i)(6), persons who have been exposed to hazardous substances through a release or probable release may petition the ATSDR for a health assessment. CERCLA § 104(i)(6)(B), 42 U.S.C. § 9604(i)(6)(B). Such a petition may also be submitted by the exposed person's physician. *Id.* If the petition is denied, the ATSDR must explain its denial in writing. *Id.* The cost of conducting a health assessment is recoverable by the ATSDR from PRPs under CERCLA § 107(a)(4)(D). Such costs are also recoverable by the Superfund under CERCLA § 111.

The question here is whether a party can incur medical monitoring costs without going through the ATSDR and then recover these costs under § 107. The answer comes from an analysis of the statute and, if necessary, the legislative history. Given the statutory provisions set out above, it appears that Congress knew how to provide for medical monitoring and deliberately chose not to cover such costs under § 107.

A generally accepted rule of construction is that where Congress expressly includes certain language in one section of a statute, it is presumed that Congress meant to exclude a similar provision in another section which is devoid of the same or similar language. *See* Russello v. United States, 464 U.S. 16, 23 (1983). This rule was relied upon by the Tenth Circuit in *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1536 (10th Cir. 1992). In *Daigle*, the court noted that medical monitoring was specifically provided for in the establishment of the ATSDR under SARA. 972 F.2d at 1536. Although plaintiff argued that the medical monitoring authority of the ATSDR is evidence that Congress meant to permit recovery of medical monitoring costs in a cost recovery action, the court rejected this assertion. *Id.* The court pointed directly to the fact that CERCLA § 111 specifically provides that the Superfund may recover for medical monitoring costs expended by the ATSDR. 972 F.2d at 1537. The court's conclusion was that the separate treatment of medical monitoring costs under the ATSDR was evidence that, contrary to plaintiffs' contentions, Congress did not want to include medical monitoring costs under the term "response costs." *Id.*

The *Daigle* court's conclusion was also reached by several district courts. *See* Coburn v. Sun Chemical Corp., 1988 WL 120739 *5 (E.D. Pa. 1988) (Congress knew how to provide for recovery of medical monitoring costs); Werlein v. United States, 746 F. Supp. 887, 903-04 (D. Minn. 1990), *vacated on other grounds*, 793 F. Supp. 898 (D. Minn. 1992); Ambrogi v. Gould, 750 F. Supp. 1233, 1249 (M.D. Pa. 1990) (noting that a person may petition for a health assessment by ATSDR). No court has held that the provisions of CERCLA § 104(i) cut in favor of permitting recovery of monitoring costs by any person or entity other that the agency or the Superfund.

It appears that SNUHSA will have a formidable task in convincing a court that, when Congress gave the ATSDR the power to perform health assessments on its own initiative or on petition and provided that the agency may recover the corresponding costs under CERCLA § 107(a)(4)(D), Congress also implied that such costs are recoverable by non-ATSDR persons acting independently. The canons of construction

and the cases applying those canons clearly weigh against such a finding.

C. Does the legislative history support or oppose the proposition that medical monitoring costs may be recovered by SNUHSA?

If the statutory language is not dispositive of an issue, a court should then turn to the legislative history for guidance on the proper interpretation. *See* Blum v. Stenson, 465 U.S. 886, 896 (1984).

Prior to the final passage of CERCLA, both the House of Representatives and the Senate considered bills which contained provisions for the recovery of personal injury damages, including medical expenses. *See e.g.* Daigle v. Shell Oil Corp., 972 F.2d 1527, 1536 (10th Cir. 1992). An early House version of CERCLA specifically stated that "costs" included "all damages for personal injury, injury to real and personal property, and economic loss, resulting from [a] release or threatened release." H.R. 7020, 96th Cong. § 3071(b)(2) (1980), *reprinted in* 3 Envt'l L. Inst., Superfund: A Legislative History, at 181 (1982) (as introduced by Rep. Florio on Apr. 2, 1980). However, this provision was not present in the bill as passed by the House. *See* H.R. 7020, 96th Cong. § 3071(b)(2) (1980), *reprinted in* 3 Envt'l L. Inst., Superfund: A Legislative History, at 50-51 (1982) (as passed by the House of Representatives). Similarly, when Senator Randolph discussed the compromise Senate bill he sponsored, he stated, "[w]e have deleted the Federal cause of action for medical expenses or income loss." 126 Cong. Rec. S14,964 (daily ed. Nov. 24, 1980).

Several courts have considered this legislative history in their analyses. *See e.g.* Daigle v. Shell Oil Corp., 972 F.2d 1527, 1535-36 (10th Cir. 1992); Coburn v. Sun Chemical Corp., 1988 WL 120739 at *2-3 (E.D. Pa. 1988). In *Daigle*, the court read the legislative history as barring recovery for any costs that could be considered personal injury costs and stated that "[p]laintiffs' request for medical monitoring to allow 'prevention or early detection and treatment of chronic disease' smacks of a cause of action for damages resulting

from personal injury." *See* 972 F.2d at 1535. In *Coburn*, the court was not quite as harsh. The *Coburn* court thought that the language in the statute was ambiguous, but also thought that the legislative history was not dispositive on the issue either. *See* 1988 WL 120739 at *3. However, at the time *Coburn* was decided, there were no Court of Appeals cases dealing with the issue.

Although several courts which denied recovery of medical monitoring costs looked into the legislative history, none of the courts which have permitted the plaintiff to seek recovery of medical monitoring costs have even considered the legislative history in their analysis. *Cf.* Williams v. Allied Automotive, 704 F. Supp. 782 (N.D. Ohio 1988); Brewer v. Ravan, 680 F. Supp. 1176 (M.D. Tenn. 1988); Jones v. Inmont Corp., 584 F. Supp. 1425 (S.D. Ohio 1984). It appears that the courts in those cases confined their inquiry to the wording of the statute alone.

There is ample disagreement among the courts regarding whether the statutory language is unclear, warranting an investigation of the legislative history. As stated above, courts finding support for recovery of medical monitoring costs did not even investigate the legislative history because they reasoned that the language of CERCLA clearly provided for recovery of such costs. Furthermore, the legislative history itself does not directly address medical monitoring. Although "personal injury" expenses are mentioned, it may be argued that what SNUHSA seeks is not really personal injury expenses, but "monitoring" costs, which are mentioned in the definition of removal. The question, then, to be decided by the court is whether, given the fact SNUHSA has discovered no medical harm to the Marinas, is the medical monitoring the result of an personal injury. If such costs are personal injury expenses, then the legislative history seems clear that medical monitoring costs would not be recoverable. Given the fact that the Marinas are the only people being monitored and that the purpose of the monitoring is to detect and treat any diseases or conditions which may result from the contamination, a court will be hard-pressed to find that expenses

SNUHSA seeks to recover do not amount to a personal injury claim not authorized under CERCLA.

D. Does the analysis change at all due to the fact that SNUHSA is a governmental entity which was not personally injured by the contamination?

In all the cases heretofore mentioned, the plaintiff was a private party directly injured by the contamination and seeking either recovery of medical monitoring costs incurred or requesting the establishment of a medical monitoring fund to cover future monitoring costs. However, in the instant case, the plaintiff is a state agency which has incurred only economic loses since it has borne the cost of monitoring the Marinas.

One district court which has permitted a claim for recovery of medical monitoring costs when the plaintiff is the government rather than a private party is *United States v. Ekotek, Inc.*, 1995 WL 580079 (D. Utah 1995). In *Ekotek*, the EPA sought to recover its oversight costs, including medical monitoring costs. *See* 1995 WL 580079 at *8. In order to permit the claim, the court distinguished the *Daigle* court's binding ruling which denied recovery of medical monitoring costs by noting that the plaintiff here was the government and not a private party. 1995 WL 580079 at *9. In support of its distinction, the court stated that "in the present case, the oversight costs were not incurred long after the threatened release of contaminants, but were actively incurred by the EPA during or closely in connection with the containment effort to restrict the public's exposure to the materials at the Ekotek site." *Id.*

Although the *Ekotek* reasoning appears persuasive, there are two important distinctions between the current case and *Ekotek*. First, in *Ekotek*, the monitoring costs were incurred as part of oversight activities by the EPA. Here, SNUHSA undertook to monitor the Marinas on its own, separate from any organized cleanup effort. Second, the contamination in *Ekotek* was apparently more widespread and the EPA employed medical monitoring in the case of many persons.

Here, there is only one family involved and the extent of the contamination has been clearly defined. Any medical screening performed will not assist the government in determining how far the contamination has actually spread, but will merely serve to evaluate the extent of the Marina's personal injuries, a result which has been shown to be inconsistent with the language of CERCLA and its legislative history.

In conclusion, the language of CERCLA, while strongly suggestive that medical monitoring costs are not recoverable, is not totally dispositive. There is some room to argue that medical monitoring, if undertaken for the benefit of a large number of people at a time when the extent of contamination is unknown, may be recoverable under CERCLA. However, in this situation, where the threat has been abated and the extent of the damage known, it is unlikely that the costs incurred by SNUHSA fall under the statutory provision of, for example, "monitor[ing] . . . the release of hazardous substances under the definition of "removal." Furthermore, the fact that either the Marinas or SNUHSA could have petitioned the ATSDR for monitoring also seems to preclude recovery of SNUHSA's costs. The legislative history does not seem to come down in favor of SNUHSA's claim unless the court accepts the argument that a claim for medical monitoring costs is not an action based on personal injury. Finally, the fact that SNUHSA is a governmental entity does not change the fact that medical monitoring costs must be "necessary costs of response" to be recoverable. Here, the facts strongly indicate that the medical expenses have been and will be incurred solely to identify the extent of the Marinas' personal injuries resulting from the contamination and to respond quickly with appropriate medical treatment. Since the costs cannot be said to have been incurred to monitor the release and its effect on the public health, it follows that SNUHSA's claim must be denied.

CONCLUSION

In summary, the court should find that applying CERCLA to this particular case does not exceed Congress's pow-

ers with regard to retroactive legislation or the Commerce Clause even though the conduct which caused the contamination occurred before CERCLA was enacted and the actual effects do not extend beyond the State of New Union. Due Process concerns do not require a different answer and neither does the *Seminole* case.

In addition, since WUWPS did not contribute to the contamination and the plain language of CERCLA seems to indicate that a PRP can bring a cost recovery action, WUWPS should be allowed to proceed under § 107 and have GUVS pay for SUPS's orphan shares. GUVS should be able to sue WUWPS for contribution and have WUWPS pay something as the owner of the land.

Finally, SNUHSA should not be permitted to recover its medical monitoring costs. CERCLA has in place a procedure for obtaining the very testing that SNUHSA provided. SNUHSA should not be able to circumvent that procedure. The plain language of the statute and its legislative history indicates Congress did not mean to provide for private parties to recover such expenses.