

April 1989

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Andrea L. Bull

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### Recommended Citation

Andrea L. Bull, *Superfund and the Hazardous Waste Site Next Door: Can Citizens Clean It Up?*, 6 Pace Env'tl. L. Rev. 643 (1989)

DOI: <https://doi.org/10.58948/0738-6206.1506>

Available at: <https://digitalcommons.pace.edu/pelr/vol6/iss2/11>

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# Superfund and the Hazardous Waste Site Next Door: Can Citizens Clean It Up?

## Introduction

Hazardous substances are found throughout the modern industrialized world. Over the past twenty years, the amounts of chemicals produced have increased dramatically.<sup>1</sup> In view of this continuing growth in production and use, it has become increasingly difficult for people to avoid the risks associated with these chemicals. Hazards arise in the work place, the home, and the environment. People are particularly at risk if they live near a hazardous waste dump site. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)<sup>2</sup> was enacted by Congress to reduce this risk, but despite its purpose, the number of sites that have been cleaned up is quite small.<sup>3</sup> When injury results from exposure to hazardous substances, the majority of individuals cannot look to a federal statute to provide direct compensation for their injuries, but must rely on state tort compensation actions.<sup>4</sup>

CERCLA provides a basis for citizens who are threatened by the release of hazardous substances to become involved in the response system. In addition, CERCLA provides citizens

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1. Davis & Magee, *Cancer and Industrial Chemical Production*, 206 Sci. 1356-58 (1979).

2. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9673 (1982 & Supp. IV 1986)) [hereinafter CERCLA].

3. In 1989, of the 29,714 sites inventoried as potentially hazardous, only 1,010 were listed to receive remedial action, and only 259 remedies were implemented or are in progress. ENVIRONMENTAL PROTECTION AGENCY, SUPERFUND PROGRESS REPORT (1989).

4. There are limited, particularized federal victim compensation schemes that have been established. See, e.g., The Black Lung Benefits Act of 1972, 30 U.S.C. §§ 901-962 (1982).

with information concerning hazardous substances and their potential effects on human health. Part II of this comment gives a brief overview of the CERCLA system. Part III examines measures citizens can take to initiate cleanup of a hazardous waste site and recover costs which they have incurred. Part IV sets forth the CERCLA sections which enable citizens to initiate government cleanup, participate in developing a cleanup plan, and oversee the final remedial action. Part V discusses the provisions which provide information concerning hazardous substances and examines the value of such information with respect to a toxic tort suit. Part VI concludes that despite the limitations of the CERCLA citizen suit provision, CERCLA provides citizens with an important role in hazardous site cleanup and arms them with valuable information concerning hazardous substances.

## II. The CERCLA System

CERCLA was enacted to give the federal government authority to respond to releases<sup>5</sup> of hazardous substances<sup>6</sup> from facilities.<sup>7</sup> A fund, financed by an excise tax on petroleum and

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5. The term "release" means "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment . . . ." CERCLA, *supra* note 2, at § 101(22), 42 U.S.C. § 9601(22).

6. The term "hazardous substance" means:

(A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33 [referring to the Clean Water Act], (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title [9602 refers to designation of additional hazardous substances and establishment of reportable released quantities; regulations], (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C. § 6921] . . . (D) any toxic pollutant listed under section 1317(a) of Title 33 [referring to Clean Water Act], (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15 [referring to the Toxic Substances Control Act]. *Id.* at § 101(14), 42 U.S.C. § 9601(14).

7. The term "facility" means:

(A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has

feedstock chemicals, was created to pay for the cleanups.<sup>8</sup> The Environmental Protection Agency (EPA) was given authority to compel or arrange for cleanup and to seek reimbursement from the Fund<sup>9</sup> or from potentially responsible parties (PRPs).<sup>10</sup> This is accomplished through a scheme of strict liability imposed upon a broad range of PRPs.<sup>11</sup> The government's responses include either removal action<sup>12</sup> or remedial action.<sup>13</sup> In addition to government-initiated cleanups, a private party may pay the costs of cleanup and seek reimbursement from the responsible parties.<sup>14</sup>

### III. Private Party Cost Recovery Actions

#### A. *Elements*

It is argued that section 107(a) of CERCLA provides a direct statutory right of private action to enable citizens to recover costs incurred in cleaning up a hazardous waste site. The statute provides that certain enumerated parties<sup>15</sup> are liable for costs "incurred by any other person, consistent with the national contingency plan [NCP]."<sup>16</sup> "Person" is broadly defined to include "an individual, firm, corporation, associa-

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been deposited, stored, disposed of, or placed, or otherwise come to be located. . . .

*Id.* at § 101(9), 42 U.S.C. § 9601(9).

8. I.R.C. §§ 4611 and 4661-4662 (1988).

9. *See* CERCLA, *supra* note 2, at § 107, 42 U.S.C. § 9607.

10. *Id.* at § 111, 42 U.S.C. § 9611.

11. For a list of PRPs, see CERCLA, *supra* note 2, at § 107(a)(1)-(4), 42 U.S.C. § 9607(a)(1)-(4).

12. Removal action is typically taken in the event of an emergency, when action needs to be taken quickly. 2 NOVICK, LAW OF ENVIRONMENTAL PROTECTION § 13.05[3][a][i] (1988).

13. Remedial action typically involves long-term clean-up where time is not of the essence. A remedial action involves four steps: 1) a Remedial Investigation/Feasibility Study (RI/FS), which assesses the problem; 2) a Record of Decision (ROD), which sets forth the cleanup plan based on analysis of the data from the RI/FS; 3) a Remedial Design (RD), or cleanup plan, which specifies how the site will be cleaned up; and 4) a Remedial Action (RA), the implementation of the cleanup plan. *See generally* 2 NOVICK, LAW OF ENVIRONMENTAL PROTECTION § 13.05[3] (1988).

14. CERCLA, *supra* note 2, at § 107(a), (e), 42 U.S.C. § 9607(a), (e).

15. *Id.* at § 107(a), 42 U.S.C. § 9607(a).

16. *Id.* at § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B).

tion, partnership, consortium, joint venture, [or] commercial entity . . . .”<sup>17</sup> The administrative regulations interpreting CERCLA lend support for private cost recovery by promoting private cleanup. The EPA writes that “in determining the need for and in planning and undertaking Fund-financed action, the lead agency shall, to the extent practicable, . . . [c]onserve Fund monies by encouraging private party cleanup.”<sup>18</sup> Despite this seemingly express authority for private causes of action, the courts are split as to what circumstances authorize it.

In order for a citizen to bring a cost recovery action, it must be shown that (1) a hazardous substance (2) is released into the environment (3) from a facility (4) causing the individual to incur necessary response costs (5) which are consistent with the NCP.<sup>19</sup> The first three elements are clearly defined in the statute and have been further clarified by the courts. CERCLA section 101(14) defines “hazardous substance” by referencing substances designated as hazardous in a number of other environmental statutes.<sup>20</sup> To prove that a substance is hazardous, a party need only show that the substance is listed in one of the referenced statutes or that it constitutes “any element, compound, solution, or substance designated pursuant to section 9602” of CERCLA.<sup>21</sup>

The statute defines “release” clearly and comprehensively<sup>22</sup> and a number of courts have broadly interpreted this definition. For example, in *Missouri v. Independent Petrochemical Corp.*,<sup>23</sup> the court found that a release of a hazardous substance occurred when waste oil containing dioxin was sprayed onto a horse track at a ranch.<sup>24</sup> In addition to

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17. *Id.* at § 101(21), 42 U.S.C. § 9601(21).

18. National Oil & Hazardous Substances Pollution Contingency Plan, 40 C.F.R. § 300.61(c)(3) (1988).

19. See, e.g., U.S. Env’tl Protection Agency, Guidance Document: Cost Recovery Actions under CERCLA (1983) cited in Crowell & Moring, SUPERFUND MANUAL: LEGAL AND MANAGEMENT STRATEGIES 4-19 (1987).

20. CERCLA, *supra* note 2, at § 101(14), 42 U.S.C. § 9601(14).

21. *Id.*

22. *Id.* at § 101(22), 42 U.S.C. § 9601(22).

23. 610 F. Supp. 4 (E.D. Mo. 1985).

24. *Id.* at 5.

imposing liability for releases that have already occurred, § 107(a) specifically states that persons are liable for a *threatened* release.<sup>25</sup> In *New York v. Shore Realty Corp.*,<sup>26</sup> the court rejected the defendants' position that CERCLA limits liability only to past releases. The court held that "leaking tanks and pipelines, the continuing leaching and seepage from the earlier spills, and the leaking drums all constitute 'releases.'"<sup>27</sup> The court went on to hold that "corroding and deteriorating tanks, [the defendant's] lack of expertise in handling hazardous waste, and even the failure to license the facility, amount to 'a threat of release.'"<sup>28</sup>

"Facility" is also broadly defined in the statute,<sup>29</sup> and courts that have construed the term 'facility' have recognized its expansive definition. In *State v. General Electric Co.*,<sup>30</sup> the court stated that "the definition of 'facility' is necessarily a broad one. It explicitly [includes] . . . among other things, any site or area where a hazardous substance has been deposited, stored, disposed of, or otherwise come to be located."<sup>31</sup>

The final two elements, necessary response costs and consistency with the NCP, have not been uniformly defined by the courts. The court in *Levin Metals Corporation v. Parr-Richmond Terminal Co.*<sup>32</sup> used a plain language interpretation of the term "necessary costs of response." It pointed out that this term as a whole is not defined in CERCLA, however, the term "response" is defined to mean "removal . . . and remedial action."<sup>33</sup> The *Levin Metals* court noted that "section

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25. CERCLA, *supra* note 2, at § 107(a)(4)(A).

26. 759 F.2d 1032 (2d Cir. 1985).

27. *Id.* at 1045.

28. *Id.*

29. Section 9601(9) states that "the term 'facility' means (A) any building, structure, installation, equipment, pipe or pipeline . . . well, pit, pond, lagoon, . . . or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located . . . ." CERCLA, *supra* note 2, at § 101(9), 42 U.S.C. § 9601(9).

30. 592 F. Supp. 291 (N.D.N.Y. 1984).

31. *Knox v. AC & S. Inc.*, 690 F. Supp. 752, 756 (S.D. Ind. 1988) (*citing*, *State v. General Electric Co.*, 592 F. Supp. 291, 295 (N.D.N.Y. 1984)).

32. 608 F. Supp. 1272 (N.D. Cal. 1985).

33. *Id.* at 1275.

9601(23) defines 'removal' to mean 'cleanup or removal of released hazardous substances from the environment,' and includes actions necessary 'to prevent, minimize, or mitigate damages to the public health or welfare or to the environment.'<sup>34</sup> "Remedial action" is defined by section 9601(24) to mean "those actions consistent with permanent remedy taken . . . to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment."<sup>35</sup>

Other courts have held that in order for costs to be "necessary", they must be authorized or required by the government.<sup>36</sup> The issue of pre-authorization also arises in the context of cleanup plans. A number of courts have held that in order for costs to be "consistent with the NCP," cleanup plans must be pre-approved by the government before they can be implemented. For example, in *Bulk Distribution Centers, Inc. v. Monsanto Co.*,<sup>37</sup> the court reasoned that prior government approval would assure that the cleanup plan was extensive enough to alleviate danger.<sup>38</sup> Additionally, the government, because of the scientific and technological expertise its environmental agencies possess, is better equipped to decide the efficacy of a cleanup proposal.<sup>39</sup> The court concluded that "the only practical way to safeguard the public's interest, while fairly mediating the competing concerns for the parties potentially responsible for cleaning up the release, is for the government to approve the cleanup proposal before it is implemented by the private part[y]."<sup>40</sup>

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34. *Id.*

35. *Id.* at 1275-76.

36. See *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887 (9th Cir. 1986); *NL Industries Inc. v. Kaplan*, 792 F.2d 896 (9th Cir. 1986); *City of New York v. Exxon Corp.*, 24 E.R.C. 1361 (S.D.N.Y. 1986); *United States v. Conservation Chem. Co.*, 628 F. Supp. 391 (W.D. Mo. 1985).

37. 21 Env't Rep. Cas. (BNA) 1080 (S.D. Fla. 1984).

38. *Id.* at 1088.

39. *Id.*

40. *Id.* See also *Artesian Waters Co. v. Government of New Castle*, 605 F. Supp. 1348 (D. Del. 1985); *Cadillac Fairview/California, Inc. v. Dow Chemical Co.*, 21 Env't Rep. Cas. (BNA) 1108 (S.D. Cal. 1984).

A better reasoned approach would be one that does not require such government pre-authorization.<sup>41</sup> First, the EPA does not have the resources to examine and approve every plan proposed by a private party. If such government pre-authorization were required, the EPA would have to institute an entire division devoted solely to that purpose. Secondly, the requirement of government pre-authorization would seriously impede the purpose of CERCLA, i.e., the quick and efficient cleanup of hazardous waste sites. Finally, the NCP provides ample guidance in and of itself so that the efficacy of the cleanup would be assured.

Additional support for this interpretation is found in the Preamble to the NCP. The Preamble, in an effort to eliminate confusion as to whether the regulations prohibited remedial action without prior EPA approval, states that:

[Section 300.25(d)] has been rewritten to require that persons who intend to undertake response actions and seek reimbursement from the Fund, must obtain a pre-authorization order for the response action to be considered consistent with the Plan for purposes of section [111(a)(2)] of . . . *Section 300.25(d) does not apply to private parties who undertake response actions, but do not intend to seek reimbursement from the fund.*<sup>42</sup>

#### B. Statute of Limitation Considerations Within CERCLA and SARA

When a private party incurs response costs and wants to recover them from the responsible parties he must be aware of the applicable statutes of limitations. Although CERCLA section 112(d) created a statute of limitations, confusion as to whether the section applied to claims for recovery of response costs or only to claims brought against the Fund<sup>43</sup> convinced

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41. See *Pinole Point Properties v. Bethlehem Steel Corp.*, 596 F. Supp. 283 (N.D. Cal. 1984).

42. 47 Fed. Reg. 31196 (1982) (emphasis added).

43. Most courts have held that CERCLA § 9612(d) [§112(d)] did not apply to response cost claims. See, e.g., *United States v. Dickerson*, 640 F. Supp. 448 (D. Md.



Congress to enact new statutes of limitations for both recovery costs and claims against the Fund.<sup>44</sup> Under the Superfund Amendments and Reauthorization Act of 1986 (SARA), claims for recovery of damages to natural resources must be brought within three years of the discovery of the loss and its connection with the release in question or the promulgation of regulations under section 301(c), whichever is later.<sup>45</sup> Claims for recovery of response costs under section 107(a) must be brought within six years after the date of completion of all response actions.<sup>46</sup>

Questions arise regarding the applicable statute of limitations when response costs were incurred prior to the enactment of SARA and a suit was filed after the enactment of SARA. The court in *Merry v. Westinghouse Elec. Corp.*,<sup>47</sup> was confronted with this issue. Defendant Westinghouse argued that since plaintiffs' response costs were incurred prior to the enactment of SARA section 113, the court should use the most analogous state statute rather than SARA.<sup>48</sup> The court agreed with the defendants' interpretation to the extent that SARA did not apply. However, the court held that since a CERCLA cost reimbursement action is not a damage action (in which case an analogous state or federal statute would apply), but is rather an equitable action for restitution, the doctrine of laches applies.<sup>49</sup> This characterization of CERCLA cost reimbursement actions as equitable actions for restitution has ample support in case law.<sup>50</sup>

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1986); *United States v. Mottolo*, 605 F. Supp. 898 (D. N.H. 1985); *Kelly v. United States*, 23 Env't Rep. Cas. (BNA) 1503 (W.D. Mich. 1985).

44. The Superfund Amendments and Reauthorization Act of 1986 § 113(g)(2), 42 U.S.C. § 9613(g)(2) (Supp. IV 1986) [hereinafter SARA].

45. *Id.* at § 113(g)(1), 42 U.S.C. § 9613(g)(1).

46. *Id.* at § 113(g)(2), 42 U.S.C. § 9613(g)(2).

47. 684 F. Supp. 852 (M.D. Pa. 1988).

48. *Id.* at 856.

49. *Id.* at 857.

50. *See, e.g., United States v. Dickerson*, 640 F. Supp. 448 (D. Md. 1986); *United States v. Conservation Chemical Co.*, 619 F. Supp. 162 (D. Mo. 1985); *United States v. Mottolo*, 605 F. Supp. 898 (D. N.H. 1985). Although all of these cases involve government actions to recover response costs under CERCLA § 107, the same analysis applies to private actions. Section 107 provides, in relevant part, that responsible parties shall be liable for: "(A) all costs of removal or remedial action incurred by the

While the courts are split as to what circumstances authorize private cost recovery, it is reasonable to conclude that government pre-authorization of the response plan is not a prerequisite to response cost recovery. Thus, if a citizen has met the burden of proof on each of the required elements, and the case is brought within the required statute of limitations, response costs can be recovered. However, this is a very burdensome and expensive way to clean up a hazardous waste site. It is therefore necessary to examine other sections of CERCLA which are better designed to aid citizens.

#### IV. Use of CERCLA to Initiate and Oversee Remedial Actions

##### A. *Listing on the National Priorities List*

A citizen<sup>51</sup> concerned about a release or a threatened re-

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United States Government . . . ; (B) any other necessary costs of response incurred by any other person . . . .” CERCLA, *supra* note 2, at § 107, 42 U.S.C. § 9607. Thus, § 107(4)(A) & (B) provides for similar relief whether the plaintiff is the government or a private party.

If a private party brings a toxic tort claim in state court, SARA establishes a discovery statute of limitations. Section 9658 provides in relevant part:

(a) State statutes of limitations for hazardous substance cases.

(1) Exception to state statutes.

In the case of any action brought under state law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the state statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such state statute.

(b) Definitions.

(4) Federally required commencement date.

Except as provided in subparagraph (B), the term “federally required commencement date” means the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(1) of this section were caused or contributed to by the hazardous substance or pollutant or contaminant concerned.

SARA, *supra* note 44, at § 309, 42 U.S.C. § 9658. Thus, if a plaintiff can show that his injury or property damage was (1) caused or contributed to by exposure to a hazardous substance (2) released into the environment (3) by a facility, the statute of limitations discovery rule will apply. *Id.*

51. Section 105(d) provides that “any person” may petition the Administrator.

lease from a site not listed on the National Priority List (NPL), and consequently, at which no removal or remedial action has been taken, can petition the Administrator to conduct a preliminary assessment of the public health and environmental hazards associated with the release.<sup>52</sup> If there has been no previous assessment of the release, the Administrator "shall, within 12 months after the receipt of any such petition, complete such assessment or provide an explanation of why the assessment is not appropriate."<sup>53</sup> If the assessment indicates that the release or threatened release may pose a threat to human health or the environment, the site is ranked through the hazard ranking system<sup>54</sup> to determine its cleanup priority. Citizens can petition the EPA either by telephoning or writing to the appropriate EPA section,<sup>55</sup> by writing to their Congressman, or by contacting the State. Despite the usefulness of this section in initiating government action, there are very few preliminary assessment petitions. For example, of the approximately three thousand sites listed on CERCLIS<sup>56</sup> in EPA Region II, that Region only receives approximately five petitions per month.<sup>57</sup> Currently, in Region II, these petitions are "never denied" as the Technical and Preremedial Support Section "must perform a certain amount" of preliminary assessments.<sup>58</sup>

If the petitioner believes that a denial of a petition was incorrect, he may seek judicial review.<sup>59</sup>

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"Person" is defined in section 101(21) to include an "individual." CERCLA, *supra* note 2, at § 105(d), 42 U.S.C. § 9605(d).

52. *Id.*

53. *Id.* (emphasis added).

54. *Id.* at § 105(c), 42 U.S.C. § 9605(a)(8)(c).

55. The Technical and Preremedial Support Section in Region II would be the appropriate section in that region as it deals with sites which have not been listed on the NPL. See *infra* note 57.

56. CERCLIS is an inventory of potentially hazardous sites. CERCLA, *supra* note 2, at § 116, 42 U.S.C. 9616.

57. Telephone conversation with Jeffery Gaal, Technical and Preremedial Support Section, Region II, New York (Apr. 18, 1989).

58. *Id.*

59. The Administrative Procedure Act provides that "[a] person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Ad-

## B. CERCLA Section 117 Public Participation

Once a site has been listed on the NPL and a Remedial Investigation/Feasibility Study (RI/FS)<sup>60</sup> has been performed to determine what cleanup action will be taken, a Remedial Design, or cleanup plan is made. Citizens can participate in the selection of the plan.<sup>61</sup> Pursuant to section 117, the Administrator or the State must 1) publish notice,<sup>62</sup> which provides sufficient information to provide a reasonable explanation and analysis of the proposed plan, the alternatives considered, and make such plan available to the public, and 2) provide a reasonable opportunity for written or oral comments and an opportunity for a public meeting at or near the site at issue. Transcripts of the meeting are to be made available to the public.<sup>63</sup> The final remedial plan must be published and made available to the public before any remedial action is taken.<sup>64</sup> The final plan must include a discussion of any significant changes from the proposed plan and response to significant comments.<sup>65</sup> This procedure is very similar to an informal rulemaking and, thus, may be subject to administrative procedural requirements.

Particularly important to citizens participating in the procedure are the requirements that the notice must adequately apprise them of the issues involved,<sup>66</sup> and must be

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Administrative Procedure Act, 5 U.S.C. § 702 (1982 & Supp. V). Additionally:

[a] preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form or reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

Administrative Procedure Act, 5 U.S.C. § 704 (1982).

60. See *supra* note 13.

61. CERCLA, *supra* note 2, at § 117, 42 U.S.C. § 9617.

62. "[P]ublication shall include, at a minimum, publication in a major local newspaper of general circulation." *Id.* at § 117(d), 42 U.S.C. § 9617(d).

63. *Id.* at § 117(a)(1)-(2), 42 U.S.C. § 9617(a)(1)-(2).

64. *Id.* at § 117(b), 42 U.S.C. § 9617(b).

65. *Id.*

66. See *Pennzoil Co. v. FERC*, 645 F.2d 360 (5th Cir. 1981).

specific.<sup>67</sup> Additionally, if the agency adopts a final rule that differs from its proposal, the interested parties must have been alerted by the notice to the changes eventually adopted.<sup>68</sup>

No mention is made of how long or to what extent notice must be given before the Administrator takes final remedial action. However, the legislative history reveals that "[t]he provision is not intended to be unreasonably burdensome for the Administrator. Published information must be adequate to inform the community of the proposed remedial action but the Committee does not intend that the Administrator must publish in local publications every shred of evidence or communication which is available."<sup>69</sup>

A significant aspect of this section is the availability of grants, not to exceed \$50,000, to any group of individuals which may be affected by a release or threatened release at a site on the NPL.<sup>70</sup> The purpose of the grant is to assist individuals with "interpreting information with regard to the nature of the hazard, remedial investigation and feasibility study, record of decision, remedial design, selection and construction of remedial action, operation and maintenance, or removal action at such facility."<sup>71</sup> The individuals must, however, contribute twenty percent of the total costs of the technical assistance for which the grant is used. This requirement may be waived if the individuals can demonstrate financial

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67. See *National Tour Brokers v. United States*, 591 F.2d 896 (D.C. Cir. 1978).

68. "Notice is adequate if the changes in the original plan are in character with the original scheme, and the final rule is a logical outgrowth of the notice and comments already given." *Chocolate Manufacturers Ass'n v. Block*, 755 F.2d 1098, 1105 (4th Cir. 1985) (quoting *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 642 (1st Cir. 1979), cert. denied 444 U.S. 1096 (1980)); see also *South Terminal Corp. v. EPA*, 504 F.2d 646, 659 (1st Cir. 1974); *Sierra Club v. Costle*, 657 F.2d 298, 352 (D.C. Cir. 1981); *Taylor Diving & Salvage Co. v. Dep't of Labor*, 599 F.2d 622, 626 (5th Cir. 1979); *Rowell v. Andrus*, 631 F.2d 699, 702 n.2 (10th Cir. 1980).

69. H.R. REP. NO. 99-253(I), 99th Cong., 2d Sess. 4, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 2835, 2873. [hereinafter H.R. Rep.].

70. CERCLA, *supra* note 2, at § 117(e), 42 U.S.C. § 9617(e). This \$50,000 limitation may be waived by the Administrator "in any case where such waiver is necessary to carry out the purposes of this subsection." *Id.* at § 117(e)(2), 42 U.S.C. § 9617(e)(2).

71. *Id.* at § 117(e)(1), 42 U.S.C. § 9617(e)(1).

need and that the waiver is necessary to facilitate public participation in the selection of the remedial action at the site.<sup>72</sup> The intent of the provision is to allow communities to hire technical consultants to assess data prepared by the EPA, not to finance legal actions regarding the facility.<sup>73</sup>

### C. Section 310 Citizen Suits

A citizen suit provision, which was not included in the 1980 Superfund law, was added by Congress when it adopted SARA.<sup>74</sup> Under section 310, any person may bring a civil action against:

(1) [A]ny person (including the United States . . . who is alleged to be in violation of any *standard*, regulation, condition, requirement or order which has become effective [under Superfund] . . . or

(2) [A]ny other officer of the United States (including the Administrator of the Environmental Protection Agency and the Administrator of the ASTDR) where there is an alleged failure . . . to perform any discretionary act or duty [which is not under Superfund].<sup>75</sup>

A citizen bringing an action alleging a violation of a standard or requirement must bring the action in the district court for the district in which the alleged violation occurred.<sup>76</sup> An action brought for failure to perform a non-discretionary duty must be brought in the United States District Court for the District of Columbia.<sup>77</sup>

Before commencing a lawsuit, the plaintiff must give sixty days notice of any violation to the EPA Administrator, the State in which the alleged violation occurred, and any alleged violator. The section further provides that no suit may be

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72. *Id.* at § 117(e)(2), 42 U.S.C. § 9617(e)(2).

73. H.R. REP. NO. 99-253(I), 99th Cong., 2d Sess. 4, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 2873.

74. CERCLA, *supra* note 2, at § 310, 42 U.S.C. § 9659.

75. *Id.* at § 310(a), 42 U.S.C. § 9659(a) (emphasis added).

76. *Id.* at § 310(b)(1), 42 U.S.C. § 9659(b)(1).

77. *Id.* at § 310(b)(2), 42 U.S.C. § 9659(b)(2).

brought under section 310(a)(1) if the Administrator has commenced or is diligently prosecuting an action under CERCLA or the Solid Waste Disposal Act.<sup>78</sup>

The legislature omitted from the final SARA bill a provision which would have allowed citizens to sue private parties to compel cleanup of a facility where there is an imminent and substantial endangerment to the public health.<sup>79</sup> The legislative history gives three reasons for the omission. First, a citizen's right to commence an injunctive action is set forth under section 7002 of the Solid Waste Disposal Act (commonly known as the Resource Conservation Recovery Act or RCRA).<sup>80</sup> Thus, a similar provision under CERCLA would be redundant.<sup>81</sup> Second, the omission does not impair the rights of any person to bring an action under federal, state or common law.<sup>82</sup> Third, if citizens were allowed to bring such suits, they would interfere with the EPA cleanup program.<sup>83</sup>

The reasoning behind these rationales is puzzling. The first rationale can be refuted by examining RCRA and CERCLA in the context of imminent and substantial endangerment to the public health or environment. RCRA is more restrictive with respect to the types of hazards it regulates than is CERCLA. Under the RCRA citizen suit section 7002, citizens can bring an action against "any person . . . who has contributed . . . to the past or present handling, [or] storage . . . of any *solid or hazardous waste* which may present an imminent and substantial endangerment to health or the environment."<sup>84</sup> The term "hazardous waste"<sup>85</sup> means a "solid waste," including any solid, liquid, semisolid, or gaseous material which may pose a substantial hazard to human health or

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78. *Id.* at § 310(d), 42 U.S.C. § 9659(d).

79. H.R. REP. NO. 99-253(I), 99th Cong., 2d Sess. 4, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 2835, at 2964 (1986).

80. Resource Conservation Recovery Act, 42 U.S.C. §§ 6901-6991(i) (1982 & Supp. V 1987) [hereinafter RCRA].

81. *Supra* note 79.

82. *Id.*

83. H.R. REP. NO. 99-253(I), 99th Cong., 2d Sess. 4, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 2835, at 2965 (1986).

84. RCRA, *supra* note 80, at § 7002, 42 U.S.C. § 6972 (emphasis added).

85. *Id.* at § 1004(5)(B), 42 U.S.C. § 6903(5)(B).

the environment.<sup>86</sup> CERCLA, on the other hand, regulates "any pollutant or contaminant which may present an imminent and substantial danger . . . ."<sup>87</sup> Pollutant or contaminant is defined broadly to include "but [is] not limited to, any element, compound, or mixture . . . which after release into the environment . . . will or may be reasonably anticipated to cause death, [or] disease . . . in such organisms or their offspring."<sup>88</sup> Thus, since the two statutes regulate different types of hazards, there is no foundation for the rationale that it would be redundant to include within CERCLA a citizen's suit provision to commence injunctive action in the face of an imminent and substantial danger.

The second rationale can be refuted by examining the many problems citizens have in bringing an action under common law. These cases are fraught with many problems such as causation and statutes of limitation.<sup>89</sup>

The third rationale can also be refuted by examining the EPA cleanup statistics themselves. With no interference from citizens in the five years after enactment of the Superfund program, the "EPA has managed to complete cleanup at only six National Priorities List sites and initiate cleanup work at less than ten percent of those now listed."<sup>90</sup> Additionally, a study of citizen's suits brought under federal environmental laws, conducted by the Environmental Law Institute, shows that citizen's suit provisions, which include injunctive actions, have had just the opposite result from that espoused in the legislative history; rather than interfere, citizens have acted both as a spur to initiate EPA action and as an alternative to inadequate EPA enforcement.<sup>91</sup>

Despite the fact that a citizen cannot institute an injunctive action under CERCLA to compel cleanup, there are a number of avenues within the citizen's suit provision which

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86. *Id.* at § 1004(27), 42 U.S.C. § 6903(27). See also 40 C.F.R. § 261 (1984).

87. CERCLA, *supra* note 2, at § 104(a), 42 U.S.C. § 9604(a) (emphasis added).

88. *Id.* at § 101(a)(2), 42 U.S.C. § 9604(a)(2).

89. See M.T. SEARCY, A GUIDE TO TOXIC TORTS (1989).

90. H.R. REP. NO. 99-253(I), 99th Cong., 2d Sess. 4, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 2964.

91. *Id.*



can be taken to assure that a cleanup is adequate.

1. *CERCLA Section 310(a)(1) Violation of a Standard or Requirement*

Section 104 gives the EPA Administrator<sup>92</sup> general authority to act whenever there is a release or a threat of release of a hazardous substance. The Administrator is authorized "to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time, . . . or take any other response measure consistent with the national contingency plan which the . . . [Administrator] deems necessary to protect the public health or welfare or the environment."<sup>93</sup> In addition, the Administrator *may* undertake investigations, surveys, and testing that he deems necessary to identify the existence and extent of a release.<sup>94</sup> However, there are neither standards nor mandatory duties which *compel* initial action. Nonetheless, once the Administrator decides to take action, there are a number of ways in which a citizen can assure adherence to the standards set forth in the statute.

The cleanup standards set forth in section 121 provide a primary avenue for citizen suits. In fact, the legislative history reveals that section 121 and section 310 were meant to work hand in hand to compel proper cleanup. The House Congressional Record states that:

Such suits would involve allegations that the agency has violated cleanup standards and other requirements of the law and that citizens' health and environment would be threatened if the agency was allowed to continue with its illegal acts . . . . A major goal of the legislation is to establish specific, uniform national health standards that will apply to EPA's cleanup decisions at Superfund sites. While we fully expect the agency to adhere to these standards, past experience has demonstrated that enforce-

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92. CERCLA, *supra* note 2, at § 104(a)(1), 42 U.S.C. § 9604(a)(1).

93. *Id.*

94. *Id.* at § 104(b), 42 U.S.C. § 9604(b).

ment of such legal requirements by affected citizens - acting as private attorneys general - is an essential component in the implementation of any detailed statutory mandate.<sup>95</sup>

Section 121 provides four requirements in selecting remedial actions. The remedial action must 1) assure protection of human health and the environment;<sup>96</sup> 2) be cost effective;<sup>97</sup> 3) use permanent solutions and alternative treatment technologies to the maximum extent practicable;<sup>98</sup> and 4) meet applicable or relevant and appropriate standards, requirements, criteria, or guidance under Federal or State environmental laws.<sup>99</sup> In choosing between alternative remedial actions, the Administrator must take into account a number of factors.<sup>100</sup>

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95. H.R. 1600, 99th Cong., 2d Sess., 132 CONG. REC. 9587 (1986).

96. CERCLA, *supra* note 2, at § 121(d), 42 U.S.C. § 9621(d)(1).

97. *Id.* at § 121(a), 42 U.S.C. § 9621(a). Despite the requirement that remedial actions must be cost effective, the legislative history is noteworthy in that it states that this requirement does not contemplate the traditional cost/benefit analysis. The Committee report states that "[t]he overriding mandate of this section is that, regardless of cost, cleanup at each and every site must protect human health and the environment." H.R. REP. NO. 99-253(I), 99th Cong., 2d Sess. 4, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 2880. Furthermore, the Congressional Record from the House states that "the Agency shall not factor the costs of implementing the response into its analysis. The costs of compliance will only become a factor in determining which of several equally effective actions could meet the required standard of protection." 132 CONG. REC. 9596 (1986).

98. CERCLA, *supra* note 2, at § 121(b)(1), 42 U.S.C. § 9621(b)(1).

99. *Id.* at § 121(d), 42 U.S.C. § 9621(d). The remedial action does not have to attain standards required under other Federal and State laws when 1) the remedial action taken is only a part of a total remedial action that will attain such standard when completed; 2) compliance with the standard will result in greater risk; 3) compliance with the standard is technically impracticable; 4) the remedial action selected will attain an equivalent standard through the use of another method; 5) with respect to a State standard, the State has not consistently applied the standard in similar circumstances; or 6) for remedial actions taken pursuant to section 9604, the selection of a remedial action that attains such standard will not provide a balance between the need for protection of public health and the environment, and the amounts available from the Fund to respond to other dangerous sites. *Id.* at § 121(d)(2)(B)(ii)-(iii), 42 U.S.C. § 9621(d)(2)(B)(ii)-(iii).

100. These factors include:

- (A) the long term uncertainties associated with land disposal;
- (B) the goals, objectives, and requirements of the Solid Waste Disposal Act § 1002 *et seq.* 42 U.S.C.A. § 6901 *et seq.*;
- (C) the persistence, toxicity, mobility, and propensity to bioaccumulate of

A citizen can challenge a remedial action pursuant to section 310(a)(1) if these factors are not taken into account.

As seen in section 104, any response action the Administrator takes must be consistent with the NCP.<sup>101</sup> The NCP sets forth a blueprint for removal and remedial actions under CERCLA. The NCP includes a section known as the national hazardous substance response plan which establishes procedures and standards for responding to the release of hazardous substances.<sup>102</sup> These response standards must include the minimum requirements set forth in section 105(a) in order to pass statutory muster.<sup>103</sup> Pursuant to section 310(a)(1), citi-

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such hazardous substances and their constituents;

(D) short and long-term potential for adverse health effects from human exposure;

(E) long-term maintenance costs;

(F) the potential for future remedial action costs if the alternative remedial action in question were to fail; and

(G) the potential threat to human health and the environment associated with excavation, transportation, and redisposal, or containment.

*Id.* at §§ 121(b)(1)(A)-(G), 42 U.S.C. §§ 9621(b)(1)(A)-(G).

101. *Id.* at § 104(a)(1), 42 U.S.C. § 9604(a)(1). A NCP for the removal of oil and hazardous substances was originally published pursuant to section 1321 of the Clean Water Act and was revised pursuant to CERCLA section 104.

102. *Id.* at § 105(a), 42 U.S.C. § 9605(a).

103. The plan must include at a minimum:

1) methods for discovering and investigating facilities where hazardous substances are located;

2) methods for evaluating and remedying releases or threats of releases which pose substantial danger to the public or the environment;

3) methods for determining the appropriate extent of removal;

4) appropriate roles and responsibilities for Federal, State, local governments, and nongovernmental entities in carrying out the plan;

5) provisions for procurement, maintenance, and storage of response equipment;

6) a method for reporting releases from facilities located on federally owned property;

7) means of assuring cost effective remedial action over the period of potential exposure to the hazardous substances;

8) criteria for determining priority of releases for the purpose of taking remedial action;

9) specification of roles for private organizations in responding to releases; and

10) standards and testing procedures to determine whether alternative or innovative testing technologies are appropriate for response actions.

*Id.* at §§ 105(a)(1)-(10), 42 U.S.C. §§ 9605(a)(1)-(10).

zens can challenge a response action if it does not meet the minimum requirements of section 105(a).<sup>104</sup>

Additionally, the NCP includes the NPL, a list of sites that present the greatest danger to public health and the environment and thus warrant cleanup before other non-listed sites. The Administrator is to decide whether a site is to be included on the NPL after consideration of a number of criteria.<sup>105</sup> A citizen wishing to challenge a decision by the Administrator not to list a site would be entitled to judicial review pursuant to the citizen suit provision.<sup>106</sup> Section 701 of the Administrative Procedure Act (APA)<sup>107</sup> provides that the action of "each authority of the Government of the United States" is subject to judicial review except to the extent that "statutes preclude judicial review; or agency action is committed to agency discretion by law."<sup>108</sup> The first exception would not be applicable as the statute gives no evidence of a legislative intent to preclude review.<sup>109</sup> Likewise, the second exception would not be applicable, as this is a very narrow exception. The legislative history of the APA reveals that this exception is only applicable where "statutes are drawn in such narrow terms that in a given case there is no law to apply."<sup>110</sup>

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104. "Following publication of the revised National Contingency Plan, the response to and actions to minimize damage from hazardous substances releases, shall, to the greatest extent possible, be in accordance with the provisions of the Plan." *Id.* at § 105(a), 42 U.S.C. § 9605(a).

105. Criteria for determining priorities among releases:

Shall be based upon relative risk or danger to public health or welfare or the environment, in the judgment of the President, taking into account to the extent possible the population at risk, the hazard potential of the hazardous substances at such facilities, the potential for contamination of drinking water supplies, the potential for direct human contact, the potential for destruction of sensitive ecosystems, the damage to natural resources which may affect the human food chain and which is associated with any release or threatened release, the contamination of the ambient air which is associated with the release or threatened release, State preparedness to assume State costs and responsibilities, and other appropriate factors.

*Id.* at § 105(a)(8)(A), 42 U.S.C. § 9605(a)(8)(A).

106. CERCLA, *supra* note 2, at § 310, 42 U.S.C. § 9659.

107. Administrative Procedure Act, 5 U.S.C. § 701 (1964 & Supp. V 1987).

108. *Id.*

109. See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967).

110. S. REP. No. 752, 79th Cong., 1st Sess. 26 (1945). See *Citizens to Preserve*

The statute provides "law to apply" in the form of criteria that must be considered. A reviewing court, applying the arbitrary and capricious test, could determine whether such criteria were in fact considered.

## 2. *Section 310(a)(2); Mandatory Duties*

When drafting CERCLA, Congress gave the Administrator very few non-discretionary duties. Thus, the citizen's role in compelling such duties is quite limited. Nevertheless, when the Administrator failed to publish the required NPL within 180 days after December 11, 1980, a citizen suit was brought and a court order issued compelling her to publish the list.<sup>111</sup> The Administrator is to revise the list annually,<sup>112</sup> and if he does not do so, a citizen can bring a citizen suit pursuant to section 310(a)(2) alleging a violation of a nondiscretionary duty.

Section 105 requires revision of the Hazard Ranking System (HRS),<sup>113</sup> a system which the EPA uses to determine what sites are to be cleaned up first. As with the revision of the NPL, a citizen can bring a citizen suit if the Administrator fails to revise the HRS.

## 3. *Timing of Judicial Review*

An important section that must be considered by citizens who wish to challenge the adequacy of EPA cleanups is section 113(h)(4).<sup>114</sup> This section, specifying the timing of judicial review, states, in relevant part, that:

No Federal court shall have jurisdiction under Federal law . . . to review any challenges to removal or remedial action selected under section 9606(a) of this title, in any

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Overton Park v. Volpe, 401 U.S. 402 (1971); Dunlop v. Bachowski, 421 U.S. 560 (1975); compare Heckler v. Chaney, 470 U.S. 821 (1985).

111. Environmental Defense Fund, Inc. v. Gorsuch, No. 82-2083 (D.D.C. Feb. 12, 1982).

112. CERCLA, *supra* note 2, at § 105(a)(8)(B), 42 U.S.C. § 9605(a)(8)(B).

113. 42 U.S.C. § 9605 (1982 & Supp. V 1987).

114. *Id.* at § 113(h)(4), 42 U.S.C. § 9613(h)(4).

action except one of the following: . . . (4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 . . . or secured under 9606 . . . was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal action where remedial action is to be undertaken at the site.<sup>115</sup>

The legislative history attempts to clarify the intent of this section by stating that:

[section 113(h)(4)] is designed to preclude lawsuits by any person concerning particular segments of the response action, as delineated in separate records of decision, until those segments of the response have been constructed. Completion of all of the work set out in a particular record of decision marks the first opportunity at which review of that portion of the response action can occur.<sup>116</sup>

Thus, section 113(h)(4) precludes judicial review of any stage of the cleanup procedure until after actual remedial action has been undertaken. However, the legislative history makes clear that the phrase “‘removal or remedial action taken’ is not intended to preclude judicial review until the total response action is finished if the response action proceeds in *distinct and separate stages*.”<sup>117</sup>

For example, a surface cleanup could be challenged as violating the standards or requirements of the Act once all the activities set forth in the Record of Decision for the surface cleanup phase have been completed. This is contemplated even though other separate and distinct phases of the cleanup, such as subsurface cleanup, remain to be undertaken as part of the total response action.<sup>118</sup>

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115. *Id.*

116. H.R. 1550, 99th Cong., 2d Sess. 132 CONG. REC. H. 9582 (1986).

117. H.R. CONF. REP. NO. 99-962, 99th Cong., 2d Sess. 224 (1986) (emphasis added).

118. *Id.*

The Administrator is directed to set forth each distinct and separate stage of a response action in a separate Record of Decision document. So as not to stall response actions, any challenge to a particular stage "shall not interfere with those stages of the response action which have not been completed."<sup>119</sup> Additionally, a citizen cannot challenge the adequacy of a remedial investigation and feasibility study, as it is a removal action, until the remedial action itself has been taken.

The rationale in limiting such pre-implementation review is to ensure expeditious cleanups.<sup>120</sup> To offset this restriction on judicial review, Congress included provisions for public participation in the selection of the cleanup plan. In light of the administrative principles of exhaustion, it is arguable that, in order to challenge a cleanup plan, a citizen *must* have participated in the selection of a cleanup plan pursuant to section 117.

#### V. Section 104(i)-Agency for Toxic Substances and Disease Registry

Section 104(i) establishes, within the Public Health Service, the Agency for Toxic Substances and Disease Registry (ATSDR).<sup>121</sup> The function of the ATSDR is to furnish and assess information concerning hazardous substances and to make this information available to individuals, the states, and the EPA. This information is gathered and assessed in a number of ways. First, through the preparation of a prioritized list of hazardous substances, which are most commonly found at facilities on the NPL and which pose the most significant potential threat to human health and the environment.<sup>122</sup> Second, through the preparation of toxicological profiles of the substances listed pursuant to paragraph (2) above.<sup>123</sup> Third,

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119. *Id.*

120. H.R. 1550, 99th Cong., 2d Sess., 132 CONG. REC. H. 9583 (1986).

121. CERCLA, *supra* note 2, at § 104(i), 42 U.S.C. § 9604(i).

122. *Id.* at § 104(i)(2)(A), 42 U.S.C. § 9604(i)(2)(A).

123. *Id.* at § 104(i)(3), 42 U.S.C. § 9604(i)(3). The profiles include A) an examination and interpretation of available toxicological information in order to determine

through the preparation of health assessments that *must* be done for each facility on the NPL<sup>124</sup> and that *may* be prepared “for releases or facilities where individual persons or licensed physicians provide information that individuals have been exposed to a hazardous substance, for which the probable source of such exposure is a release.”<sup>125</sup> All three of these methods for gathering information are non-discretionary duties that must be performed by the Administrator of the ATSDR. Individuals or licensed physicians may either provide information through formal or informal methods or may petition the Administrator of the ATSDR providing such information and requesting a health assessment. If, after being petitioned, the Administrator does not initiate a health assessment he must provide a written explanation of why the assessment was not appropriate.<sup>126</sup> An individual is entitled to judicial review of the denial to initiate a health assessment.<sup>127</sup> After a health assessment is completed, the results and recommendations for further action, if any, are given to the Administrator of the EPA and the affected states. Additionally, and of importance to potentially threatened citizens:

[I]f the health assessment indicates that the release or

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the levels of significant human exposure and the health effects of such exposure; B) a determination of the availability of adequate information on the health effects; and C) where appropriate, the identification of toxicological testing needed to identify the types or levels of exposure that may present significant adverse health effects. *Id.* at § 104(i)(3)(A)-(C), 42 U.S.C. § 9604(i)(3)(A)-(C).

124. *Id.* at § 104(i)(6)(A), 42 U.S.C. § 9604(i)(6)(A) (emphasis added). Health assessments shall include preliminary assessments of the potential risk to human health posed by individual sites and facilities, based on such factors as the nature and extent of contamination, the existence of potential pathways of human exposure (including ground or surface water contamination, air emissions, and food contamination), the size and potential susceptibility of the community within the likely pathways of exposure, the comparison of expected human exposure levels to the short-term and long-term health effects associated with identified hazardous substances and any available recommended exposure or tolerance limits for such hazardous substances, and the comparison of existing morbidity data on diseases that may be associated with the observed levels of exposure. *Id.* at § 104(i)(6)(F), 42 U.S.C. § 9604(i)(6)(F).

125. *Id.* at § 104(i)(6)(B), 42 U.S.C. § 9604(i)(6)(B).

126. *Id.*

127. Administrative Procedure Act, 5 U.S.C. § 704 (1964 & Supp. V. 1987).



threatened release concerned may pose a serious threat to human health or the environment, the Administrator of ATSDR *shall* so notify the Administrator of EPA who *shall* promptly evaluate such release or threatened release in accordance with the hazard ranking system . . . to determine whether the site shall be placed on the National Priorities List or, if the site is already on the list, the Administrator of ATSDR may recommend to the Administrator of EPA that the site be accorded a higher priority.<sup>128</sup>

Pursuant to the citizen suit provision, section 310(a)(2), a citizen can bring a civil action against the Administrator of the ATSDR for failure to perform any of these three non-discretionary duties.

The information provided by the ATSDR can have a number of important effects on toxic tort litigation. The toxicological profiles will contain health effects statements for particular chemicals. The statement will provide information on the general use of particular substances, the ways in which people can become exposed to them, and the hazards and symptoms of diseases that may be caused by exposure. There will be information on the risks associated with the chemicals and discussion on the acute hazards and carcinogenicity.<sup>129</sup> The health assessments for all sites on the NPL "[are] essentially a preliminary examination of the potential human health risk at individual sites based on the extent of contamination, the size of the exposed population, and the comparison of anticipated exposure levels with available literature on tolerance limits."<sup>130</sup>

The potential value of this information to the toxic tort plaintiff is yet undetermined and has received mixed ratings. Through the toxicological profiles, a plaintiff's injuries can be related to the toxicology quickly and inexpensively, without

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128. CERCLA, *supra* note 2, at § 104(i)(6)(H), 42 U.S.C. § 9604(i)(6)(H). (emphasis added).

129. Rogers, *The Potential Role of Superfund in Toxic Tort Litigation*, 3 NAT. RESOURCES & ENV'T 13, 15 (1988).

130. *Id.*

the need for experts. However, defense attorneys argue that the Congressional intent of this information is "remedial and public, not compensatory and private,"<sup>131</sup> and thus not admissible under the Federal Rules of Evidence. Although potentially not admissible as evidence, the information provided by the ATSDR may be used to form the basis of expert opinions.<sup>132</sup>

One commentator suggests that the information may not even be available in the near future. Despite barely making the December 10, 1988 deadline for completion of the first wave of health assessments, "the ATSDR Administrator James O. Mason admitted to Congress last June that it is 'highly unlikely' that the Agency will be able to meet its statutory deadlines for FY 1989, especially given EPA's plans to add 300-400 sites to the [NPL]."<sup>133</sup> Another commentator stated that "[a]ll these assessments can accomplish is a study with the government's seal of approval saying that nothing is wrong with you. EPA uses ATSDR to calm community anxiety."<sup>134</sup>

Despite these wary views, the ATSDR information has

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131. Sherwood & Fitzsimmons, *The ATSDR: A Plaintiff's Dream Come True?* 2 TOXICS L. REP. 1072, 1075 (Mar. 1988).

132. Rule 703 of the Federal Rules of Evidence permits an expert to form an opinion based on (1) firsthand information, (2) facts or data presented to him at trial, and (3) data that could not be admitted into evidence, provided it is data reasonably relied upon by experts in the field. *Id.* at 1078 (citing FED. R. EVID. 703); See also 3 WEINSTEIN'S EVIDENCE, § 703(1) (1989).

133. Steinzor, *SARA's Unfulfilled Promises: What They Mean for Toxic Tort Litigation*, 3 TOXICS L. REP. 803 (Nov. 1988) (quoting statement of James O. Mason, M.D., Ph.D., Administrator, Agency for Toxic Substances and Disease Registry, before the Committee on Energy and Commerce, Subcommittee on Oversight, and Investigations, U.S. House of Representatives, June 20, 1988, at 7).

134. *Id.* at 804. Yet another attorney believes that:

SARA will hurt toxic tort plaintiffs more than help them because it puts government and industry in the position to say that medical monitoring programs, an increasingly important type of relief sought by toxic tort plaintiffs, is not necessary because a government program is set up to deal with such activities.

*Id.* Nonetheless, courts continue to be willing to allow recovery for medical monitoring, see, e.g., *Brewer v. Ravan*, 680 F. Supp. (M.D. Tenn. 1988); *Lykins v. Westinghouse Electric Corp.*, 27 E.R.C. 1590 (E.D. Ky. 1988); *Jones v. Inmont Corp.*, 584 F. Supp. 1425 (D.C. Ohio 1984); *United States v. Septa*, 24 Env't Rep. Cas. (BNA) 1860, 1863 (E.D. Pa. 1986).

the potential for use by the treating physician. At the very least, the information can be used to narrow the focus on what chemicals are present at the site, and then symptoms manifested by the victim can be matched with the symptoms of diseases that may be caused by those chemicals.

## VI. Conclusion

CERCLA can be very useful to a citizen who is concerned about the health hazards associated with residing near a hazardous waste facility. Despite the absence of a CERCLA provision allowing a citizen to compel a PRP to cleanup a site, there are a number of avenues a citizen can take. These avenues range from the costly route of private action, to the less burdensome routes of petitioning the government and participating in cleanup plan selection. In addition, a citizen can bring a toxic tort action in state court and use the information provided by the ATSDR as a basis for his claim.

Andrea L. Bull