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GOVERNMENTAL LIABILITY UNDER CERCLA

*Steven G. Davison**

I. INTRODUCTION

Litigation under the Comprehensive Environmental Reponse, Compensation and Liability Act¹ (CERCLA), seeking to determine and apportion liability for the costs of a cleanup of a release or threatened release of a hazardous substance, often involves the issue of whether federal, state, or local government is liable under CERCLA for part or all of the cleanup costs. In some CERCLA litigation, the federal government may be liable for cleanup costs because the release or threatened release occurred at a federal facility (such as a military base or a Department of Energy facility) where hazardous substances have been disposed of or leaked into the environment.² Liability of the federal government under CERCLA also may be at issue when a release or threatened release of a hazardous substance occurs at a privately owned factory or a facility that was manufacturing a product or producing materials under a contract with the United States government.³

A municipality may be sued under CERCLA for recovery of cleanup costs when the municipality's solid wastes, containing hazardous substances from household, industrial, or commercial wastes, re-

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¹ Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, 42 U.S.C. §§ 9601-9675 (1994).

² See *FMC Corp. v. United States Dep't of Commerce*, 29 F.3d 833, 849-50 (3d Cir. 1994) (en banc) (Sloviter, C.J., dissenting). "Studies suggest that there are numerous [federal] government facilities dangerous enough to fall within the ambit of CERCLA . . ." *Id.* at 49.

³ See, e.g., *United States v. Vertac Chem. Corp.*, 46 F.3d 803, 808-10 (8th Cir. 1995); *FMC Corp.*, 29 F.3d at 839-42.

lease hazardous substances into the ground or groundwater at a municipal or private sanitary landfill where the wastes were sent;⁴ or when another person illegally dumps hazardous substances at the municipality's sanitary landfill without the municipality's consent.⁵ Both a state and the United States Environmental Protection Agency (EPA) may be sued for recovery of cleanup costs when their cleanup activities under CERCLA or other governmental programs are conducted negligently or otherwise improperly, causing the release of hazardous substances into the environment.⁶

Under CERCLA, Congress has provided a mechanism for the federal and state governments and private parties to clean up a hazardous waste site and to recover their cleanup costs from those persons (including federal, state, and local governments) responsible for the contamination of the site.⁷ "Congress enacted . . . 'CERCLA' . . . [in 1980] in response to increasing concern over the severe environmental and public health effects from improper disposal of hazardous waste and other hazardous substances."⁸ Congress enacted CERCLA for the following two primary purposes: "First, Congress intended to provide the federal government with the means to effectively control the spread of hazardous materials from inactive and abandoned waste disposal sites. . . . Second, it intended to affix the ultimate cost of cleaning up these disposal sites to the parties responsible for the contamination."⁹

CERCLA furthers these purposes by providing EPA with authority and funding "to take immediate cleanup action, without the need to await administrative and judicial determination of liability."¹⁰ This goal of immediate cleanup is accomplished in part through section 104¹¹ of CERCLA, which authorizes EPA, in coordination with state and local governments and persons responsible for the contamination, to clean up or otherwise respond¹² to any release or threatened

⁴ See, e.g., *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1199 (2d Cir. 1992); *New Jersey Dep't of Env'tl. Protection v. Gloucester Env'tl. Management Serv.*, 821 F. Supp. 999, 1004-05 (D.N.J. 1993).

⁵ See *Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1142-43 (E.D. Pa. 1982).

⁶ See, e.g., *United States v. Atlas Minerals & Chem., Inc.*, 797 F. Supp. 411, 414-17 (E.D. Pa. 1992); *United States v. Western Processing Co.*, 761 F. Supp. 725, 728-30 (W.D. Wash. 1991); *Stilloe v. Almy Bros., Inc.*, 759 F. Supp. 95, 99-104 (N.D.N.Y. 1991) (motion to dismiss originally denied but later granted in *Stilloe v. Almy Bros., Inc.*, 782 F. Supp. 731 (N.D.N.Y. 1992)).

⁷ See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7-8 (1989).

⁸ *B.R. MacKay & Sons, Inc. v. United States*, 633 F. Supp. 1290, 1293 (D. Utah 1986).

⁹ *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1340 (9th Cir. 1992).

¹⁰ *B.R. MacKay*, 633 F. Supp. at 1293.

¹¹ See 42 U.S.C. § 9604 (1994).

¹² See *B.R. MacKay*, 633 F. Supp. at 1293 n.4.

release of a "hazardous substance,"¹³ "pollutant or contaminant."¹⁴ In addition, section 107¹⁵ of CERCLA "establishes liability rules to allow the [federal and state] government[s] to recover [their] response costs under section 104 from responsible parties."¹⁶

Section 107 authorizes the United States, a state, an Indian tribe, or a private person to bring suit against an owner or operator of a facility from which a hazardous substance is released or threatened to be released, a generator of a hazardous substance disposed of at such a facility, and certain other potentially responsible parties (PRPs), to recover both the costs of cleaning up hazardous substances released or threatened with release from the facility and damages for injuries to natural resources caused by a release.¹⁷ The federal government, state governments, and political subdivisions of the states can be PRPs liable for cleanup costs and damages to natural resources, both in suits brought under section 107 of CERCLA and in contribution actions brought by other PRPs under section 113(f)¹⁸ of CERCLA.

However, as a result of the 1996 decision by the United States Supreme Court in *Seminole Tribe v. Florida*,¹⁹ private persons will no longer be able to sue state governments in federal courts to recover hazardous substance cleanup costs under either section 107 or section 113(f) of CERCLA. This effect is due to the fact that *Seminole Tribe* overruled the Supreme Court's 1989 decision in *Pennsylvania v. Union Gas*,²⁰ and held that Congress does not have authority under its powers under Article I of the United States Constitution (which includes the power to regulate interstate commerce) to waive a state's immunity under the Eleventh Amendment of the United States Constitution from suits by private persons in federal courts.²¹

¹³ Section 101(14) of CERCLA defines the term "hazardous substance" to include substances listed, designated or identified under certain other statutes as well as substances designated, pursuant to section 102. See 42 U.S.C. §§ 9601(14), 9602; see also *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1196 (2d Cir. 1992). Pursuant to section 101(14)(B), and under section 102 of CERCLA, the EPA has designated over 700 hazardous substances under CERCLA in Table 302.4 of 40 C.F.R. § 302. See 42 U.S.C. §§ 9601(14)(B), 9602; 40 C.F.R. § 302 (1996). A substance is a "hazardous substance" under CERCLA if it is designated under any of the other statutes referred to in section 101(14) of CERCLA or under Table 302.4 of 40 C.F.R. § 302 regardless of the origin of the substance and the concentration or quantity of the substance. See *B.F. Goodrich*, 958 F.2d at 1200.

¹⁴ Section 101 of CERCLA defines the term "pollutant or contaminant." 42 U.S.C. § 9601(33).

¹⁵ *Id.* § 9607.

¹⁶ *B.R. MacKay*, 633 F. Supp. at 1293 (footnote omitted).

¹⁷ See 42 U.S.C. § 9607; see also *infra* notes 145-54, 164-79 and accompanying text.

¹⁸ See 42 U.S.C. §§ 9607, 9613(f); see also *infra* notes 155-63 and accompanying text.

¹⁹ *Seminole Tribe of Fla. v. Florida*, 116 S. Ct. 1114, 1127-32 (1996).

²⁰ *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).

²¹ See *infra* notes 110-39 and accompanying text.

This Article analyzes the extent to which federal, state, and local governments are subject to liability as PRPs under CERCLA in suits brought under section 107 or section 113(f). It concludes that despite *Seminole Tribe*, states continue to be subject to suits in federal court brought under either section 107 or section 113(f) of CERCLA by the United States and other states, and the federal government and political subdivisions of states continue to be subject to liability as PRPs in suits brought by private persons under sections 107 and 113(f). The liability of federal and state governments under sections 107 and 113(f) as PRPs as a result of governmental regulatory activities, governmental cleanup activities, and governmental involvement with private business facilities also is analyzed in this Article. In agreement with the conclusions reached by most of the courts that have addressed these issues, this Article concludes that federal, state, and local governments should not be held liable under either section 107 or section 113(f) of CERCLA as PRPs solely as a result of governmental regulation of private business facilities, governmental cleanup of hazardous waste sites, or governmental contractual involvement with a private business facility manufacturing a product for, or providing materials to, the government. One conclusion reached in the analysis is that government entities should not be liable as PRPs even when cleanup activities are performed negligently or otherwise improperly and release hazardous substances into the environment; instead, a governmental entity that performs improper cleanup activities should not be able to recover cleanup costs that are not consistent with the National Contingency Plan (NCP)²² and should be subject to recoupment counterclaims filed by defendants in actions under section 107 or section 113(f) for damages to property caused by improper cleanup activities.²³

II. POTENTIAL LIABILITY OF FEDERAL, STATE, AND LOCAL GOVERNMENTS UNDER CERCLA

CERCLA imposes the costs of cleanup of hazardous waste sites on certain persons whom Congress determined should be responsible for the cleanup of the contamination. These persons (referred to as potentially responsible parties, or PRPs) can be held liable under CER-

²² See *infra* notes 426-37 and accompanying text.

²³ See *infra* notes 438-64 and accompanying text.

CLA for cleanup costs either in actions brought under section 107²⁴ by governmental entities or private citizens who have incurred response costs, or in contribution actions brought by other PRPs under section 113(f).²⁵ Two general terms, “persons” and “owners or operators,” describe those who may be liable as PRPs under section 107 or section 113(f).²⁶ Because the term “person” is defined to include federal, state, and local governments,²⁷ and the term “owner or operator” is defined by reference to certain activities that a “person” may undertake,²⁸ federal, state, and local governments may be subject to liability under section 107 or section 113(f) when a governmental entity meets the standards for PRP liability.²⁹

A. Federal Government's Liability

CERCLA to some extent has waived the United States' general sovereign immunity, which Congress has the power to waive if it expresses its intent to do so “unequivocally”³⁰ on the face of a statute (without resort to legislative history).³¹ As originally enacted in 1980, CERCLA contained a section 107(g)³² that provided:

Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government shall be subject to, and comply with, this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under this section.³³

²⁴ See 42 U.S.C. § 9607 (1994); see also *infra* notes 145–54, 164–79 and accompanying text.

²⁵ See 42 U.S.C. § 9613(f); see also *infra* notes 155–63 and accompanying text.

²⁶ See 42 U.S.C. §§ 9607, 9613(f); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7 (1989).

²⁷ Section 101(21) of CERCLA defines the term “person” to mean “an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a state, or any interstate body.” 42 U.S.C. § 9601(21).

²⁸ See *id.* § 9601(20).

²⁹ See *Union Gas Co.*, 491 U.S. at 7–13.

³⁰ See *United States v. Testan*, 424 U.S. 392, 399 (1976); *United States v. King*, 395 U.S. 1, 4 (1969). A waiver of the federal government's sovereign immunity, however, is construed narrowly in favor of the United States. See *United States v. Idaho ex rel. Dir., Idaho Dep't of Water Resources*, 508 U.S. 1, 7 (1993).

³¹ See *United States v. Nordic Village, Inc.*, 503 U.S. 30, 37 (1992).

³² Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, § 107(g), Pub. L. No. 96-510, 94 Stat. 2783 (1980).

³³ This provision was interpreted as not waiving the United State's sovereign immunity (i) from suits seeking injunctive relief against alleged violations of CERCLA by EPA, see *Jefferson*

When Congress amended Title I of CERCLA with the Superfund Amendments and Reauthorization Act of 1986³⁴ (SARA), section 107(g) was amended to read: "For provisions relating to federal agencies, see section 120 of this title,"³⁵ and a new section 120³⁶ was added to CERCLA, entitled "Federal facilities." Section 120(a)(1)³⁷ now provides:

Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 107 of this title. Nothing in this section shall be construed to affect the liability of any person or entity under sections 106 and 107 of this title.³⁸

Because section 120(a)(1) of CERCLA is part of a section entitled "Federal facilities," section 120(a)(1) might be interpreted as only waiving the United States' sovereign immunity from liability for federally owned or operated facilities.³⁹ In *FMC Corp. v. United States Department of Commerce*, four judges of the United States Court of Appeals for the Third Circuit, dissenting from the opinion and judgment of a majority of the *en banc* Third Circuit, argued that the federal government reasonably interpreted section 120(a)(1) of CERCLA as only making the federal government liable under section 107 of CERCLA when the government owns or operates a facility where the release or threatened release of a hazardous substance occurs.⁴⁰

County, Missouri v. United States, 644 F. Supp. 178, 181 (E.D. Mo. 1986); or (ii) from suits seeking a declaratory judgment that a defendant has not violated CERCLA, *see* United States v. Nicolet, 1986 WL 15017, at *4 (E.D. Pa. 1986).

³⁴ Superfund Amendments and Reauthorization Act ("SARA") Pub. L. No. 99-499, 100 Stat. 1666 (1986) (codified as amended at 42 U.S.C. § 9620 (1994)).

³⁵ *Id.* § 9607(g).

³⁶ *Id.* § 9620.

³⁷ *Id.* § 9620(a)(1).

³⁸ This section has been interpreted as waiving the United States' sovereign immunity for actions of the federal judiciary, but not as waiving the immunity from personal liability of federal judicial officers, and officers of the federal courts, for action in the performance of judicial functions. *In re Sundance Corp., Inc.*, 149 B.R. 641, 660 (Bankr. E.D. Wash. 1993). Consequently, CERCLA does not make federal judicial officers, or agents of the federal courts acting in an official capacity, personally liable under section 107 of CERCLA. *Id.*

³⁹ *See* *FMC Corp. v. United States Dep't of Commerce*, 29 F.3d 833, 842 (3d Cir. 1994) (*en banc*).

⁴⁰ *See id.* at 849 (Sloviter, C.J., dissenting).

Under this federal government interpretation of section 120(a)(1), the federal government would be subject

to liability when it is acting or has acted like a “non-governmental entity,” such as by owning facilities, but not when it is conducting a sovereign’s purely regulatory actions in connection with the operations of a private, for-profit entity. Thus under the government’s analysis, its operation of facilities such as a federal park or an army base or naval vessel would subject it to “operator” or “owner” liability under CERCLA but its regulation of private parks or other private facilities would not, even if that regulation may result in the discharge of hazardous wastes.⁴¹

The dissenters in *FMC Corp.* also argued that CERCLA’s waiver of sovereign immunity under section 120(a)(1) does not extend to some regulatory activities, such as waging war, reserved exclusively to the federal government.⁴²

However, Judge Greenberg, for a majority of the *en banc* Third Circuit, held in *FMC Corp.* that “Section 120(a)(1) of CERCLA does not state that regulatory activities cannot form the basis of liability. Rather it states that the [federal] government is liable in the same manner and to the same extent as any non-governmental entity.”⁴³ Judge Greenberg reasoned in *FMC Corp.* that Congress did not explicitly limit the scope of its waiver of sovereign immunity to federal facilities when it enacted section 120 in 1986, because section 120(a)(1)’s reference to federal government entities being subject to “liability under section 107” “was an exact counterpart to language in section 107 as originally enacted.”⁴⁴ Although he did not do so, Judge Greenberg also could have supported this reasoning by noting that section 107(g),⁴⁵ as amended in 1986, refers to section 120 “for provisions relating to federal agencies,” not “for provisions relating to federal facilities.” In *FMC Corp.*, Judge Greenberg further reasoned:

⁴¹ *Id.* at 847.

⁴² *See id.*

⁴³ *Id.* at 840; The court in *East Bay Municipal Utility District v. United States Department of Commerce* found the Third Circuit’s analysis in *FMC Corp.* to be “persuasive” and concurred that federal government regulatory activities are not immune from liability under CERCLA. *See East Bay Mun. Util. Dist. v. United States Dep’t of Commerce*, 43 *Env’t Rep. Cas. (BNA)* 1918, 1926 (D.D.C. 1996). The court in *East Bay Municipal Utility District* also held, as did *FMC Corp.*, that section 120 “actually covers the general applicability of CERCLA to the entire federal government . . .” *East Bay*, 43 *Env’t Rep. Cas. (BNA)* at 1926; *see infra* note 46 and accompanying text.

⁴⁴ *F.M.C. Corp. v. United States Dep’t of Commerce*, 29 F.3d 833, 840 (3d Cir. 1994) (*en banc*).

⁴⁵ 42 U.S.C. § 9607(g) (1994).

Inasmuch as Congress did nothing *in terms* in 1986 to narrow its earlier waiver of sovereign immunity, it would be unreasonable for us to infer that it impliedly limited its original waiver by moving the waiver section. Indeed, if anything, through its enactment of section 120, Congress reemphasized its intention that CERCLA be applied to the government. Overall, we think it is quite clear that the transfer of the waiver of sovereign immunity provision was nothing more than a logical reordering of the waiver provision accompanying the enactment of section 120. (We also point out that it would be difficult to understand why Congress would have limited the waiver of sovereign immunity to activities at federally owned facilities. . . . Thus, the government itself does not treat the waiver of sovereign immunity as being limited to federal facilities.)⁴⁶

This holding by the majority of the *en banc* Third Circuit is a correct one, because it is clearly what section 120(a)(1) says on its face, and waivers of the United States' sovereign immunity are to be determined only by the language on the face of a statute.⁴⁷ The "Federal facilities" heading of section 120 should not be relied upon to limit the clear language on the face of section 120(a)(1); section 120 may have been entitled "Federal facilities" because most of the other subsections of section 120 specify CERCLA cleanup standards and procedures for facilities and real property owned or operated by the United States.

Under the interpretation of section 120(a)(1) followed by the majority of the *en banc* Third Circuit in *FMC Corp.*, a court, in deciding whether the federal government is liable as a PRP under section 107, will consider both the federal government's regulatory activities and its non-regulatory activities with respect to a facility, and will determine whether the government's activities "taken *in toto* were of the type commonly associated with being" one of the four types of PRPs under section 107 and "the type of activities in which private parties could engage."⁴⁸ Although no court has held that governmental activities regulating actions of private persons are immune *per se* from PRP liability under CERCLA, the courts uniformly have held, following a totality of circumstances approach similar to that applied in *FMC Corp.*, that a governmental entity cannot be held liable as a PRP

⁴⁶ *FMC Corp.*, 29 F.3d at 842 & n.2.

⁴⁷ See *United States v. Nordic Village, Inc.*, 503 U.S. 30, 37 (1992) (stating that congressional waiver of United States' sovereign immunity must be clearly expressed on face of federal statute and cannot be implied from legislative history).

⁴⁸ *FMC Corp.*, 29 F.3d at 842.

under section 107 of CERCLA *solely* on the basis of governmental regulation of private business activities.⁴⁹

In support of this totality of circumstances approach, Judge Greenberg reasoned in *FMC Corp.* that exempting the federal government altogether from CERCLA liability for regulatory activities would be inconsistent with the principle that "CERCLA is a remedial statute which should be construed liberally to effectuate its goals,"⁵⁰ and with CERCLA's "essential purpose of making those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created."⁵¹

Judge Greenberg also argued in *FMC Corp.* that immunizing the federal government's regulatory activities from liability would undermine Congress' intent under CERCLA to ensure that those who benefit financially from a commercial activity should internalize the health and environmental costs of that activity into the cost of doing business,⁵² and to provide an incentive for the sound treatment and handling of hazardous substances.⁵³

In *FMC Corp.*, Judge Greenberg further asserted that the court's refusal to recognize an exemption from CERCLA liability for federal government regulatory functions was consistent with section 107(b),⁵⁴ which he described as listing "the only three defenses . . . available to any person, including the government,"⁵⁵ from liability under section 107. Judge Greenberg also argued in *FMC Corp.* that recognition of a principle of *per se* non-liability of the federal government would be inconsistent with section 107(d)(2),⁵⁶ which exempts state and local governments from liability for "actions taken in response to an emergency created by the release or threatened release of a hazardous

⁴⁹ See *infra* notes 213-310 and accompanying text.

⁵⁰ *FMC Corp.*, 29 F.3d at 840 (quoting *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 258 (3d Cir. 1992)).

⁵¹ *Id.* at 840 (quoting *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1221 (3d Cir. 1993)) (internal quotation marks omitted by *FMC Corp.*).

⁵² See *id.* at 840 (citing *United States v. Azrael*, 765 F. Supp. 1239, 1245 (D. Md. 1991) and quoting *United States v. Atlas Minerals and Chem., Inc.*, 797 F. Supp. 411, 413 n.1 (E.D. Pa. 1992)).

⁵³ See *id.* at 840 (quoting 125 CONG. REC. 17989 (1979)) (statement of Senator John S. Culver of Iowa), reprinted in 1 SENATE COMM. ON ENV'T AND PUB. WORKS, A LEGISLATIVE HISTORY OF CERCLA, Pub. L. No. 96-510, 148-49 (Comm. Print 1983).

⁵⁴ 42 U.S.C. § 9607(b) (1994).

⁵⁵ *FMC Corp.*, 29 F.3d at 841.

⁵⁶ 42 U.S.C. § 9607(d)(2).

substance generated by or from a facility owned by another person.”⁵⁷ Judge Greenberg reasoned that:

Congress’s creation of an exception for cleanup activities by state and local governments plainly shows that it intended to treat these activities differently from other government activities. Accordingly, CERCLA does not protect a government from liability simply because it acts in a regulatory capacity. Rather, a government is protected under section 107(d)(2) because it is responding to an environmental emergency.⁵⁸

He also asserted that CERCLA’s essential purpose of making responsible parties bear the costs of remedying harmful conditions they created is not “served by making the government liable for attempting to clean up wastes created by others.”⁵⁹ He then stated, technically in *dicta*, that:

[i]t stands to reason that inasmuch as state and local governments are immune from CERCLA liability for the consequences of cleanup activities in response to emergencies created by others, but not for the consequences of regulatory conduct in general, we should read this distinction as implied in the federal government’s waiver of sovereign immunity as well.⁶⁰

In dissent in *FMC Corp.*, Chief Judge Sloviter of the Third Circuit argued in response:

Furthermore, the majority’s implication of an exception for federal cleanup of hazardous materials from the waiver of sovereign immunity makes the statute’s explicit exception for cleanup by state governments in section 107(d)(2) redundant because section 101(20)(D) abrogates the states’ sovereign, i.e. Eleventh Amendment, immunity in language virtually identical to its waiver of the federal government’s sovereign immunity.⁶¹

⁵⁷ Section 107(d) of CERCLA, 42 U.S.C. § 9607(d), is analyzed *infra* notes 86–108 and accompanying text.

⁵⁸ *FMC Corp.*, 29 F.3d at 841.

⁵⁹ *Id.*

⁶⁰ *Id.* (*dictum*). Judge Greenberg concluded, however, that the federal government’s involvement with the facility at issue in *FMC Corp.* was not in response to a threatened release of hazardous substances, and therefore concluded that the relevant question under CERCLA was whether the government’s actions at the facility, whether or not characterized as actions in a regulatory capacity, were sufficient to impose liability upon the federal government under section 107 of CERCLA as one of the types of PRPs subject to liability under that section. *Id.* at 841–42.

⁶¹ *Id.* at 848 n.2 (Sloviter, C.J., dissenting). Section 101(20)(D) of CERCLA is analyzed later in this article. See *infra* notes 68–76 and accompanying text.

However, as discussed later in this article,⁶² most courts, agreeing with the majority position in *FMC Corp.*, have held either that governmental cleanup activities are immune from liability under CERCLA, or that such cleanup activities by themselves are not sufficient to make a governmental entity liable as a PRP under section 107 of CERCLA. Without making any distinction between governmental regulatory and cleanup activities and other governmental activities, the United States Supreme Court in 1989 stated in *dictum* that section 120(a)(1) of CERCLA "is doubtless an 'unequivoca[l] ex-

Judge Greenberg, in an earlier opinion for the majority of a three-judge panel in *FMC Corp. v. United States Department of Commerce* (an opinion and judgment that were withdrawn and vacated when the Third Circuit granted *en banc* review in *FMC Corp. v. United States Dept. of Commerce*, 10 F.3d 987), also had held that the federal government's liability as a PRP under CERCLA should be determined by considering whether both the government's regulatory and non-regulatory activities "taken *in toto* were of the type commonly associated with being an operator or arranger under CERCLA and are the type of activities in which private parties could engage." *FMC Corp. v. United States Dept. of Commerce*, 37 Env't Rep. Cas. (BNA) 1689, 1695 (3d Cir. 1993). Judge Greenberg's opinion for the majority of the three-judge panel also had rejected the federal government's theory that the government is immune from liability under section 107 when it is acting as a sovereign in regulatory actions in connection with a private, profit-making facility and also held that the federal "government is liable in the same manner and to the same extent as any non-governmental agency." *Id.* at 1694. Judge Greenberg's majority decision, however, also concluded that

courts should consider both regulatory and non-regulatory activities as bases for liability and that the government should be immune only for regulatory activities that have no analogue to conduct of a private business. . . . Thus, where the government enacts regulations that do not have an environmental remedial purpose but instead are intended to further its commercial undertakings, it can be held liable under CERCLA. Similarly, if the government designs and constructs a landfill to run as a business it can be subject to section 120(a)(1).

Id. He also reasoned in this subsequently vacated panel decision that determination of whether the government is liable as an "operator" of a facility under section 107 should be based not upon "the ultimate goal of the government regulation, but instead . . . [upon] the short term goals of the regulation and the regulation's immediate effects and characteristics." *Id.* at 1695. Applying this standard to the facts of the case, Judge Greenberg's decision concluded that the federal government was liable under CERCLA as an "operator" during World War II of a privately owned industrial facility because

the government was not issuing regulations for the purpose of taking remedial action or directly protecting the environment, uniquely governmental function. . . . It was imposing conditions to ensure its "contractual" rights in purchasing a custom-made product. Its motivation to do so was to protect its position as a buyer by ensuring that the specifications for the product were met. In short the government regulated in furtherance of its commercial goals.

Id. at 1696. Judge Greenberg's emphasis on the relevance of the goals and purposes of governmental regulation in determining governmental liability as an "operator," is absent from his subsequent majority decision for the *en banc* Third Circuit in *FMC Corp. v. United States Dept. of Commerce*, 10 F.3d 987 (3d Cir. 1993).

⁶² See *infra* notes 360-425 and accompanying text.

press[ion]' of the Federal Government's waiver of its own sovereign immunity."⁶³ A number of lower federal courts, relying upon section 120(a)(1) and the inclusion of the United States within CERCLA's definition of "person," have held that Congress has waived the federal government's sovereign immunity under CERCLA and that the United States can be liable as a PRP under section 107 to the same extent as private parties.⁶⁴

These decisions correctly interpret the clearly expressed intent of Congress in section 120(a)(1). Congress intended to make the federal government liable under section 107 to the same extent that private parties are liable, with no *per se* exemptions from liability for governmental regulatory activities, governmental cleanup activities responding to releases or threatened releases of hazardous substances, or governmental contractual involvement with private businesses. However, as discussed later in this article, the federal government should not be held liable as a PRP under section 107 of CERCLA solely on the basis of governmental regulatory activities,⁶⁵ governmental involvement with a private business facility that is producing a product or materials for the government under a contract,⁶⁶ or governmental cleanup activities responding to a release or threatened release of hazardous substances.⁶⁷

B. State Government Liability

In *Pennsylvania v. Union Gas*,⁶⁸ the United States Supreme Court held that Congress clearly has expressed its intent in CERCLA that "States be liable along with everyone else for cleanup costs recoverable under CERCLA."⁶⁹ The Supreme Court's reasoning in *Union Gas*, in support of this holding, was that Congress expressly included

⁶³ *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 10 (1989).

⁶⁴ *Cadillac Fairview/California Inc. v. Dow Chem. Co.*, 1997 U.S. Dist. LEXIS 3081, at *51 (C.D. Cal. 1997); *United States v. Iron Mountain Mines, Inc.*, 881 F. Supp. 1432, 1441 (E.D. Cal. 1995); *United States v. Moore*, 703 F. Supp. 455, 459 (E.D. Va. 1988).

⁶⁵ See *infra* notes 213-310 and accompanying text.

⁶⁶ See *infra* notes 311-59 and accompanying text.

⁶⁷ See *infra* notes 360-425 and accompanying text.

⁶⁸ *Union Gas Co.*, 491 U.S. at 1.

⁶⁹ *Id.* at 8. The Court also held in *Union Gas Co.* that Congress had the power under the Commerce Clause of the United States Constitution to override a state's immunity, under the Eleventh Amendment of the United States Constitution, from suits by private parties in federal court, but this holding was overruled in 1996 in *Seminole Tribe of Fla. v. Florida*. *Id.* at 13-23; *Seminole Tribe of Fla. v. Florida*, 116 S. Ct. 1114, 1123 (1996); see *infra* notes 109-39 and accompanying text.

“State” within CERCLA’s definition of “person”⁷⁰ and that provisions of sections 101(20)(D)⁷¹ and 107(d)(2)⁷² of CERCLA, which exempt states from liability in certain circumstances, indicated that Congress intended states, unless exempted under these sections, to be subject to liability as PRPs under section 107.⁷³ Specifically, the Supreme Court in *Union Gas* noted that section 101(20)(D), after stating that the term “owner or operator” does not include a unit of state or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign, explicitly states that this paragraph’s

[E]xclusion . . . shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title.⁷⁴

In addition, the Court in *Union Gas* noted that section 107(d)(2) is “an explicit recognition of the potential liability of States” under CERCLA, because Congress would not have exempted states from liability under this section “unless they would otherwise be liable.”⁷⁵

⁷⁰ 42 U.S.C. § 9601(21) (1994).

⁷¹ *Id.* § 9601(20)(D).

⁷² *Id.* § 9607(d)(2); see *infra* notes 102–08 and accompanying text.

⁷³ *Union Gas Co.*, 491 U.S. at 7–10.

⁷⁴ *Id.* at 7–8 (citing 42 U.S.C. § 9601(20)(D) (1994)).

⁷⁵ *Id.* at 10. The court in *Union Gas Co.* also reasoned that Congress would not have provided that citizen suits could be brought under 42 U.S.C. § 9659(a)(1) “against any person (including the United States and any other governmental instrumentality or agency, to the extent permitted by the Eleventh Amendment to the Constitution),” unless suits against the States were elsewhere permitted, because “the reservation of States’ rights under the Eleventh Amendment would be unnecessary if Congress had not elsewhere in the statute overridden the States’ immunity from suit.” *Id.* at 10 (quoting 42 U.S.C. § 9659(a)(1) (1994)). Finally, the majority noted in *Union Gas Co.* that section 101(20)(D) of CERCLA uses language “virtually identical” to the language Congress used in section 120(a)(1) of CERCLA (see *supra* notes 30–67 and accompanying text) in unequivocally waiving the federal government’s immunity from suits for damages under CERCLA; and reasoned that Congress, “[i]n choosing this mirroring language in section 101(20)(D) . . . must have intended to override the States’ immunity from suit, just as it waived the Federal Government’s immunity in section 120(a)(1).” *Id.*

Justice Scalia, concurring in part in *Union Gas Co.*, agreed with Justice Brennan’s majority holding that CERCLA clearly makes states liable for money damages for cleanup costs in private suits. *Union Gas Co.*, 491 U.S. at 30 (Scalia, J., concurring in part and dissenting in part). Justice White, joined by Chief Justice Rehnquist, Justice O’Connor, and Justice Kennedy, dis-

Consequently, states are subject to liability under sections 107 and 113(f) to the same extent as private persons.⁷⁶

C. Local Government Liability

The Supreme Court's reasoning in *Union Gas* in support of its holding that states can be held liable under CERCLA also supports a conclusion that local governments (including counties and municipalities) can be held liable as PRPs under sections 107 and 113(f). CERCLA's definition of the term "person"⁷⁷ includes "municipality" and "political subdivision of a State" as well as a "State." Furthermore, the exemptions in sections 101(20)(D)⁷⁸ and 107(d)(2),⁷⁹ and the citizen suit provision in section 310(a)(1)⁸⁰ (the other sections relied upon by the Supreme Court in *Union Gas*), apply equally to state and local governments. Lower federal courts consequently have held that municipalities and other local governments can be subject to liability as PRPs,⁸¹ even for their disposal of municipal solid wastes (containing CERCLA hazardous substances) at a sanitary landfill.⁸²

sented in *Union Gas Co.* from Justice Brennan's majority holding that CERCLA makes States liable to suit by private parties in federal court, finding no "unmistakably clear language" . . . in either CERCLA or SARA that expresses Congress' intent to abrogate the State's Eleventh Amendment immunity." *Id.* at 45 (White, J., concurring in part and dissenting in part) (citation omitted).

⁷⁶ The Supreme Court in *Union Gas Co.* rejected the state of Pennsylvania's argument that CERCLA made states liable only to the United States, but not to private entities or private citizens. *Id.* at 11-13.

The term "state" within CERCLA's definition of "person" has been interpreted, however, to include only a unit of state government that is acting in an executive or proprietary activity. 42 U.S.C. § 9601(21) (1994); *In re Sundance Corp.*, 149 B.R. 641, 658 (Bankr. E.D. Wash. 1993) (*dictum*). The term "state" within the meaning of CERCLA's definition of "person" does not include either a state's courts or a state's judiciary when they are acting in an official capacity, or a state court's officers (such as receivers) acting under the authority of judicial orders. *Sundance Corp.*, 149 B.R. at 658. Consequently, neither a state's judiciary (when acting in an official capacity), nor court officers such as receivers (when acting under the authority of judicial orders), can be liable under section 107 of CERCLA as either a person or an owner or operator of a facility.

⁷⁷ 42 U.S.C. § 9601(21).

⁷⁸ *Id.* § 9601(20)(D).

⁷⁹ *Id.* § 9607(d)(2).

⁸⁰ *Id.* § 9659(a)(1).

⁸¹ See, e.g., *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1199 (2d Cir. 1992); *New Jersey Dep't of Env'tl. Protection and Energy v. Gloucester Env'tl. Management Serv., Inc.*, 821 F. Supp. 999, 1004-05 (D.N.J. 1993); *Reading Co. v. City of Philadelphia*, 155 B.R. 890, 897 (E.D. Pa. 1993).

⁸² *B.F. Goodrich*, 958 F.2d at 1206; *New Jersey Dep't of Env'tl. Protection and Energy*, 821 F. Supp. at 1008-09.

Although federal, state, and local governments generally are subject to liability as PRPs under sections 107 and 113(f) to the same extent as private persons, several sections of CERCLA (which are discussed in the next section of this Article) exempt governmental entities from PRP liability in certain circumstances. Furthermore, as discussed later in this Article, the courts generally have held that federal, state, and local governments cannot be held liable as PRPs solely for actions involving the exercise of governmental regulatory powers,⁸³ for governmental involvement with a private business facility producing a product or materials for government pursuant to a contract with the government or government regulations,⁸⁴ or for governmental cleanup actions responding to releases or threatened releases of hazardous substances.⁸⁵

D. *Exemptions of Governmental Entities from Liability Under Section 107(d) of CERCLA*

Sections 107(d)(1) and 107(d)(2)⁸⁶ of CERCLA exempt some federal, state, and local government cleanup activities from PRP liability.⁸⁷ These subsections, however, provide that governmental entities may be liable for costs or damages as a result of negligence, gross negligence, or intentional misconduct, although, as discussed subsequently, it is unclear whether such liability is to be under CERCLA, state common law, or federal common law.

EPA, in its Interim Municipal Settlement Policy takes the position that CERCLA does not exempt municipalities from PRP liability under section 107 for their disposal of municipal wastes at sites that release or threaten to release hazardous substances. 54 Fed. Reg. 51,071 (1989); *B.F. Goodrich*, 958 F.2d at 1205-06. However, EPA indicates in this municipal settlement policy that "EPA presently does not intend to pursue enforcement actions against municipalities generating or transporting municipal waste—regardless of whether hazardous substances are present—unless the total privately generated commercial hazardous substances are insignificant compared to the municipal waste." *B.F. Goodrich*, 958 F.2d at 1205 (citing 54 Fed. Reg. at 51,072 (1989)).

⁸³ See *infra* notes 213-310 and accompanying text.

⁸⁴ See *infra* notes 311-59 and accompanying text.

⁸⁵ See *infra* notes 360-425 and accompanying text.

⁸⁶ 42 U.S.C. §§ 9607(d)(1)-(d)(2).

⁸⁷ In addition, section 104(j)(3) provides that no federal, state, or local government agency shall be liable solely as a result of acquiring an interest in real estate under section 104(j); and section 101(20)(D) excludes from CERCLA's definition of "owner or operator" a "unit of state or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign." 42 U.S.C. §§ 9601(20)(D), 9604(j)(3); see *supra* notes 68-76 and accompanying text.

Section 107(d)(1) provides that except as provided in section 107(d)(2), no "person" shall be liable under subchapter I of CERCLA (which includes sections 107 and 113(f)):

for costs or damages as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with the National Contingency Plan (NCP) or at the direction of an on scene coordinator appointed under such plan, with respect to an incident creating a danger to public health or welfare or the environment as a result of any releases of a hazardous substance or the threat thereof. This paragraph shall not preclude liability for costs or damages as the result of negligence on the part of such person.⁸⁸

Because the term "person" is defined under CERCLA to include federal, state, and local governments,⁸⁹ section 107(d)(1) applies to the federal government, to state governments,⁹⁰ and to local governments as well as to private individuals and corporations. This exception from liability apparently could be raised as an affirmative defense by a government entity being sued under section 107 or section 113(f).

Section 107(d)(1), however, only applies to cleanup actions that are both in accordance with the National Contingency Plan (or at the direction of an on-scene coordinator under such plan) and "with respect to an incident creating a danger to public health or welfare or the environment as a result of any releases of a hazardous substance or the threat thereof."⁹¹ The implication of this latter requirement is that there may be cleanup response actions, in response to a release⁹²

⁸⁸ 42 U.S.C. § 9607(d)(1).

⁸⁹ *See id.* § 9601(21).

⁹⁰ *See* *United States v. Iron Mountain Mines, Inc.*, 881 F. Supp. 1432, 1443 (E.D. Cal. 1995); *United States v. Azrael*, 765 F. Supp. 1239, 1246 (D. Md. 1991).

⁹¹ *See* 42 U.S.C. § 9607(d)(1). CERCLA classifies response actions as either removal actions or remedial actions. *See id.* § 9601(23)-(25); *see also* *KvD Properties Corp. v. Aluminum Co. of America*, 711 F. Supp. 784, 795 (D.N.J. 1989) (removal actions are designed for shorter term hazards); *City of New York v. Exxon Corp.*, 633 F. Supp. 609, 614 (S.D.N.Y. 1986) (remedial actions are typically long term projects to effect permanent solutions). The NCP's requirements for remedial actions are greater than its requirements for removal actions. *See* *Carlyle Piermont Corp. v. Federal Paper Bd. Co.*, 742 F. Supp. 814, 818 (S.D.N.Y. 1990).

The National Contingency Plan, which was promulgated by EPA pursuant to section 105 of CERCLA is an EPA regulation that establishes procedures, standards, and responsibilities for response actions conducted under CERCLA by both federal and state governments and by private parties. 42 U.S.C. § 9605. The NCP, presently codified at 40 C.F.R. Pt. 300, was initially issued by EPA in 1982, and was revised in 1985 and 1990. The NCP is designed to assure that response actions under CERCLA are both cost-effective and environmentally sound. *See* *Reading Co. v. City of Philadelphia*, 823 F. Supp. 1218, 1239 (E.D. Pa. 1993).

⁹² Subject to some exceptions, CERCLA generally defines the term "release" to mean "any

or threatened release of a hazardous substance, which are in accordance with the NCP but which are not exempted from liability under section 107(d)(1) because the incident did not create a danger to public health or the environment (even though there was a release or threatened release).⁹³

Interpretation of section 107(d)(1) (and section 107(d)(2)) must take into account the admonition in section 107(d)(3) that section 107(d) "shall not alter the liability of any person covered by the provisions of paragraph (1), (2), (3), or (4) of subsection (a) of this section with respect to the release or threatened release concerned."⁹⁴ Section 107(d)(3) therefore prohibits a person who is a PRP under section 107(a) because of involvement with or responsibility for a release or threatened release of a hazardous substance, from being exempted from that liability under section 107(d). However, section 107(d)(3) should not be interpreted in a way that makes section 107(d)(1) or 107(d)(2) meaningless. Sections 107(d)(1) and 107(d)(2) should be interpreted as exempting cleanup activities that are *in response* to a release or threatened release of a hazardous substance,⁹⁵ but as not exempting activities by PRPs that *result in or cause* the release or threatened release (for which section 107(d)(3) preserves liability).

Courts disagree on whether the reservation of liability for negligence in the last sentence of section 107(d)(1) is referring to statutory liability under CERCLA, tort liability under state common law, or liability under federal common law. This provision has been interpreted by one court as meaning that a person, who otherwise is within the scope of section 107(d)(1)'s exemption from CERCLA liability, can be liable in an action under section 107(d)(1) for the costs or damages

spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant) . . ." 42 U.S.C. § 9601(22).

⁹³ Cf. *Foster v. United States*, 922 F. Supp. 642, 660-62 (D.D.C. 1996) (mere presence of hazardous wastes in the soil at a site does not establish an imminent and substantial endangerment to health or the environment justifying issuance of an injunction under section 7002(a)(1)(B) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a)(1)(B)) (1994).

⁹⁴ 42 U.S.C. § 9607(d)(3).

⁹⁵ *United States v. Azrael*, 765 F. Supp. 1239, 1246 (D. Md. 1991) (stating that "Section 107(d)(1) expressly exempts all 'persons,' including the United States and states, from liability under CERCLA arising from actions taken in accordance with the NCP"); *see also* section 107(d)(2)'s exemption from liability for "actions in response to . . . the release or *threatened release* . . . generated by or from a facility owned by another person." 42 U.S.C. § 9601(d)(2) (emphasis added); *see infra* notes 102, 107-08 and accompanying text.

that are the result of negligence by that person.⁹⁶ However, because the last sentence of section 107(d)(1) does not refer to liability “under this subchapter” (as does the first sentence of the section), one court has observed that this last sentence of section 107(d)(1) could be interpreted as providing that persons otherwise within the scope of section 107(d)(1)’s exemption can be held liable only under state tort law for damages caused by their negligent cleanup activities.⁹⁷ Several courts, implicitly following this interpretation, have concluded that section 107(d)(1) does not authorize litigation against the United States,⁹⁸ “but merely clarifies Congress’ intent that the CERCLA remedial scheme not be viewed as occupying the field to the exclusion of tort claims.”⁹⁹ These courts apparently were referring to tort claims under state common or statutory law,¹⁰⁰ although a third possible interpretation of the last sentence of section 107(d)(1) is that it is preserving claims for negligence under federal common law (not state common law) or under other federal statutory law such as the Federal Tort Claims Act.¹⁰¹

Section 107(d)(1)’s exemption from liability is limited explicitly by section 107(d)(2), which states:

No State or local government shall be liable under this subchapter for costs or damages as a result of actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person. This paragraph shall not preclude liability for costs

⁹⁶ See *United States v. Iron Mountain Mines, Inc.*, 881 F. Supp. 1432, 1447 (E.D. Cal. 1995).

⁹⁷ See *id.*

⁹⁸ See *United States v. Skipper*, 781 F. Supp. 1106, 1112 (E.D.N.C. 1991); *United States v. Western Processing Co.*, 761 F. Supp. 725, 729 (W.D. Wash. 1991).

⁹⁹ *Western Processing Co.*, 761 F. Supp. at 729.

¹⁰⁰ See *Iron Mountain Mines, Inc.*, 881 F. Supp. at 1447.

¹⁰¹ See 28 U.S.C. §§ 1346(b), 2674–2680 (1994). However, claims alleging that the federal government improperly carried out response actions under CERCLA have been held not to be actionable under the FTCA because they fall within the FTCA’s discretionary function exception in 28 U.S.C. § 2680(a). See *United States v. Colbert*, No. 87 Civ. 4789 (MGC) 1991 WL 183376, at *3 (S.D.N.Y. 1991); see also *Skipper*, 781 F. Supp. at 1113–15 (FTCA’s discretionary function exception applies to Coast Guard response actions under Clean Water Act, 33 U.S.C. § 1321, so FTCA cannot waive United States’ sovereign immunity from a counterclaim under section 113(f) of CERCLA based upon claims alleging that Coast Guard improperly performed response actions). However, some courts that have not addressed the FTCA’s discretionary function exception have permitted persons sued by the United States for response costs under section 107 of CERCLA to file counterclaims under the FTCA alleging that the United States’ response actions were conducted improperly or injured or destroyed the defendant’s property. See generally *United States v. Shaner*, No. Civ. A. 85–1372 1992 WL 154652 (E.D. Pa. 1992); *United States v. Nicolet*, No. Civ. A. 85–3060, 1986 WL 15017 (E.D. Pa. 1986).

or damages as a result of gross negligence or intentional misconduct by the State or local government. For the purpose of the preceding sentence, reckless, willful, or wanton misconduct shall constitute gross negligence.¹⁰²

This exception from liability apparently could be raised as an affirmative defense by a state or a local government being sued under section 107 or section 113(f) of CERCLA.¹⁰³

One court has stated in *dictum* that “this exemption indicates that Congress intended to exclude from liability a state or local government which responds to non-CERCLA public health and environmental nuisances,”¹⁰⁴ although section 107(d)(2) does not state explicitly on its face that its exemption does not apply to responses to an emergency that are undertaken under CERCLA. Section 107(d)(2), unlike section 107(d)(1), however, does not require a response action to be in accordance with CERCLA’s National Contingency Plan or under the direction of an on-scene coordinator appointed under the NCP, but it does require that a cleanup action be in response to an “emergency” (a term which CERCLA does not define).¹⁰⁵ Furthermore, a state or local government does not lose its exemption from liability under section 107(d)(2) because its “efforts proved to be less than entirely successful”¹⁰⁶

On its face, however, section 107(d)(2) does not exempt the federal government from CERCLA liability for emergency response actions; and, unlike section 107(d)(1) (which applies to both “actions taken” and “actions omitted”), section 107(d)(2) on its face only provides an exemption from liability for “actions taken” (but not for “actions omitted”). Furthermore, section 107(d)(2) on its face does not exempt state and local governments from CERCLA liability when they are

¹⁰² 42 U.S.C. § 9607(d)(2) (1994). The first clause of section 107(d)(1) states: “Except as provided in paragraph (2), no person shall be liable under this subchapter for” *Id.* § 9607(d)(1).

¹⁰³ Apparently because section 107(d)(2) is viewed as an affirmative defense to be raised by a state or local government that is sued under section 107 or section 113(f) of CERCLA, a plaintiff in an action brought under section 107 does not have to allege in his or her pleadings that no emergency existed, or that a state (or local) agency was grossly negligent, in order to state a claim against a state or local government under section 107. *See* United States v. Cordova Chem. Co., 59 F.3d 584, 591 (6th Cir. 1995).

¹⁰⁴ *Lincoln v. Republic Ecology Corp.*, 765 F. Supp. 633, 636 (C.D. Cal. 1991).

¹⁰⁵ *Cf.* *Foster v. United States*, 922 F. Supp. 642, 647, 662 (D.D.C. 1996) (mere presence of hazardous wastes in the soil at a site does not establish an imminent and substantial endangerment to health or the environment justifying issuance of an injunction under the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a)(1)(B)) (1994).

¹⁰⁶ *See* United States v. Cordova Chem. Co., 59 F.3d 584, 591 (6th Cir. 1995).

responding to a release or threatened release of a hazardous substance generated by or from a facility owned by that governmental entity (even if the action is in response to an emergency).¹⁰⁷ As is the case with section 107(d)(1), section 107(d)(2) should be interpreted as exempting state and local government cleanup activities that are *in response* to a release or threatened release of a hazardous substance, but as not exempting activities by PRPs that *result in or cause* the release or threatened release (for which section 107(d)(3) preserves liability).¹⁰⁸

III. CONSTITUTIONAL LIMITATIONS ON GOVERNMENTAL LIABILITY UNDER CERCLA

Although Congress clearly intended to subject states to liability under sections 107 and 113(f) of CERCLA,¹⁰⁹ states now are immune, under the Eleventh Amendment of the United States Constitution, from suits brought in federal courts by private parties under section 107(a)(4)(B) or 113(f). This immunity is the result of the United States Supreme Court's recent decision in *Seminole Tribe v. Florida*,¹¹⁰ which overruled *Pennsylvania v. Union Gas*.¹¹¹

The Eleventh Amendment of the United States Constitution provides: "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any Foreign State."¹¹² The literal text of the Eleventh Amendment restricts only suits against states in federal courts brought by citizens of other states or by citizens of other nations, and might further be interpreted "to restrict only the Article III diversity jurisdiction of the federal courts . . ."¹¹³ However, the United States Supreme Court has held that the Eleventh Amendment "confirms" the "presupposition" that a state is a sovereign entity in our federal system and that inherent in this sovereignty is a state's

¹⁰⁷ See *supra* notes 94–95 and accompanying text; see also 42 U.S.C. § 9607(d)(2) (1994).

¹⁰⁸ See *supra* note 95 and accompanying text. See also *United States v. Azrael*, 765 F. Supp. 1239, 1246 (D. Md. 1991) (stating that "Section 107(d)(2) expressly exempts all states and local governments from liability as a result of actions taken in response to an emergency created by a threatened or actual release from a hazardous waste site owned by another").

¹⁰⁹ See *supra* notes 68–76 and accompanying text.

¹¹⁰ See *Seminole Tribe of Fla. v. Florida*, 116 S. Ct. 1114, 1118 (1996).

¹¹¹ *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).

¹¹² U.S. CONST. amend XI.

¹¹³ See *Seminole Tribe*, 116 S. Ct. at 1122.

immunity from being sued in federal courts by any private individual (including a state's own citizens).¹¹⁴

Congress has been recognized, however, as having the power to abrogate a state's Eleventh Amendment sovereign immunity if (1) Congress in the language in the text of a statute clearly expresses its intent to abrogate the states' Eleventh Amendment sovereign immunity, and (2) Congress in doing so has acted pursuant to a valid exercise of power under the United States Constitution.¹¹⁵ Section 5 of the Fourteenth Amendment of the United States Constitution has been held to authorize Congress to abrogate a state's immunity from suit under the Eleventh Amendment.¹¹⁶ In 1989, the Supreme Court held in *Pennsylvania v. Union Gas* that Congress had authority, when legislating under its powers under the Commerce Clause of the United States Constitution, to override a state's Eleventh Amendment immunity; and therefore that Congress had the power under the Commerce Clause of the United States Constitution to make states subject to suits by private parties in federal court under section 107.¹¹⁷

In 1996, Chief Justice Rehnquist overruled *Union Gas* in his 1996 opinion for the court in *Seminole Tribe v. Florida*.¹¹⁸ The Chief Justice reasoned in *Seminole Tribe* that Justice Brennan's rationale for this holding in *Union Gas* was that Congress' power under the Interstate Commerce Clause of the Constitution to abrogate a state's Eleventh Amendment immunity from suit arose from the states' cession of their sovereignty when they gave Congress plenary power to regulate interstate commerce.¹¹⁹ In his opinion for the court in *Seminole Tribe*, Chief Justice Rehnquist concluded, however, that "a majority of the Court expressly disagreed with the rationale of the plurality" expressed in Justice Brennan's opinion in *Union Gas*.¹²⁰ In *Seminole Tribe*, Chief Justice Rehnquist concluded that "it was well established in 1989 when *Union Gas* was decided that the Eleventh Amendment stood for the constitutional principle that state sovereign immunity

¹¹⁴ See *id.*; see also *Hans v. Louisiana*, 134 U.S. 1, 13-15 (1890).

¹¹⁵ See *Seminole Tribe*, 116 S. Ct. at 1123.

¹¹⁶ See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452-56 (1976); see also *Seminole Tribe*, 116 S. Ct. at 1125.

¹¹⁷ See *Union Gas Co.*, 491 U.S. at 19.

¹¹⁸ See *Seminole Tribe*, 116 S. Ct. at 1131-32.

¹¹⁹ See *id.* at 1126.

¹²⁰ See *id.* at 1128. In *Seminole Tribe*, Chief Justice Rehnquist explained that in *Union Gas Co.*, "Justice White added the fifth vote necessary to the result in that case, but wrote separately in order to express that he [did] not agree with much of [the plurality's] reasoning." *Id.* at 1125 (alteration in original) (citation omitted).

limited the federal courts' jurisdiction under Article III."¹²¹ He also agreed with the dissent in *Union Gas* that the *Union Gas* plurality's conclusion, that Congress under Article I of the United States Constitution could expand the scope of the federal courts' jurisdiction under Article III, "contradict[ed] our unvarying approach to Article III as setting forth the *exclusive* catalog of permissible federal court jurisdiction"¹²² (except when Congress is acting under the Fourteenth Amendment of the Constitution).¹²³

When the Supreme Court in *Seminole Tribe* overruled *Union Gas*, it relied upon what was characterized as "the well-established rationale upon which the Court based the results of its earlier decisions" interpreting the Eleventh Amendment of the Constitution and state sovereign immunity in federal courts.¹²⁴ *Seminole Tribe* held that "even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."¹²⁵

Although Congress clearly expressed its intent in CERCLA to waive the states' Eleventh Amendment immunity from suits in federal courts by private parties,¹²⁶ Congress acted under the Interstate Commerce Clause of the Constitution in making states liable under section 107.¹²⁷ However, the provisions of sections 107(a)(4)(B) and 113(f) that subject a state to suits brought by private citizens in federal district courts are not authorized by Congress' Commerce

¹²¹ *Id.* at 1127.

¹²² *Seminole Tribe*, 116 S. Ct. at 1128 (Scalia, J., concurring in part and dissenting in part) (quoting *Union Gas Co.*, 491 U.S. at 39).

¹²³ *See id.* ("[T]he Fourteenth Amendment . . . operated to alter the preexisting balance between state and federal power achieved by Article III and the Eleventh Amendment.")

¹²⁴ *Id.* at 1129, 1131. The earlier decisions relied upon by Chief Justice Rehnquist were *Pennhurst State Sch. v. Halderman*, 465 U.S. 89 (1984); *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934); *Ex parte New York*, 256 U.S. 490 (1921); and *Hans v. Louisiana*, 134 U.S. 1 (1890). *See Seminole Tribe*, 116 S. Ct. at 1129-30.

¹²⁵ *Seminole Tribe*, 116 S. Ct. at 1131-32 (citation omitted). *Seminole Tribe* consequently held that provisions of the 1988 Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(7), which authorize Indian tribes to bring suit in federal courts against a state in order to compel performance of duties imposed upon states by the Act, were not authorized by Congress' powers under the Indian Commerce Clause of the United States Constitution and violated a state's Eleventh Amendment immunity from suits by private persons in federal court. *See id.* at 1131-33.

¹²⁶ *See supra* notes 68-76 and accompanying text.

¹²⁷ *See Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 5-6, 22 (1989).

Clause powers and violate a state's immunity under the Eleventh Amendment of the Constitution.¹²⁸ The Supreme Court's decision in *Seminole Tribe* precludes a private person from filing a suit against a state in federal district court under CERCLA, except for defensive CERCLA claims filed under the recoupment doctrine¹²⁹ to reduce the state's recovery against that private person.¹³⁰

The Eleventh Amendment's immunity (and therefore its prohibition of suits brought by private parties under CERCLA) applies not only to suits that name a state as a party to the action, but also extends to suits brought against a state agency and other "arm[s] of the State."¹³¹ However, the Eleventh Amendment does not bar a suit in federal court against a county, municipality, or other political subdivision of a state.¹³²

The determination of whether a federal court suit brought by a private party against a governmental entity (including a bi-state entity) is a permissible suit against a local governmental entity, or is a suit against a state that is barred by the Eleventh Amendment of the Constitution, is based upon a number of factors.¹³³ If those factors point in different directions, a court then will look at the Eleventh Amendment's twin rationales: (1) respecting state sovereignty—protecting the integrity and dignity of the state and (2) protecting the state's treasury from the risk of state liability.¹³⁴ "[T]he vulnerability

¹²⁸ Suits under sections 107 and 113(f) of CERCLA can be brought only in federal district courts because federal district courts are given exclusive original jurisdiction over such suits. See 42 U.S.C. § 9613(b)(1994).

¹²⁹ See *infra* notes 438–64 and accompanying text.

¹³⁰ *United States v. Iron Mountain Mines, Inc.*, 952 F. Supp. 673, 678 (E.D. Cal. 1996).

¹³¹ See *Mancuso v. New York State Thruway Auth.*, 86 F.3d 289, 292 (2d Cir. 1996).

¹³² See *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890); *Mount Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 280 (1977). Because "there is no tradition of immunity for municipal corporations" in federal courts and because state laws granting municipalities immunity from such do not control the application of federal law, municipal corporations are not immune under the United States Constitution from suits and liability under section 107. *Owen v. City of Independence*, 445 U.S. 622, 638 (1980); *Monell v. Dep't of Soc. Serv.*, 436 U.S. 658, 695 n.59 (1978); see *Reading Co. v. City of Philadelphia*, 155 B.R. 890, 896–97 (E.D. Pa. 1993).

¹³³ See *Mancuso*, 86 F.3d at 293. These factors include:

(1) how the entity is referred to in the documents that created it; (2) how the governing members of the entity are appointed; (3) how the entity is funded; (4) whether the entity's function is traditionally one of local or state government; (5) whether the state has a veto power over the entity's actions; and (6) whether the entity's obligations are binding upon the state.

Id.

¹³⁴ See *id.* at 293, 296.

of the State's purse is the most salient factor,"¹³⁵ and if all the factors "are evenly balanced, this concern will control."¹³⁶

However, although the Eleventh Amendment makes states and "arms of the state" immune from suits in federal court brought by private persons, neither the Eleventh Amendment nor Article III of the United States Constitution bars the federal government from suing a state in federal court.¹³⁷ Furthermore, the Eleventh Amendment does not bar an action brought by one state against another state in federal court¹³⁸ unless the plaintiff state is actually suing the other state as a trustee on behalf of individual citizens to obtain damages for those citizens for their individual claims.¹³⁹

IV. ACTIVITIES WHICH MAY SUBJECT A GOVERNMENT ENTITY TO PRP LIABILITY UNDER CERCLA

Federal, state, and local governments generally are subject to liability as PRPs under section 107 or section 113(f) of CERCLA to the same extent as private parties, although sections 101(20)(D),¹⁴⁰ 104(j)(3),¹⁴¹ 107(d)(1),¹⁴² and 107(d)(2)¹⁴³ exempt governmental entities in certain circumstances from PRP liability. Furthermore, the Eleventh Amendment of the United States Constitution bars suits against states brought by private parties under CERCLA.

When these exemptions from liability are not applicable, courts usually will determine the liability of a governmental entity as a PRP under the same standards that are applied to determine PRP liability of private parties, by looking at the totality of the relevant circumstances.¹⁴⁴ However, courts have had difficulty in determining whether governmental entities should be held liable as PRPs on the

¹³⁵ *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994).

¹³⁶ *Mancuso*, 86 F.3d at 293.

¹³⁷ *See* *United States v. Mississippi*, 380 U.S. 128, 140-41 (1965); *United States v. Texas*, 143 U.S. 621, 644-45 (1892).

¹³⁸ *See* *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 258-59 n.12 (1972).

¹³⁹ *See* *North Dakota v. Minnesota*, 263 U.S. 365, 375-76 (1923); *New Hampshire v. Louisiana*, 108 U.S. 76, 90-91 (1883).

¹⁴⁰ *See* 42 U.S.C. § 9601(20)(D)(1994); *see supra* notes 74-75 and accompanying text.

¹⁴¹ *See* 42 U.S.C. § 9604(j)(3); *see supra* note 88.

¹⁴² *See* 42 U.S.C. § 9607(d)(1); *see supra* notes 88-103 and accompanying text.

¹⁴³ *See* 42 U.S.C. § 9607(d)(2); *see supra* notes 104-08 and accompanying text.

¹⁴⁴ *See* *FMC Corp. v. United States Dep't of Commerce*, 29 F.3d 833, 843 (3d Cir. 1994) (en banc); *Hassayampa Steering Comm. v. State of Arizona*, 21 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 20,549, 20,554 (D. Ariz. 1990); *United States v. New Castle County*, 727 F. Supp. 854, 869 (D. Del. 1989).

basis of governmental regulatory activities, governmental involvement with private business facilities producing products or material for the government pursuant to a contract or regulation, or governmental cleanup of hazardous substances or wastes. After outlining CERCLA's scheme for liability of PRPs, this section of the Article analyzes the liability of governmental entities under CERCLA for these types of activities.

A. *Prima Facie Case of Liability Under Section 107 of CERCLA*

In a suit by the federal government or a state government under section 107(a)(4)(A)¹⁴⁵ of CERCLA, a prima facie case of liability requires a showing of the following: there has been a release, or a threatened release which caused the incurrence of response costs, of a hazardous substance from a facility¹⁴⁶ (or, in some situations, a vessel¹⁴⁷ or an incineration vessel)¹⁴⁸ which caused the plaintiff to incur response costs, and the defendant is a responsible party within one or more of the categories of PRPs under section 107.¹⁴⁹ In a suit by a private party under section 107(a)(4)(B),¹⁵⁰ the majority of courts hold that a plaintiff's prima facie case requires a showing that the plaintiff's response costs were consistent with the National Contingency Plan,¹⁵¹ as well as the elements of a prima facie case for a suit by federal or state government under section 107(a)(4)(A).¹⁵²

¹⁴⁵ 42 U.S.C. § 9607(a)(4)(A).

¹⁴⁶ CERCLA defines the term "facility" to mean

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

Id. § 9601(9).

¹⁴⁷ *See id.* § 9607(a)(1).

¹⁴⁸ *See id.* § 9607(a)(3), (a)(4).

¹⁴⁹ *See United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1378-79 (8th Cir. 1989).

¹⁵⁰ *See* 42 U.S.C. § 9607(a)(4)(B).

¹⁵¹ *See United States v. Azrael*, 765 F. Supp. 1239, 1246 (D. Md. 1991).

¹⁵² *See B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1198 (2d Cir. 1992); *County Line Inv. Co. v. Timney*, 933 F.2d 1503, 1512 (10th Cir. 1991); *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1152 (9th Cir. 1989). *But see Donahey v. Bogle*, 987 F.2d 1250, 1255-56 (6th Cir. 1993) (stating that consistency with NCP is not necessarily required in order to recover monitoring or investigative costs). A few courts, however, hold that a private plaintiff in an action under section 107(a)(4)(B) is required to prove that their response costs were consistent with the NCP

A person who is *prima facie* liable under section 107 may seek to avoid liability by establishing one of the defenses provided under section 107(b)¹⁵³ (or, in the case of a governmental entity, one of the exemptions under sections 101(20)(D), 104(j)(3), 107(d)(1), or 107(d)(2)). Furthermore, a person who is *prima facie* liable under section 107 for governmental or private response costs may have any damages reduced by the amount that such response costs were inconsistent with the NCP.¹⁵⁴

B. *Contribution Actions Against CERCLA PRPs*

A person who is liable or potentially liable as a PRP under section 107 also can be held liable in a contribution action brought under section 113(f)(1).¹⁵⁵ Section 113(f)(1) on its face authorizes "any person" to bring a suit (which can be brought only in federal court)¹⁵⁶ to "seek contribution from any other person who is liable or potentially liable under [section 107(a)], during or following any civil action under [section 106] or under [section 107(a)]."¹⁵⁷ Liability of the defendant under section 107 therefore is an element of a section 113(f)(1) contribution claim.¹⁵⁸

only in order to have damages awarded, not in order to establish a *prima facie* case for liability. *See, e.g., Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 668 (5th Cir. 1989).

"[T]he phrase in subparagraph (4) of Section 9607(a) [of CERCLA, 42 U.S.C. § 9607(a)], 'from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable' was apparently intended to modify each provision of subparagraphs (1)-(4)." *Louisiana Pac. Corp. v. Beazer Materials & Serv., Inc.*, 37 Env't Rep. Cas. (BNA) 1176, 1181 (E.D. Cal. 1993).

Under this interpretation, a *prima facie* case for the federal or a state government or an Indian tribe to recover natural resources damages under section 107(a)(4)(c) and (f) of CERCLA would require a showing that there has been release of a hazardous substance from a facility (or, in some cases, a vessel or incineration vessel), and that the release caused injury to, destruction of, or loss of natural resources belonging to, managed by, controlled by, or appertaining to the plaintiff. 42 U.S.C. § 9607(a)(4)(c) & (f). A *prima facie* case for the federal government under section 107(a)(4)(D) of CERCLA, to recover the costs of any health assessment carried out under section 104(i) of CERCLA, would require a showing that there has been a release of a hazardous substance from a facility (or, in some cases, a vessel or incineration vessel), and that the federal government incurred the costs of a health assessment under section 104(i) of CERCLA. 42 U.S.C. §§ 9604(i), 9607(a)(4)(D).

¹⁵³ *See* 42 U.S.C. § 9607(b).

¹⁵⁴ *See infra* notes 426-37 and accompanying text.

¹⁵⁵ *See* 42 U.S.C. § 9613(f)(1).

¹⁵⁶ *See id.* § 9613(b).

¹⁵⁷ *Id.* § 9613(f)(1).

¹⁵⁸ *See* *United States v. Shaner*, No. 85-1372, 1992 WL 154652, at *4 (E.D. Pa. Jun. 15, 1992).

While section 113(f)(1) clearly authorizes "any person" to seek contribution from a PRP, as discussed below, federal courts disagree as to whether a person who is a PRP can recover hazardous substance cleanup costs from another PRP(s) in an action under section 107. Some courts have held that a person who is a PRP can recover some or all of its hazardous substance cleanup costs from another PRP only in a contribution action under section 113(f)(1) and cannot bring a suit under section 107 to recover cleanup costs from other PRPs.¹⁵⁹ Other courts, however, allow a person who is a PRP to recover part or all of its cleanup costs from other PRPs either in a suit under section 113(f) or in a suit under section 107 (at least when the plaintiff is not seeking through the suit under section 107 to circumvent contribution protection granted by the government to another party under section 113(f)(2)¹⁶⁰ or to avoid the shorter statute of limitations¹⁶¹ for contribution actions).¹⁶²

A court in a section 113(f) contribution action may equitably apportion liability for recoverable response costs (and probably also for natural resources damages) "among liable parties using such equitable factors as the court determines are appropriate."¹⁶³ A person who is liable as a PRP therefore can be held liable for response costs or natural resources damages either in a direct action under section 107 or in a contribution action brought by another PRP(s) under section 113(f)(1). However, a PRP in turn can bring its own contribution action under section 113(f)(1) against other PRPs to have other PRPs pay a portion of the response costs and natural resources damages for

"Section 113(f)(1), 42 U.S.C. § 9613(f)(1), authorizes contribution actions only against liable or potentially liable parties, i.e., parties who are owners, [operators], generators or transporters within the meaning of CERCLA section 107(a)(1)-(4), 42 U.S.C. § 9607(a)(1)-(4)." United States v. American Color & Chem. Corp., 858 F. Supp. 445, 450 (M.D. Pa. 1994).

¹⁵⁹ See *Reynolds Metals Co. v. Arkansas Power & Light Co.*, 920 F. Supp. 991, 994-95 (E.D. Ark. 1996); *City of Fresno v. NL Indus., Inc.*, No. CV-F 93-5091 REC/DLB, 1995 U.S. Dist. LEXIS 15534, at *15-*19 (E.D. Cal. Jul. 13, 1995) (surveying contribution action cases).

¹⁶⁰ See 42 U.S.C. § 9613(f)(2).

¹⁶¹ See *id.* § 9613(d).

¹⁶² See *Pinal Creek Group v. Newmount Mining Corp.*, 42 Env't Rep. Cas. (BNA) 1755, 1761-63 (D. Ariz. 1996); *Pneumo Abex Corp. v. Bessener and Lake Erie R.R. Co.*, 921 F. Supp. 336, 346-48 (E.D. Va. 1996).

¹⁶³ 42 U.S.C. § 9613(f)(1). See *Environmental Transp. Sys., Inc. v. ENSCO, Inc.*, 969 F.2d 503, 507 (7th Cir. 1992); *Cadillac Fairview/California, Inc. v. Dow Chem. Co.*, No. 83-7996 MRP (Bx), 1997 U.S. Dist. LEXIS 3081, at *57-*60, 76-79, (C.D. Cal. Feb. 19, 1997), *Cadillac Fairview/California, Inc. v. Dow Chem. Co.*, No. 83-8034 MRP (Bx), 1997 U.S. Dist. LEXIS 3083, *43-*50 (C.D. Cal. Feb. 19, 1997).

which the plaintiff PRP has been held liable (or is potentially liable) under section 107.

C. Damages for Which PRPs Are Liable

A person who is a PRP under section 107 of CERCLA is both strictly liable¹⁶⁴ and jointly and severally liable (when there is indivisible harm)¹⁶⁵ for:

(1) all costs of removal or remedial action incurred by the United States Government, a state,¹⁶⁶ or an Indian tribe, not inconsistent with the National Contingency Plan;¹⁶⁷

(2) any other necessary costs¹⁶⁸ of response incurred by any other person¹⁶⁹ consistent with the National Contingency Plan;¹⁷⁰

(3) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release;¹⁷¹

¹⁶⁴ See *United States v. Monsanto Co.*, 858 F.2d 160, 167 (4th Cir. 1988).

¹⁶⁵ See *Matter of Bell Petroleum Serv., Inc.*, 3 F.3d 889, 902-04 (5th Cir. 1993); *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 721-23 (2d Cir. 1993); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 267-70 (3d Cir. 1992); *Monsanto*, 858 F.2d at 171-73.

¹⁶⁶ A statewide agency has been held to be within CERCLA's definition of a "state" under this provision. See *Washington State Dep't of Transp. v. Washington Natural Gas Co. Pacificorp*, 59 F.3d 793, 800-01 (9th Cir. 1995). However, a county airport commission created under state law has been held not to be a "state" for purposes of this provision. See *Johnson Co. Airport Comm'n v. Parsonitt Co.*, 916 F. Supp. 1090, 1094 (D. Kan. 1996). Furthermore, most courts have held that a municipality is not a "state" for purposes of this provision. See *City of Health, Ohio v. Ashland Oil, Inc.*, 834 F. Supp. 971, 977 (S.D. Ohio 1993); *Town of Bedford v. Raytheon Co.*, 755 F. Supp. 469, 475 (D. Mass. 1991); *City of Philadelphia v. Stepan Chem. Co.*, 713 F. Supp. 1484, 1488-89 (E.D. Pa. 1989).

¹⁶⁷ See 42 U.S.C. § 9607(a)(4)(A) (1994). See *infra* notes 426-37 and accompanying text.

¹⁶⁸ "To show that any response costs were necessary under the CERCLA, the plaintiff must show '(1) that the costs [were] incurred *in response to* a threat to human health or the environment and (2) that the costs were necessary to address that threat.'" *Foster v. United States*, 922 F. Supp. 642, 652 (D.D.C. 1996) (quoting *G.J. Leasing Co. v. Union Elec. Co.*, 854 F. Supp. 539, 562 (S.D. Ill. 1994)) (emphasis in original). See *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 669-72 (5th Cir. 1989).

¹⁶⁹ Private parties, including owners of land adjacent to a hazardous waste site, are accorded a private right of action for response costs under this provision. See *Jones v. Inmont Corp.*, 584 F. Supp. 1425, 1428 (S.D. Ohio 1984).

¹⁷⁰ See 42 U.S.C. § 9607(a)(4)(B). EPA's Natural Contingency Regulations adopted in 1990 provide that a private party's response actions in substantial compliance with specified NCP criteria will be considered consistent with the NCP. See *Reading Co. v. City of Philadelphia*, 823 F. Supp. 1218, 1239-40 (E.D. Pa. 1993).

¹⁷¹ See 42 U.S.C. § 9607(a)(4)(C). The United States, a state, and an Indian tribe are the only entities authorized to collect such natural resources damages. See *id.* § 9607(f)(1).

(4) the costs of health assessment or health effects study carried out by the federal government under section 104(i)¹⁷² of CERCLA.¹⁷³

D. PRPs Subject to Liability Under CERCLA

Four categories of persons (which can include federal, state, and local governments) can be held liable as PRPs under section 107:

- (1) [Present Owner or Operator:] the owner or operator¹⁷⁴ of a vessel or a facility at the time of a release, or a threatened release causing the incurrence of response costs, from the vessel or facility,¹⁷⁵
- (2) [Past Owner or Operator:] any person who at the time of disposal¹⁷⁶ of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of [when there is a release, or a threatened release which causes the incurring of response costs, of a hazardous substance from the facility];¹⁷⁷
- (3) [Arranger-Generator:] any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by

¹⁷² See *id.* § 9604(i).

¹⁷³ See *id.* § 9607(a)(4)(D).

¹⁷⁴ Although 42 U.S.C. § 9607(a)(1) provides for liability of "the owner and operator of a vessel or facility," the courts have held that a person is liable under this section if they are *either* an owner *or* an operator of a facility or vessel at the time of a release or a threatened release of a hazardous substance from the facility or vessel. See, *e.g.*, Long Beach Unified Sch. Dist. v. Godwin Cal. Living Trust, 32 F.3d 1364, 1367 (9th Cir. 1994).

¹⁷⁵ 42 U.S.C. § 9607(a)(1).

¹⁷⁶ The term "disposal" is defined by section 101(29) of CERCLA as having the meaning provided by section 1004 of the Solid Waste Disposal Act, 42 U.S.C. § 6903. 42 U.S.C. § 9601(29). Section 1004(3) of that Act defines "disposal" as:

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

42 U.S.C. § 6903 (1994).

Some courts hold that "disposal" includes so-called "passive" disposal (when substances leak from soil, containers, or equipment previously placed at or dumped at the facility). See, *e.g.*, Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 844-46 (4th Cir. 1992). A number of courts have held, however, that "disposal" does not occur when hazardous substances, which were previously placed at or dumped at a facility, migrate or leach to different locations in the soil or groundwater. See, *e.g.*, United States v. Peterson Sand & Gravel, Inc., 806 F. Supp. 1346, 1351-53 (N.D. Ill. 1992).

¹⁷⁷ 42 U.S.C. § 9607(a)(2). This section "merely requires that one [own or] operate the facility at which hazardous substances are disposed of, at the time of the disposal; it does not require any involvement in the disposal activities themselves." United States v. TIC Inv. Corp., 68 F.3d 1082, 1090 n.7 (8th Cir. 1995).

any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances [from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance];¹⁷⁸

(4) [Transporter Who Selects Disposal Facility:] any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels, or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance.¹⁷⁹

1. Owner/Operator Liability Under CERCLA

Because sections 107(a)(1) and 107(a)(2) make a person liable either if the person is an owner of a facility or if the person is an operator of a facility, a person can be liable under these sections if they own a facility which is operated by another person, or if they operate a facility which is owned by another person. Therefore, a governmental entity can be liable under these sections either on the basis of governmental ownership of a facility (such as a federally owned military base¹⁸⁰ or a municipally owned sanitary landfill),¹⁸¹ or on the basis of governmental operation of a facility owned by another person.¹⁸²

"The definition of 'operator' in CERCLA gives little guidance to the courts in determining if a particular person or entity is liable as an operator because the statute circularly defines 'operator' as 'any person . . . operating such facility.'"¹⁸³ All courts recognize, however, that an "operator" of a facility can be an entity such as a corporation or a governmental body,¹⁸⁴ as well as an individual person—and that both

¹⁷⁸ 42 U.S.C. § 9607(a)(3).

¹⁷⁹ *Id.* § 9607(a)(4).

¹⁸⁰ *See, e.g.,* United States v. Allied Corp., Nos. C-83-5898-FMS, C-83-5896-FMS, 1990 WL 515976, at *1-*3, (N.D. Cal. 1990).

¹⁸¹ *See, e.g.,* New Jersey Dept' of Env'tl. Protection v. Gloucester Env'tl. Management Serv., Inc., 719 F. Supp. 325, 328 (D.N.J. 1989).

¹⁸² *See, e.g.,* United States v. Stringfellow, 20 Env'tl. L. Rep. (Env. L. Inst.) 20,656 (C.D. Cal. Jan. 9, 1990).

¹⁸³ *FMC Corp. v. United States Dep't of Commerce*, 29 F.3d 833, 843 (3d Cir. 1994) (en banc) (quoting 42 U.S.C. § 9601(20)(A)(ii) (defining the term "owner or operator" of an offshore or onshore facility as "any person owning or operating such facility"). 42 U.S.C. § 9601(20)(A)(i) defines "the owner or operator" of a vessel as "any person owning, operating, or chartering by demise, such vessel . . ." 42 U.S.C. § 9601(20) also defines "owner or operator" in several other contexts, and provides some exceptions from the definition of owner or operator.

¹⁸⁴ *See, e.g., FMC Corp.*, 29 F.3d at 843.

such an entity and one or more individuals can be an "operator" of a single facility under sections 107(a)(1) and 107(a)(2).¹⁸⁵

However, the United States Supreme Court has not adopted standards or criteria for determining when a person will be held to be an "owner" or "operator" of a facility under sections 107(a)(1) and 107(a)(2), and the lower federal courts have not adopted a "universal formula" for determining when a person is an "operator" of a facility under section 107(a)(1) or 107(a)(2).¹⁸⁶ Some courts, following what is called an "actual control" test for operator liability, hold that in order for a person to be held liable as an operator of a facility under section 107(a)(1) or 107(a)(2), the person "must play an active role in running the facility, typically involving hands-on, day-to-day participation in the facility's management."¹⁸⁷ An alternative "actual control" test used by some other courts for determining operator liability under CERCLA focuses on "the degree of control that [a person] is able to exert over the activity [at the facility] causing the pollution."¹⁸⁸ A third test (called the "authority to control" test) applied by some courts imposes operator liability under CERCLA upon a person who had the authority or power to control the operations or decisions at the facility involving the disposal of hazardous substances, even if that person did not affirmatively exercise that power or authority to manage the facility or the pollution-causing activity.¹⁸⁹

¹⁸⁵ See, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044, 1052 (2d Cir. 1985).

¹⁸⁶ See *Reading Co. v. City of Philadelphia*, 155 B.R. 890, 908 (E.D. Pa. 1993).

¹⁸⁷ *Long Beach Unified Sch. Dist. v. Godwin Cal. Living Trust*, 32 F.3d 1364, 1367 (9th Cir. 1994); see also *Redland Soccer Club, Inc. v. Department of the Army*, Nos. CV-90-1072, CV-90-1073, 1992 U.S. Dist. LEXIS 14420, at *12 (M.D. Pa. Sept. 15, 1992) (stating that "to be liable as an operator, a party must currently participate in decisions regarding the overall operations at a facility").

¹⁸⁸ *CPC Int'l, Inc. v. Aerojet-Gen. Corp.*, 731 F. Supp. 783, 788 (W.D. Mich. 1989), *motions for summary judgment denied*, 759 F. Supp. 1269 (W.D. Mich. 1991), *judgment entered*, 777 F. Supp. 549 (W.D. Mich. 1991), *aff'd in part and rev'd in part sub nom.*; *United States v. Cordova Chem. Co.*, 59 F.3d 584 (6th Cir. 1995); *United States v. Gurley*, 43 F.3d 1188, 1193 (8th Cir. 1994) (holding that "an individual may not be held liable as an operator under § 9607(a)(2) unless he or she (1) had authority to determine whether hazardous wastes would be disposed of and to determine the method of disposal and (2) actually exercised that authority, either by personally performing the tasks necessary to dispose of the hazardous wastes or by directing others to perform these tasks").

¹⁸⁹ See *Nurad, Inc. v. William E. Hooper & Sons, Inc.*, 966 F.2d 837, 842 (4th Cir. 1992); *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1558 (11th Cir. 1990) (stating that "a secured creditor will be liable if its involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose"); *East Bay Mun. Util. Dist. v. United States Dep't of Commerce*, 43 Env't Rep. Cases (BNA) 1918, 1930 (D.D.C. 1996) (stating that "the authority to control must be specifically related to

However, the one recurring theme that does emerge from a canvassing of cases discussing operator liability is that "courts have broadly construed . . . 'operating' in order to effectuate the perceived intent of Congress that liability under Section 107(a) should extend to all who profit from the treatment or disposal of hazardous waste . . ." At the same time, courts have been careful not to read CERCLA as creating unlimited liability for those only tangentially or remotely involved with hazardous substances.¹⁹⁰

Consequently, whether a governmental entity is held liable as an "operator" of a facility in a particular case under section 107(a)(1) or section 107(a)(2) will depend not only upon the test for operator liability which is applied by the court, but also upon whether governmental liability under CERCLA is viewed as consistent with CERCLA's purposes.¹⁹¹

2. Arranger (Generator) Liability Under CERCLA

Section 107(a)(3) of CERCLA on its face requires that in order for a person to be liable as an "arranger" (i.e., "generator"), the person must have arranged (by contract, agreement, or otherwise)¹⁹² for the disposal or treatment of hazardous substances owned or possessed by the arranger, by another person or entity at a facility or incineration vessel owned or operated by another person and which contains such hazardous substances.¹⁹³

A person can be liable as an arranger under section 107(a)(3) for arranging for disposal or treatment of hazardous substances which the person does not own or physically possess, if such person has constructive possession of the substances (such as through supervi-

the control of waste disposal" and "general authority to control operation of the facility is not the relevant legal standard").

¹⁹⁰ *Reading Co.*, 155 B.R. at 908.

¹⁹¹ *See, e.g., FMC Corp. v. United States Dep't of Commerce*, 29 F.3d 833 (3d Cir. 1994) (en banc).

¹⁹² *See Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746 (7th Cir. 1993).

¹⁹³ A person may be liable as an arranger under this section even though the person did not know that the substances would be deposited at a particular site, or in fact believed they would be deposited elsewhere. *United States v. Hardage*, 761 F. Supp. 1501, 1511 (W.D. Okla. 1990). The phrase "containing such hazardous substances" at the end of section 107(a)(3) has been interpreted to mean that there must be evidence that an arranger's hazardous substances were shipped to the particular facility and "that hazardous substances similar to these contained in the defendant's waste remained present at the time of release." *United States v. Monsanto Co.*, 858 F.2d 160, 169 n.15 (4th Cir. 1988). Proof that the arranger's specific hazardous substances remained at the facility at the time of release is not required under section 107(a)(3). *See id.* at 169.

sion over the transportation and disposal of the substances).¹⁹⁴ An arranger under section 107(a)(3) can include an entity such as a corporation or a governmental body¹⁹⁵ as well as an individual—and in some cases both an entity and an individual can be liable under section 107(a)(3) for arranging the disposal or treatment of particular hazardous substances.¹⁹⁶

As is the case with operator liability under CERCLA, there is no universally adopted standard for determining when a person is liable as an arranger (generator) under section 107(a)(3). The Supreme Court has not adopted standards or criteria for determining arranger liability under section 107(a)(3), but lower courts interpret section 107(a)(3) liberally to hold liable all persons who profit from the generation and disposal of hazardous substances.¹⁹⁷ Some lower courts have held that in order for a person to have such constructive possession, the person must have “some nexus” with the owner of the hazardous substances.¹⁹⁸ The United States Court of Appeals for the Eighth Circuit, on the other hand, has held that a person can be liable as an arranger under section 107(a)(3) if the person had the authority to control, and did in fact exercise actual or substantial control over, the arrangement for disposal, or the off-site disposal, of hazardous substances, without proof that the person had the specific intent to arrange for the disposal of hazardous substances.¹⁹⁹ Under this Eighth Circuit approach, a person can be held liable under section 107(a)(3) without proof that the person ever personally participated in, or had any knowledge or awareness of, arrangements for disposal of hazardous substances at the facility.²⁰⁰ There must be “some level of actual participation in, or exercise of control over, activities that are causally connected to, or have some nexus with, the arrangement for disposal of hazardous substance or the offsite disposal itself.”²⁰¹ In *United States v. Aceto Agricultural Chemical*, the Eighth Circuit adopted an

¹⁹⁴ *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726, 743 (8th Cir. 1986).

¹⁹⁵ *See, e.g., FMC Corp.*, 29 F.3d at 845–46 (3d Cir. 1994); *United States v. Stringfellow*, 20 *Envtl. L. Rep. (Envtl. L. Inst.)* 20,656 (C.D. Cal. Jan. 9, 1990).

¹⁹⁶ *See, e.g., Northeastern Pharm. & Chem. Co.*, 810 F.2d at 726.

¹⁹⁷ *See United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1380 n.8 (8th Cir. 1989).

¹⁹⁸ *Hassayampa Steering Comm. v. Arizona*, 768 F. Supp. 697, 702 (D. Ariz. 1991); *Stilloe v. Almy Bros., Inc.*, 759 F. Supp. 95, 99 n.2 (N.D.N.Y. 1991), *motion to dismiss granted*, 782 F. Supp. 731 (N.D.N.Y. 1992); *United States v. New Castle County*, 727 F. Supp. 854, 871–72 (D. Del. 1989); *New York v. City of Johnstown*, 701 F. Supp. 88, 36 (N.D.N.Y. 1988).

¹⁹⁹ *See United States v. TIC Inv. Corp.*, 68 F.3d 1082 (8th Cir. 1995).

²⁰⁰ *See id.* at 1088.

²⁰¹ *See id.* at 1085–88 (footnote omitted).

alternative test for section 107(a)(3) arranger liability under which a person can be held liable as arranger if: (1) that person supplied raw materials to another manufacturer's facility which the person had hired to produce a final product; (2) that person retained ownership of those raw materials, the work in progress, and the final product; and (3) that person knew that the generation of hazardous substances was inherent in that other manufacturer's production process.²⁰² Some courts have adopted yet another test for arranger liability under section 107(a)(3), under which a person is an arranger if they had the obligation and the authority to arrange for disposal of a hazardous substance (even if that person did not actually exercise that authority and was not actually involved in arranging the disposal or treatment of the substance).²⁰³ Whether a governmental entity will be held liable as an arranger in a particular case may depend not only upon which test for arranger liability is applied by the court, but also upon whether the court finds that governmental liability would be consistent with CERCLA's purpose of imposing liability on all those who profit from treatment or disposal of hazardous substances.²⁰⁴

3. Transporter Liability Under CERCLA

A person is liable under section 107(a)(4) of CERCLA if the person accepts or accepted any hazardous substance for transport to a facility incineration vessel or site which the transporter selected.²⁰⁵ A "transporter" therefore is liable under this section only if the transporter selected the site, facility, or incineration vessel where the transported wastes were taken and from where there was release or threatened release of a hazardous substance.²⁰⁶ "To be held liable under § 107(a)(4), the transporter must be so engaged in the selection process that holding it liable furthers one of CERCLA's central objectives:

²⁰² *Aceto Agric. Chem. Corp.*, 872 F.2d at 1373; see *infra* notes 326 and 354-55 and accompanying text.

²⁰³ See *General Elec. Co. v. AAMCO Transmission, Inc.*, 962 F.2d 231, 236 (2d Cir. 1992) (*dictum*).

²⁰⁴ See, e.g., *Lincoln v. Republic Ecology Corp.*, 765 F. Supp. 633 (C.D. Cal. 1991).

²⁰⁵ At least one court has held that a person who possesses and transports a hazardous substance to a third party's facility for disposal also can be held liable as an arranger under section 107(a)(3). *State v. SCA Serv., Inc.*, 844 F. Supp. 926 (S.D.N.Y. 1994); see Gerald M. Giordano, *When Is a Transporter an Arranger Under CERCLA?*, 24 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,665 (Nov. 1994).

²⁰⁶ See *Tippins, Inc. v. USX Corp.*, 37 F.3d 87, 93 (3d Cir. 1994) (interpreting the phrase "selected by such person" in section 107(a)(4) as modifying "facilities" and "incineration vessels" as well as "sites").

to hold all persons actively involved in the storage or disposal of hazardous waste financially accountable for the cost of remedying harm to the human health or the environment."²⁰⁷

Because corporate entities as well as individuals can be held liable under section 107(a)(4),²⁰⁸ governmental entities, which generally are subject to liability under section 107 to the same extent as private persons, also should be subject to liability under section 107(a)(4) when a government agent or employee, acting within the scope of governmental agency or employment, transported hazardous substances to a facility selected by the agent or employee.²⁰⁹

A person can held liable under section 107(a)(4) not only when the person "ultimately selects" the disposal facility,²¹⁰ but also when the person "actively participates in the disposal decision to the extent of having had substantial input into which facility was ultimately chosen."²¹¹ Under this approach, a person can be liable under section 107(a)(4) without personally accepting the waste for transport or personally participating in the selection of the disposal facility, if the person had the authority to control disposal decisions by the transporter and was aware of the transporter's acceptance of the waste and its participation in the selection of the facility (thus effectively acquiescing in the decisions to transport the waste to the selected facility).²¹² Governmental entities should be subject to transporter liability under section 107(a)(4) when a governmental agent or employee acting within the scope of government agency or employment meets the applicable standard for transporter liability under section 107(a)(4)

²⁰⁷ *Id.* at 95.

²⁰⁸ *See id.*

²⁰⁹ In such a case, in addition to the governmental entity being liable under section 107(a)(4), the individual agents or employees of the government who accepted the substances for transport and selected the disposal or treatment facility to which the substances would be transported, also could be personally liable under section 107(a)(4). *See United States v. USX Corp.*, 68 F.3d 811, 825 (3d Cir. 1995).

²¹⁰ *See Tippins, Inc.*, 37 F.3d at 94.

²¹¹ *Tippins*, 37 F.3d at 94. "The substantiality of the input will be a function, in part, of whether the decisionmaker relied upon the transporter's special expertise in reaching its final decision." *Id.* at 94-95. A transporter can be considered to have selected a site under section 107(a)(4) when it suggests several potential sites to a generator customer from which to pick, and the customer relied upon the transporter's expertise in the field of hazardous waste management in deciding the appropriate means and location for disposal of its wastes. *See id.* at 95. However, "[a] transporter clearly does not select the disposal site merely by following the directions of the party with which it contracts." *Id.*

²¹² *See United States v. Hughes, Hubbard & Reed*, 1995 WL 617823 (3d Cir. 1995); *United States v. USX Corp.*, 68 F.3d at 825.

and governmental liability would be consistent with CERCLA's purpose of imposing liability on all those who profit from the treatment or disposal of hazardous substances.

E. Governmental Liability as CERCLA PRP as a Result of Governmental Regulation of Other Persons

Courts generally hold that federal, state, and local governments are not liable under section 107 of CERCLA solely on the basis of governmental activities involved in regulating other persons and businesses. A number of courts have held that federal, state, and local governments are not liable under section 107 either as an arranger or as an operator solely on the basis of a governmental entity's actions or failure to act in regulating the disposal of hazardous wastes or substances at a facility owned by another person.²¹³ Several other courts similarly have held that a governmental entity is not liable under section 107 solely on the basis of the government's regulation, at a facility owned by another person, of activities involving the production, treatment, or disposal of hazardous substances.²¹⁴ And one court has held that a local government's adoption and implementation of an ordinance to abate a public nuisance (created by abandoned vehicles on public and private property) was governmental regulatory conduct that does not, as a matter of law, give rise to liability as an arranger under section 107(a)(3).²¹⁵ These holdings that a governmental entity cannot be held liable under section 107 solely on the basis of governmental activity in regulating other persons have been based upon determinations that such activities alone are not sufficient to make the governmental entity a liable PRP under section 107.²¹⁶ No court has based a holding of non-liability for governmental regulatory

²¹³ *United States v. Dart Indus.*, 847 F.2d 144, 146 (4th Cir. 1988); *Hassayampa Steering Comm. v. Arizona*, 768 F. Supp. 697, 702 (D. Ariz. 1991); *United States v. New Castle County*, 727 F. Supp. 854, 859, 874 (D. Del. 1989); *New York v. City of Johnstown*, 701 F. Supp. 33, 36 (N.D.N.Y. 1988).

²¹⁴ *See United States v. Vertac Chem. Corp.*, 46 F.3d 803, 809, 810 (8th Cir. 1995) (regulation by federal government under Walsh-Healy Act, 41 U.S.C. § 35(b)-(d) (1994) of worker health and safety, and under Defense Production Act of 1950, 50 U.S.C. app. § 2061 (1994), of government constructor's facility, held insufficient basis to hold United States liable under either section 107(a)(2) or 107(a)(3) of CERCLA) *cert. denied*, 515 U.S. 1158 (1995); *Maxus Energy Corp. v. United States*, 898 F. Supp. 399, 408 (N.D. Tex. 1995).

²¹⁵ *See Lincoln v. Republic Ecology Corp.*, 765 F. Supp. 633, 639 (C.D. Cal. 1991).

²¹⁶ *See Vertac Chem. Corp.*, 46 F.3d at 808; *Dart Indus.*, 847 F.2d at 146; *Maxus Energy Corp.*, 898 F. Supp. at 406-7; *Hassayampa Steering Comm.*, 768 F. Supp. at 702; *Lincoln*, 765 F. Supp. at 638-39; *New Castle County*, 727 F. Supp. at 874; *City of Johnstown*, 701 F. Supp. at 36.

activities on the grounds that Congress has not waived the sovereign immunity of governmental entities from liability.

In fact, as discussed earlier in this Article,²¹⁷ the United States Court of Appeals for the Third Circuit, in *FMC Corp. v. United States Department of Commerce*, rejected the federal government's argument that governmental regulatory activities should be *per se* immune from liability under section 107.²¹⁸ Although this holding of no sovereign immunity under CERCLA for governmental regulatory activities applied only to the federal government, this holding also should be extended to state and local governments because CERCLA waives state and local government sovereign immunity to the same extent that it waives the federal government's sovereign immunity.²¹⁹ Under the Third Circuit's approach in *FMC Corp.*, a government can be liable under section 107 "when it engages in regulatory activities extensive enough to make it an operator of a facility or an arranger of the disposal of hazardous wastes even though no private party could engage in the regulatory activities at issue."²²⁰ Following this approach, the Third Circuit in *FMC Corp.* held that the United States was liable under section 107 both as an operator of a privately owned facility, and as an arranger for disposal of hazardous substances at the facility, as a result of the federal government's involvement during World War II with the private facility which produced materials for the United States' war effort.²²¹

As mentioned earlier, other courts have held that governmental entities should not be liable PRPs under section 107 solely on the basis of governmental regulatory activities.²²² Some of these courts take the position that liability should not be imposed upon a governmental entity "engaged in legitimate sovereign, as opposed to proprietary or commercial, functions."²²³ One reason these courts give for making

²¹⁷ See *supra* notes 43-61 and accompanying text.

²¹⁸ See *FMC Corp. v. United States Dep't of Commerce*, 29 F.3d 833, 838-42 (3d Cir. 1994) (en banc).

²¹⁹ See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 10 (1989).

²²⁰ *FMC Corp.*, 29 F.3d at 840.

²²¹ See *id.* at 843-46; see also *infra* notes 311-32 and accompanying text.

²²² See *supra* note 216 and accompanying text.

²²³ *Lincoln v. Republic Ecology Corp.*, 765 F. Supp. 633, 637-38 (C.D. Cal. 1991). See also *United States v. Western Processing Co., Inc.*, 761 F. Supp. 725, 730-31, (W.D. Wash. 1991) (stating that Congress intended to impose liability on federal government under section 107 when it "acts in a fashion analogous to that of a business concern," but not when EPA engages in "regulatory efforts" at a hazardous waste site); *United States v. American Color & Chem. Corp.* 858 F. Supp. 445, 449 (M.D. Pa. 1994) (stating "liability can be imposed only when the

such a distinction is that holding a governmental entity liable under CERCLA for its regulatory activities would be inconsistent with Congress' "intent that the cleanup costs be absorbed by those entities who can best send proper price signals to the market—those who profit from transactions involving hazardous substances or cause their release."²²⁴ Other reasons given by these courts are that governmental entities would be reluctant to exercise governmental functions to abate public nuisances or protect the environment if they were subject to potential liability under CERCLA for such regulatory activities, and that private parties engaged in hazardous substances transactions, and who actually cause or contribute to hazardous substances releases, "will have less of an incentive to operate their businesses in an environmentally sound manner" if CERCLA liability were extended to governmental entities engaged in such regulatory activities.²²⁵

However, the United States Court of Appeals for the Second Circuit has held that a municipality can be liable as an operator under section 107(a)(3) when it arranges, in its sovereign capacity, for disposal or treatment of solid wastes generated by the municipality and its citizens, at a sanitary landfill owned by another person.²²⁶ The Second Circuit's reasoning in support of this holding was that although a municipality may be exempted from CERCLA liability either under the sovereign function exemption in section 101(20)(D)²²⁷ or under section 107(d)(2),²²⁸ "Congress limited the sovereign function exception to those situations where liability is premised on the state or local government entity being an 'owner or operator' of a vessel or facility" and did not extend the exception to arranger liability under section 107(a)(3).²²⁹ The court concluded that a municipality can be liable as an arranger when there "is a sufficient nexus . . . between

government acts as the operator of a business concern, not when it is acting in a governmental or regulatory capacity").

²²⁴ *Lincoln*, 765 F. Supp. at 638.

²²⁵ *See id.*

²²⁶ *See* *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1198 (2d Cir. 1992); *accord* *Transportation Leasing Co. v. California*, 861 F. Supp. 931, 938-39 (C.D. Cal. 1993).

²²⁷ 42 U.S.C. § 9601(20)(D) (1994). This provision exempts a state or municipal government from "owner or operator" liability when the government "acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign." *See id.*; *see also supra* notes 74-76 and accompanying text.

²²⁸ 42 U.S.C. § 9607(d)(2). *See supra* notes 102-08 and accompanying text.

²²⁹ *B.F. Goodrich Co.*, 958 F.2d at 1199.

the municipality and the hazardous substances, one that does not exist . . . only for promulgating disposal regulations or for permitting disposal facilities."²³⁰ The Second Circuit held that the facts in the record established a prima facie case for plaintiffs because such a nexus existed and held the municipal defendants liable as arrangers under section 107(a)(3) because of their actions in arranging for disposal and treatment of municipal solid wastes at two privately owned sanitary landfills, even though the municipalities acted in their sovereign status in doing so.²³¹

The United States Court of Appeals for the Eighth Circuit, however, has held that a governmental entity cannot be held to have the requisite ownership or possession of hazardous substances required for arranger liability "merely because it had statutory or regulatory authority to control activities which involved the production, treatment or disposal of hazardous substances."²³²

The court in *New York v. City of Johnstown* followed similar reasoning in holding that the state of New York could not be liable as an arranger under section 107(a)(3) on the basis of the state's alleged failure to regulate two solid waste management facilities (sanitary landfills) in accordance with the state's own sanitary landfill and permitting regulations, and the state's actions in permitting or directing hazardous substances to be placed in a particular facility (after another such available facility had been closed).²³³ The state of New York initially had sued two cities that owned and operated these two facilities (under sections 107(a)(1) and (2)); and generators of wastes that allegedly were deposited at these facilities (under section 107(a)(3)), to recover response cleanup costs and natural resources damages. The state previously had entered into agreements with the

²³⁰ *Id.*

²³¹ *See id.* at 1196-99. The court noted, however, that inequitable and disproportionate burdens upon liable municipalities can be avoided if courts exercise their powers to equitably apportion response costs in contribution actions under section 113(f)(1). *See id.* at 1206. A federal district court in California similarly has held municipalities that have a duty under state law to provide waste collection services within their jurisdiction were liable as arrangers under section 107(a)(3) as a result of their contracting with private disposal companies to have the companies haul away municipal waste and exercising "significant control" over those haulers through contracts and ordinances. *See Transportation Leasing Co.*, 861 F. Supp. at 955. The court found that the municipalities' statutory duty to provide for waste disposal, and their significant control over residential and commercial wastes through their contracts with the haulers and through municipal ordinances, satisfied section 107(a)(3)'s requirement that an arranger "own[ed] or possess[ed]" the disposed wastes. *See id.*

²³² *United States v. Vertac Chem. Corp.*, 46 F.3d 803, 810 (8th Cir. 1995).

²³³ *See New York v. City of Johnstown*, 701 F. Supp. 33, 36 (N.D.N.Y. 1988).

two cities that provided for closure of the facilities by specified dates and operation of them in the interim without permits, but in accordance with the state's solid waste management regulations. One of the defendant waste generators in the state's suit filed a counterclaim under section 113(f)(1),²³⁴ alleging that the state of New York was itself liable under section 107(a)(3) because it "otherwise arranged for" disposal of hazardous substances at these two facilities, by either permitting or directing wastes to be placed at the two facilities.²³⁵

The court in *City of Johnstown*, however, dismissed these counterclaims.²³⁶ The court reasoned that in order for a person to be liable as an arranger under section 107(a)(3), "it must be shown . . . that the State *owned* or *possessed* the hazardous substances of which it arranged to dispose" and that "there has to be some nexus between the allegedly responsible person and the owner of the hazardous substances before a party can be held liable under 42 U.S.C. § 9607(a)(3)."²³⁷ The court concluded that there was no such nexus between the state and the defendant waste generator, with the court noting that "the state was attempting to remediate the hazardous waste problems at both sites"²³⁸

Several months before the *City of Johnstown* decision was issued, the United States Court of Appeals for the Fourth Circuit held, in *United States v. Dart Industries*, that neither governmental regulatory activity nor governmental failure to exercise regulatory authority is sufficient to make a governmental entity liable as an "operator" under section 107.²³⁹ In *Dart Industries*, the Fourth Circuit affirmed the district court's holding that the South Carolina Department of Health and Environment (DHEC) was not an owner or operator under section 107 of the abandoned Fort Lawn, South Carolina hazardous waste disposal site as a result of DHEC's regulatory activities involving the site.²⁴⁰ The United States, after completing a surface cleanup of the Fort Lawn site after private hazardous waste operations ceased there, brought suit under section 107, to recover its cleanup costs against twenty persons who allegedly had generated certain hazardous substances found at the site.²⁴¹ Three of these gen-

²³⁴ 42 U.S.C. § 9613(f)(1) (1994).

²³⁵ See *City of Johnstown*, 701 F. Supp. at 36.

²³⁶ *Id.* at 36-38.

²³⁷ *Id.* at 36.

²³⁸ *Id.*

²³⁹ *United States v. Dart Indus.*, 847 F.2d 144 (4th Cir. 1988).

²⁴⁰ *Id.* at 146.

²⁴¹ See *United States v. Carolawn Co.*, 698 F. Supp. 616, 618 (D.S.C. 1987).

erator defendants filed a third-party complaint against DHEC alleging that DHEC was liable under section 107 for the federal government's cleanup costs, because DHEC allegedly controlled hazardous waste disposal operations at the Fort Lawn site,²⁴² and because DHEC allegedly "approved and disapproved applications to store wastes at Fort Lawn, inspected the site, and required proper transportation of the wastes delivered to Fort Lawn."²⁴³ The district court concluded that DHEC "did not at any time own or operate" the site, finding that "all the third party complaint alleges against DHEC is a series of regulatory actions consistent with its statutory mandate."²⁴⁴

Affirming this holding of the District Court, the Fourth Circuit in *Dart Industries* held that DHEC was not an owner or operator of the site within the meaning of section 107, reasoning:

First under § 9601(20)(A), an owner or operator includes the entity that "controlled activities at such facility" before a declaration of bankruptcy. 42 U.S.C. § 9601(20)(A)(iii). The generators argue the DHEC controlled the activities at Fort Lawn before Carolawm abandoned the site in 1980. During this time, DHEC loosely regulated the activity at the site pursuant to [South Carolina statutes regulating hazardous waste disposal]. DHEC approved or disapproved applications to store wastes at Fort Lawn, inspected the site, and required proper transportation of the wastes delivered to Fort Lawn. However, there is no allegation that DHEC went beyond this governmental supervision and directly managed Carolawm's employees or finances at the Fort Lawn site. Thus the court finds that DHEC is not an owner or operator under § 9601(20)(A)(iii).²⁴⁵

The Fourth Circuit then addressed the defendant generator's additional argument that DHEC was an owner or operator under section 101(20)(D) because it did not fall within that section's express exemption for governmental units that acquire ownership through bankruptcy, abandonment, or other involuntary means and "had caused or contributed to the release or threatened release of a hazardous substance"²⁴⁶ The defendant generators argued that after the Fort Lawn site was abandoned in 1980, DHEC caused or contributed to the waste release by approving transportation of one generator's wastes to the site, by failing to force a cleanup of the site, and by

²⁴² See *id.* at 618–19.

²⁴³ *Dart Indus.*, 847 F.2d at 146.

²⁴⁴ *Carolawm Co.*, 698 F. Supp. at 621.

²⁴⁵ *Dart Indus.*, 847 F.2d at 146.

²⁴⁶ *Id.*

refusing to allow generators to remove their wastes from the site.²⁴⁷ The Fourth Circuit rejected that argument on the following grounds:

As with the claim under § 9601(20)(A), these allegations that DHEC did not properly monitor the site or facilitate the cleanup fail to characterize DHEC as an owner or operator. The generators are unable to specify any "hands on" activities by DHEC that contributed to the release of hazardous wastes. The District Court appropriately described DHEC's activities as merely "a series of regulatory actions . . ." DHEC may have inadequately enforced the state environmental regulations. However, such unfortunate deficiencies do not constitute ownership or control as defined in § 9601; the DHEC is not liable as an owner or operator under § 9607.²⁴⁸

In its earlier discussion of the defendants' argument based upon section 101(20)(A)(iii) (which equates "controlled activities" at a facility with "operates" a facility in its next-to-last sentence), the Fourth Circuit in *Dart Industries* implied that a person is an operator of a facility if the person directly manages a hazardous waste facility's employees or the facility's finances.²⁴⁹ Some courts follow such an actual control approach to operator liability, defining an operator to be a person that manages or controls the operations of the facility.²⁵⁰ The Fourth Circuit, in its discussion of the defendants' argument based upon section 101(20)(D), alternatively implied that a person is an operator of a facility if the person engaged in "hands on" activities (a term which the court did not define) that contributed to the release of a hazardous substance.²⁵¹ This approach seems to follow an alternative actual control test for operator liability that states that a person who manages, or controls, hazardous waste disposal activities or activities that result in the release of a hazardous substance is an operator of a facility.²⁵²

Under *Dart Industries*, a governmental entity is not an operator of a facility solely as a result of government regulation of hazardous waste disposal, or of failure of governmental to regulate hazardous

²⁴⁷ See *id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ See *supra* note 187 and accompanying text.

²⁵¹ *United States v. Dart Indus.*, 847 F.2d 144, 146 (4th Cir. 1988).

²⁵² See *supra* note 188 and accompanying text. The Fourth Circuit subsequently held that a person can be an "operator" of a facility under section 107 if the person has "authority to control" disposal of hazardous substances at a facility. *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 842 (4th Cir. 1992).

waste disposal properly or to require cleanup of a hazardous waste site.²⁵³ However, the court in *Dart Industries* does not define what constitutes “hands on” activities that will make a governmental entity an operator of a facility under section 107, and therefore does not indicate whether a governmental entity would be held to be an operator of a facility it engages in response cleanup activities under section 104 of CERCLA, or other authority, that result in a release of a hazardous substance.²⁵⁴ As discussed in a subsequent section of this Article, a governmental entity should not be held liable under section 107 solely on the basis of cleanup activities under CERCLA or other authority, even if such cleanup activities were not consistent with the National Contingency Plan or resulted in the release of additional hazardous substances.²⁵⁵

Relying upon *City of Johnstown* and *Dart Industries*, the Delaware district court held, one year later, in *United States v. New Castle County*, that the state of Delaware was not liable under section 107 either as an operator of a landfill site, or as an arranger of disposal of hazardous substances at the Tybouts Corner landfill facility solely on the basis of the state’s regulation of hazardous substances at the site.²⁵⁶ In this case, the United States had brought suit against New Castle County, Delaware, an individual, and two corporations, seeking, as part of the requested relief, the recovery of response costs it had incurred in responding to the alleged release and threatened release of hazardous substances at the landfill.²⁵⁷ The defendants filed third-party complaints against the state of Delaware, which claimed that the state was liable under section 107 as an operator of the landfill and as an arranger of disposal of hazardous substances at the landfill as a result of the state’s regulation of the disposal of wastes at the site.²⁵⁸ The state’s regulatory activities with respect to the site involved the state’s implementation and enforcement of various regulations adopted under the state’s solid waste disposal statute.²⁵⁹ These regulatory activities included selection of the site for the landfill, planning and design of the landfill and its operations, determining the types of wastes to be disposed of at the site, issuing a permit for the

²⁵³ See *Dart Indus.*, 847 F.2d at 146.

²⁵⁴ *Id.* at 144.

²⁵⁵ See *infra* notes 360–425 and accompanying text.

²⁵⁶ *United States v. New Castle County*, 727 F. Supp. 854, 876 (D. Del. 1989).

²⁵⁷ See *id.* at 857.

²⁵⁸ See *id.*

²⁵⁹ See *id.* at 862.

landfill, requiring users of the site to submit periodic reports to the state detailing the landfill's conditions, and monitoring the site on a continuous basis to ensure that the parties working at the landfill complied with the statutory and regulatory standards for waste disposal at the landfill.²⁶⁰

The court in *New Castle County* held that these regulatory activities by the state were insufficient to hold the state liable under CERCLA, either as an operator or as an arranger.²⁶¹ The court found that the state's actions "do not exceed 'mere regulation nor do they constitute active, voluntary, "hands on" participation in the day-to-day management and operations' of the site."²⁶² Although noting that courts have interpreted the term operator broadly to effectuate Congress' perceived intent that all those who profit from the treatment or disposal of hazardous waste should be liable under section 107, the court in *New Castle County* stated that "surely, however, there must be some limitations contemplated by CERCLA because in a sense, every member of society profits from the disposal and treatment of hazardous and non-hazardous wastes."²⁶³ The court found that CERCLA's "legislative history and cases indicate that it is relevant in determining liability to consider whether the 'person' charged with CERCLA liability profited in a commercial sense, as opposed to a general societal health sense."²⁶⁴

²⁶⁰ *See id.*

²⁶¹ *United States v. New Castle County*, 727 F. Supp. 854, 870, 874 (D. Del. 1989).

²⁶² *Id.* at 870.

²⁶³ *Id.* at 865.

²⁶⁴ *Id.* The court cited S. Rep. No. 848, 96th Cong. 2d Sess., at 13 (1980), the following portion of which the court had quoted earlier:

[CERCLA's] strict liability . . . assures that those who *benefit financially from a commercial activity* internalize the health and environmental costs of that activity into the *cost of doing business* To establish provisions of liability any less than strict, joint, and several liability would be to condone a system in which innocent victims bear the burdens of releases, while *those who conduct commerce in hazardous substances which cause such damage benefit with relative impunity*.

Id. at 858 (emphasis added by court). The court in *New Castle County* also quoted the following from *State ex rel. Brown v. Georgeoff*:

It is also clear from the Congressional debates that Congress intended to have the chemical industry pay for the costs of this cleanup. EPA argued that "society should not bear the cost of protecting the public from hazards produced in the past by a generator, transporter, consumer, or dump site owner-operator who *has profited or otherwise benefitted from commerce involving these substances* and now wishes to be insulated from any continuing responsibilities for the present hazards to society that have been created . . . relieving *industry* of responsibility establishes a precedent seriously adverse to the *public* interest"

The court in *New Castle County* concluded that a number of cases²⁶⁵ that had held parent corporations, corporate shareholders, corporate executives, or corporate employees liable as operators under section 107, were not controlling on the issue of a state's liability for regulatory activities.²⁶⁶ These cases were stated to be "factually distinguishable in that they all involved some form of a corporate-like entity and/or an individual who actually did (or could have) controlled or managed that entity"²⁶⁷ and involved an assertion of liability "against a person who had commercial, financial or proprietary interest at stake in relation to the hazardous substance."²⁶⁸ These cases were described as "merely following the statutory mandate that 'individuals,' and not just the corporations they work for or own, can be held liable as 'persons' . . . and thus were 'owners or operators.'"²⁶⁹ The court concluded that "[b]y imposing liability on these individuals, the courts were merely following the Congressional policy that those who plant their polluted seed should pay for the fruit they bear."²⁷⁰ However, the court also stated that a person actually must exercise control over a facility in order to be held liable under section 107 as an operator of that facility, and "[m]ere ability to exercise control as a result of the financial relationship of the parties is insufficient for liability to attach"²⁷¹

The court concluded in *New Castle County*, however, that the state of Delaware had participated at the sanitary landfill involved in the suit "in its regulatory capacity as protector of the health, safety and welfare of its citizens. It did not participate or have the ability to

United States v. New Castle County, 727 F. Supp. 854, 858 (D. Del. 1989) (quoting *Brown v. Georgeoff*, 562 F. Supp. 1300, 1312 (N.D. Ohio 1983)) (emphasis added by *New Castle County*) (citation omitted).

The *New Castle County* court added that "[t]his is further borne out by the fact that Congress imposed certain taxes upon various industries, e.g., oils, petrochemicals, chemicals, etc., to help set up the fund to pay for response costs." *Id.*

²⁶⁵ See, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985); *Idaho v. Bunker Hill Co.*, 635 F. Supp. 665 (D. Idaho 1986); *United States v. Conservation Chem. Co.*, 628 F. Supp. 391 (W.D. Mo. 1985); *United States v. Carolawn Co.*, 21 Env't Rep Cas. (BNA) 2124, 2131 (D.S.C. 1984); *United States v. Northeastern Pharm. & Chem. Co., Inc.*, 579 F. Supp. 823, 848 (W.D. Mo. 1984), *aff'd in part and rev'd in part*, 810 F.2d 726 (8th Cir. 1986); *United States v. Mottolo*, 629 F. Supp. 56 (D.N.H. 1984).

²⁶⁶ See *New Castle County*, 727 F. Supp. at 866.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.* (citing 42 U.S.C. § 9601(20)).

²⁷⁰ *Id.* (citing S.Rep. No. 848, 96th Cong. 2d Sess. 98, at 13 (1980)).

²⁷¹ *United States v. New Castle County*, 727 F. Supp. 854, 866 (D. Del. 1989) (quoting *Rockwell Intern. Corp. v. IU Intern. Corp.*, 702 F. Supp. 1384, 1390 (N.D. Ill. 1988)).

control the site with any proprietary or financial interest at stake. The State did not have any commercial interests at stake in the site.²⁷² The court added that the state's testing, reporting, and monitoring requirements applicable to the sanitary landfill "were all required as part of the permit approval process and regulatory mandate of the [state] Disposal Code" and that "these day-to-day operational mandates amount to nothing more than the implementation by the State of its regulatory requirements."²⁷³

The court then analyzed the Fourth Circuit's *Dart Industries*²⁷⁴ decision, finding "several points of comparison and contrast,"²⁷⁵ and then found, "based on an analysis of the present case law and what meager legislative history is pertinent,"²⁷⁶ that the following factors should be considered in determining whether to impose liability upon a person under section 107 as an operator:

whether the person sought to be strapped with operator status controlled the finances of the facility; managed the employees of the facility; managed the daily business operations of the facility; was responsible for the maintenance of environmental control at the facility; and conferred or received any commercial or economic benefit from the facility, other than the payment or receipt of taxes. The recitation of these factors is not intended to be exclusive but only part of a *para materia* inquiry in determining operator status . . . Also, operator status will not necessarily attach if any one of these factors is found to exist. Each case must be determined based upon the unique factual situation presented.²⁷⁷

Applying these criteria to the facts of the case, the court concluded in *New Castle County* that "considering the totality of circumstances," the state of Delaware should not be held liable under section

²⁷² *Id.* at 866-67.

²⁷³ *Id.* at 869.

²⁷⁴ *United States v. Dart Indus.*, 847 F.2d 144 (4th Cir. 1988).

²⁷⁵ *See New Castle County*, 727 F. Supp. at 868.

²⁷⁶ *See id.* at 869.

²⁷⁷ *See id.* The court in *United States v. Stringfellow*, affirming a Special Master's Order on Directed Verdict that held the state of California liable under section 107 as an operator of a sanitary landfill, held that operator is defined "by looking at the degree of control which is exercised" (which "need not to be day to day"), based on the following 11 factors "weighed as a whole":

expertise and knowledge of dangers of hazardous waste, conception of idea of the site, design of the site, supervision, inspection, receipt of reports of the site, hiring or approving hiring of employees, determining operational responsibilities, control of disposal, ability to discover and abate harm, public declarations of responsibility, participation in opening and closing of site, and benefitting from the existence of the site.

107 as an operator of the sanitary landfill.²⁷⁸ The court added that whether or not Delaware's regulatory program "may or may not have been more expansive or exacting than another state's regulatory program should not be the basis for holding that the state of Delaware was an operator of the site under CERCLA."²⁷⁹

As a final point in support of its holding that the state of Delaware was not liable as an operator of the sanitary landfill, the court in *New Castle County* distinguished the Special Master's decision in *United States v. Stringfellow*.²⁸⁰ In *Stringfellow*, a Special Master held the state of California liable under section 107 as an owner and operator of a disposal facility and as an arranger of treatment and disposal of hazardous substances.²⁸¹ The Special Master reasoned in *Stringfellow* that:

Even if the State were considered an "involuntary" owner or operator of the facility (*see* § 101(20)(D)) its liability is unaffected since the State *caused and contributed to a release and threatened release of a hazardous substance* from the facility both before and after it became the owner and operator, including but not limited to its negligence in (i) investigating the site, (ii) choosing the site, (iii) designing the site, (iv) supervising construction of the site, (v) delaying taking cleanup activities at the site and (vi) failing to remedy conditions at the site.²⁸²

The court in *New Castle County* found, however, that several of the facts relied upon by the Special Master in *Stringfellow* to support his holdings were "conspicuously missing in the instant case."²⁸³ The first missing fact was that the state of Delaware did not have California's involvement in hiring, setting the responsibilities for, directing, and supervising the employees who had day-to-day operational responsibility for the Stringfellow site.²⁸⁴ The court in *New Castle County* noted that such facts also were missing in *Dart Industries*²⁸⁵ and that

United States v. Stringfellow, 20 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,656, 20,658 (C.D. Cal. Oct. 6, 1989) (citing *Rockwell Int'l Corp. v. UI Int'l Corp.*, 702 F. Supp. 1384, 1390-91 (N.D. Ill. 1988)).

²⁷⁸ *New Castle County*, 727 F. Supp. at 869.

²⁷⁹ *Id.*

²⁸⁰ *See id.* at 870; *see also Stringfellow*, No. CIV 83-2501 JMI(MX) Peetris, Special Master. Objections by the state of California to this order on directed verdict were overruled, and the order affirmed, in *United States v. Stringfellow*. *See* 20 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,656.

²⁸¹ *See New Castle County*, 727 F. Supp. at 870.

²⁸² *Id.* (quoting *Stringfellow*, No. CIV 83-2501 JMI(MX) at 4-5 (emphasis added)).

²⁸³ *See id.* at 870.

²⁸⁴ *See id.*

²⁸⁵ *United States v. Dart Indus.*, 847 F.2d 144 (4th Cir. 1988).

the Fourth Circuit in *Dart Industries* considered the absence of such facts "important in determining the non-culpability of DHEC."²⁸⁶ Other facts that *New Castle County* court found present in *Stringfellow* but absent in its case were: (1) the state of California made a public announcement that it was and would be responsible for the Stringfellow site;²⁸⁷ and (2) two state of California employees testified at trial that California "'directed' and 'controlled' the Stringfellow site."²⁸⁸ The court concluded the section of its opinion dealing with the state's liability as an operator with the statement that "[u]nlike the Special Master's decision in *Stringfellow*, the actions taken by the State of Delaware at Tybouts Corner do not exceed 'mere regulation' nor do they constitute 'active, voluntary, 'hands on' participation in the day-to-day management and operations' of the Site."²⁸⁹ Later, in the section of its decision dealing with the state's liability as an arranger under section 107(a)(3), the court added:

It is not the fact that the state was *regulating* the sites that compels the Court's conclusions that the state was not a covered person under Sections 107(a)(2) and (3). Rather, the basis of these conclusions is that the level of the state's involvement at Tybouts Corner, which in this case was taken pursuant to its regulatory and statutory mandate, does not amount to sufficient activity to give rise to operator or arranger status under CERCLA.²⁹⁰

²⁸⁶ *New Castle County*, 727 F. Supp. at 870 (citing *Dart Indus.*, 847 F.2d at 146). "However, there is no allegation that DHEC went beyond the governmental supervision and *directly managed Carolawn's employees or finances* at the Fort Lawn site." *Id.* (quoting *Dart Indus.*, 847 F.2d at 146). *New Castle County* also compared *Stringfellow* with *Edward Hines Lumber Co. v. Vulcan Materials Co.*, which *New Castle County* described as affirming summary judgment of no operator liability "where 'Hines has presented no evidence that Osmose ever . . . exercised any control over the disposal of process run-off into the holding pond.'" *New Castle County*, 727 F. Supp. at 870 (quoting *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 685 F. Supp. 651, 657 (N.D. Ill. 1988), *aff'd*, 861 F.2d 155 (7th Cir. 1988)). "Osmose . . . did not interfere with operational decisions . . . Osmose had no control of the work at the Hines plant, no right to chose [sic] employees, [or] direct their activities . . ." *Id.* (quoting *Edward Hines Lumber Co.*, 861 F.2d at 158.)

²⁸⁷ See *New Castle County*, 727 F. Supp. at 870. The court pointed out that "denial of responsibility for the site lies at the core of the state's arguments." *Id.*

²⁸⁸ See *id.* (citing *Stringfellow* NO. CIV 83-2501 JMI(MX) at 7). The court noted that there was "no positive statement by State officials that the state directed and controlled the Tybouts Corner site." *Id.* at 870.

²⁸⁹ *Id.* (quoting *Stringfellow*, No. CIV. 83-2501 JMI(MX) at 7).

²⁹⁰ *United States v. New Castle County*, 727 F. Supp. 854, 874-75 (D. Del. 1989). The court similarly stated that it "does not hold that a governmental body is automatically foreclosed from CERCLA liability merely because it is acting in a regulatory capacity pursuant to statutory mandate." *Id.* at 875. It added, in *dictum*, however, that "[i]f a state owned or operated a facility or deposited its own hazardous wastes at a facility it owned, the mere fact that it was also

As the preceding passage indicates, the *New Castle County* court also held that the state of Delaware's regulatory activities did not make it liable as an arranger under section 107(a)(3). The court first noted that neither CERCLA nor its legislative history defines the term "arrange," but asserted that "it is fairly well settled" that the term arrange in section 107(a)(3) "should be given a liberal interpretation."²⁹¹ The court in *New Castle County* reviewed the decision in *City of Johnstown*²⁹² and found that decision's "reasoning . . . to be persuasive."²⁹³ Agreeing with the reasoning in *City of Johnstown*, the court held "that to impose liability under section 107(a)(3) some nexus or relationship must be shown between the person alleged to be an arranger (here the State) and the owner of the hazardous substance."²⁹⁴

The cases²⁹⁵ relied upon by the defendant in *City of Johnstown* were distinguished by the *New Castle County* court for the same reasons as they were distinguished in *City of Johnstown*, with the court stressing that there were no facts indicating that the state of Delaware ever actually or constructively possessed any hazardous substances that were disposed of by another person at Tybouts Corner landfill, and that the attempt to hold the state liable under section 107(a)(3) was based upon the state's actions in permitting or directing wastes to be deposited at Tybouts Corner landfill.²⁹⁶ The court then rejected the defendants' "final contention that the State should be held an arranger because it had the authority to control the disposal of the toxic substances."²⁹⁷ The court concluded that a finding that the state was liable as an arranger was not required by two decisions²⁹⁸ of the Eighth Circuit Court of Appeals relied upon by the defendants

operating in a regulatory capacity would not necessarily mean that it would escape liability under CERCLA." *Id.*

²⁹¹ See *id.* at 871.

²⁹² *New York v. City of Johnstown*, 701 F. Supp. 33 (N.D.N.Y. 1988).

²⁹³ *New Castle County*, 727 F. Supp. at 872.

²⁹⁴ *Id.* at 872. Later in the opinion the court similarly stated "that in order to characterize a CERCLA person as an arranger there must be some nexus or relationship between the person under attack and the actual owner or possessor of the hazardous substance." *Id.* at 874.

²⁹⁵ *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986); *United States v. Bliss*, 667 F. Supp. 1298, 1306-07 (E.D. Mo. 1987); *United States v. A&F Materials Co., Inc.*, 582 F. Supp. 842, 845 (S.D. Ill. 1984); *United States v. Mottolo*, 629 F. Supp. 56, 60 (D.N.H. 1984).

²⁹⁶ See *New Castle County*, 727 F. Supp. at 872.

²⁹⁷ *Id.* at 873.

²⁹⁸ See *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373 (8th Cir. 1989); *Northeastern Pharm. & Chem. Co.*, 810 F.2d at 726.

in support of this contention.²⁹⁹ The court in *New Castle County* reasoned that these two decisions are not inconsistent with its requirement that there must be some nexus or relationship between the person alleged to be an arranger and the actual owner or possessor of the hazardous substance in order for the person to be liable as an arranger, because in those Eighth Circuit cases "this nexus or relationship was present due to the commercial relationship of the person fixed with arranger status (which in some instances was coupled with the actual control that person had over the hazardous wastes) and the hazardous wastes which were disposed."³⁰⁰

The court concluded in *New Castle County* that the state of Delaware should not be liable under section 107(a)(3) as an arranger because the state's attempts "to solve the problem of the safe disposal of wastes (—some of which may be determined to be hazardous . . .) is simply not an appropriate situation for the attachment of arranger status on the State."³⁰¹

Two years after *New Castle County* was decided, Judge Broomfield, in *Hassayampa Steering Committee v. State of Arizona*, relied upon *City of Johnstown* and *New Castle County* to hold that the state of Arizona was not liable as an arranger under section 107(a)(3) as a result of its regulatory involvement with the disposal of hazardous wastes at a sanitary landfill.³⁰² The state in *Hassayampa Steering Committee* had arranged for a sanitary landfill to receive hazardous wastes for a limited period of time, notified transporters of the landfill's availability for such disposal, established a manifest and permit system to screen and track wastes going to the landfill, and assisted the landfill's owner in designing pits at the landfill to receive hazardous wastes. The court in *Hassayampa Steering Committee* equated the state's actions to the state's actions in *City of Johnstown*

²⁹⁹ See *New Castle County*, 727 F. Supp. at 874.

³⁰⁰ *Id.* The court also rejected an argument, based on the Special Master's decision in *United States v. Stringfellow*, see No. CIV 83-2501 JMI(MX) Peetris, Special Master (Order on Directed Verdict), that "arranger status can attach even to a person who did not own the waste and that it is the possession and exercise of 'the authority to take an active role in "arranging for" the disposal of wastes' that is relevant." *New Castle County*, 727 F. Supp. at 874 n.43.

³⁰¹ *New Castle County*, 727 F. Supp. at 874. As noted earlier, the court also stated that the state was not being exempted from CERCLA liability "merely because it is acting in a regulatory capacity pursuant to statutory mandate," but rather was being held not to be an arranger under section 107(a)(3) because the state's involvement at Tybouts Corner, pursuant to its regulatory and statutory mandate, did not amount to sufficient activity to give rise to arranger liability. *Id.* at 874-75; see *supra* note 290 and accompanying text.

³⁰² *Hassayampa Steering Comm. v. Arizona*, 768 F. Supp. 697, 702 (D. Ariz. 1991).

and *New Castle County*, and held that the state of Arizona did not have a nexus with the actual owners of the hazardous wastes sent to the landfill, which the court held was necessary to establish that the state had the constructive ownership or possession of the wastes required to impose arranger liability.³⁰³ *Hassayampa Steering Committee* emphasized that although the state gave waste owners permission through the manifest system to deposit hazardous wastes at the landfill, “[t]he State . . . was not authorized by any of the actual waste owners to decide on the owner’s behalf where and how the waste would be deposited.”³⁰⁴ The court reasoned that because “the generators and transporters [could] not be said to have appointed the State to decide on their behalf where the hazardous waste would be deposited, the State’s relationship with the actual owners and depositors therefore was insufficient to establish that the State constructively owned or possessed the waste.”³⁰⁵ The court alternatively could have argued on this basis that the state could not be held liable as an arranger because the state’s lack of appointment to decide where the waste would be deposited meant that it could not have “otherwise arranged” for treatment or disposal of the waste (a requirement for liability under section 107(a)(3)).

In an earlier opinion involving the same landfill, Judge Broomfield, however, denied motions for summary judgment as to the state of Arizona’s liability under section 107(a)(2) as an operator of the landfill.³⁰⁶ The court declined to hold that the state was an operator of the facility, concluding that a totality of circumstances approach was appropriate for deciding the issue of operator liability.³⁰⁷ Although Judge Broomfield characterized the state’s participation in hazardous waste disposal at the landfill as “pervasive,” he noted that “many of those activities were regulatory in nature” and concluded that “plaintiffs have not presented sufficient evidence that the state controlled enough management activities for the court to determine on summary judgment, that the State was an operator, under CERCLA.”³⁰⁸

³⁰³ *Id.* at 702. The court in *dictum* suggested that such nexus “is usually evidenced by having the authority to decide on behalf of the owner where the waste could be deposited.” *Id.*

³⁰⁴ *Id.* at 701.

³⁰⁵ *Id.*

³⁰⁶ See *Hassayampa Steering Comm. v. Arizona*, 21 *Envtl. L. Rep. (Envtl. L. Inst.)* 20,549, 20,555 (D. Ariz. 1990).

³⁰⁷ See *id.* at 20,554.

³⁰⁸ *Id.*

Although governmental entities should not be immune *per se* (through sovereign immunity) from liability under section 107 when the government is regulating other persons in a sovereign capacity,³⁰⁹ governmental entities usually should not be held liable, either as operators of facilities or as arrangers of disposal or treatment, solely on the basis of governmental regulation of business or commercial activities of other persons (through requirements governing site location, facility design, types of materials processed or wastes disposed of at a facility, monitoring, reporting, permits, etc.). When a governmental entity's only involvement with a facility is through such regulation in the government's sovereign capacity and in furtherance of the general public interest, holding the government liable under CERCLA would not further CERCLA's purpose of imposing liability upon those persons who profit commercially from business activities relating to hazardous substances.³¹⁰ However, if government regulation of another person's facility becomes so intrusive (as in *Stringfellow*) that the government is actually controlling the day-to-day activities or finances of the facility, or deciding where hazardous substances shall be disposed of, the governmental entity may be held liable as a facility operator or as an arranger of disposal. But as *City of Johnstown*, *Dart Industries* and *New Castle County* illustrate, these standards for CERCLA liability for governmental regulatory activity rarely will result in governmental liability under CERCLA, and therefore should not impede governmental regulatory programs in promoting public health, safety, and welfare.

F. *Liability of a Governmental Entity as a CERCLA PRP Through Involvement with Private Business Facilities*

As the cases discussed in this section indicate, the United States increasingly is being sued under sections 107 and 113(f) under the theory that the federal government's involvement with a private business facility makes it liable as an owner or operator of the facility or as an arranger of disposal of hazardous substances at the facility. Many of these cases are based upon the United States' involvement with private facilities that manufactured products or extracted mate-

³⁰⁹ See *supra* notes 39–51, 217–21 and accompanying text.

³¹⁰ See *supra* notes 222–25 and accompanying text.

rials used by the United States in waging war during World War II³¹¹ or the Vietnam War.³¹²

In some of these cases, the United States had entered into a contract with the owner or operator of a private facility to have that facility produce a product or materials for the United States for use by the federal government in its war efforts,³¹³ while in others the United States directed and assisted a private manufacturing facility to produce a particular product or material needed for a war effort (without the federal government having contracted to purchase the materials or products produced by the facility.)³¹⁴ Although these cases have dealt only with the liability of the United States under CERCLA in such circumstances, the holdings in these cases should apply equally to a state or local government in similar circumstances because CERCLA's waivers of sovereign immunity essentially are the same for federal, state, and local governments.³¹⁵

In the leading case of *FMC Corp. v. United States Department of Commerce*, a majority of the *en banc* Third Circuit Court of Appeals affirmed the district court's holdings that the United States was liable under section 107 as the operator of a private industrial facility (owned and operated by American Viscose Corporation) at Front Royal, Virginia.³¹⁶ This facility had produced high-tenacity rayon (a substitute for natural rubber) during World War II under the direction and assistance of the federal government for the war effort. The Third Circuit in *FMC Corp.*, without discussion, because the court was equally divided on the issue, also affirmed the district court's holding that the United States was liable under section 107(a)(3) as

³¹¹ See *FMC Corp. v. United States Dep't of Commerce*, 29 F.3d 833, 834 (3d Cir. 1994); *Elf Atochem North America v. United States*, 914 F. Supp. 1166, 1168 (E.D. Pa. 1996); *East Bay Mun. Util. Dist. v. United States Dep't of Commerce*, 43 Env't Rep. Cas. (BNA) 1918, 1921 (D.D.C. 1996); *United States v. Iron Mountain Mines, Inc.*, 881 F. Supp. 1432, 1435 (E.D. Cal. 1995); see also Van S. Katzman, Note, *The Waste of War: Government CERCLA Liability at World War II Facilities*, 79 VA. L. REV. 1191 (1993).

³¹² See *United States v. Vertac Chem. Corp.*, 46 F.3d 803, 806 (8th Cir. 1995); *Maxus Energy Corp. v. United States*, 898 F. Supp. 399, 402 (N.D. Tex. 1995).

³¹³ See, e.g., *Vertac Chem. Corp.*, 46 F.3d at 806; *Elf Atochem North America*, 914 F. Supp. at 1168; *East Bay*, 43 Env't Rep. Cas. (BNA) at 1921; *Maxus Energy Corp.*, 898 F. Supp. at 402; *Iron Mountain Mines, Inc.*, 881 F. Supp. at 1435.

³¹⁴ See, e.g., *FMC Corp. v. United States Dep't of Commerce*, 29 F.3d 833, 836-38 (3d Cir. 1994) (*en banc*).

³¹⁵ See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 9-10 (1989).

³¹⁶ *FMC Corp.*, 29 F.3d at 845.

an arranger for the disposal or treatment of hazardous substances at the facility.³¹⁷

In *FMC Corp.*, the majority rejected the federal government's argument that its involvement with the facility during World War II was regulatory activity for which the federal government is *per se* immune from liability under section 107, holding that "the [federal] government can be liable when it engages in regulatory activities extensive enough to make it an operator of a facility or an arranger of the disposal of hazardous wastes even though no private party could engage in the regulatory activities at issue."³¹⁸ The court also held that it would "consider both the government's regulatory and non-regulatory activities with respect to the facility during the war and determine whether these activities taken *in toto* were of the type commonly associated with being an operator or arranger under CERCLA and are the type of activities in which private parties could engage."³¹⁹

After noting that "the definition of 'operator' in CERCLA gives little guidance to the courts in determining if a particular person or entity is liable as an operator because the statute circularly defines 'operator' as 'any person . . . operating such facility,'"³²⁰ the majority of the Third Circuit in *FMC Corp.* relied³²¹ upon the "actual control" test which it previously had used³²² to determine whether operator liability should be imposed upon one corporation for the acts of a related corporation. Under this actual control test, a corporation is held liable for the environmental violations of another corporation if it exercises actual and substantial control over "the corporation's day-to-day operations and its policy making decisions."³²³ After reviewing the record in the case and applying this actual control test to the facts of the case, the majority in *FMC Corp.* concluded that the federal government was an operator of the facility under section 107 because it had had "substantial control" over the facility and "active involvement in the activities" there.³²⁴ The court's reasoning was that:

³¹⁷ *Id.* at 846.

³¹⁸ *Id.* at 840.

³¹⁹ *Id.* at 842.

³²⁰ *Id.* at 843.

³²¹ *FMC Corp. v. United States Dep't of Commerce*, 29 F.3d 833, 843 (3d Cir. 1994) (en banc).

³²² *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1221 (3d Cir. 1993).

³²³ *FMC Corp.*, 29 F.3d at 843 (quoting *Lansford-Coaldale Joint Water Auth.*, 4 F.3d at 1222).

³²⁴ *Id.* at 843.

The government determined what product the facility would manufacture, controlled the supply and price of the facility's raw materials, in part by building or causing plants to be built near the facility for their production, supplied equipment for use in the manufacturing process, acted to ensure that the facility retained an adequate labor force, participated in the management and supervision of the labor force, had the authority to remove workers who were incompetent or guilty of misconduct, controlled the price of the facility's product, and controlled who could purchase the product. . . . In particular, the government cannot reasonably quarrel with the conclusion that leading indicia of control were present, as the government determined what product the facility would produce, the level of production, the price of the product and to whom the product would be sold.³²⁵

After stating that "none of these factors is dispositive, and each is important only to the extent it is evidence of substantial, actual control,"³²⁶ the majority in *FMC Corp.* discussed several decisions in which courts had decided whether a person was an operator under section 107 by considering factors similar to those it considered under what it referred to as "the totality of the circumstances presented" approach.³²⁷

The majority in *FMC Corp.*, however, distinguished *Dart Industries*³²⁸ and *New Castle County*³²⁹ on the grounds that "in neither case did the governmental entity implicated have the control that the federal government exercised at Front Royal, and in neither case was the governmental entity involved in the facility for the purpose of obtaining a product for its own use."³³⁰ The majority in *FMC Corp.* added that "although the government officials and employees personally did not take over the plant, the government maintained a significant degree of control over the production process through regulations, on-site inspectors, and the possibility of seizure."³³¹ Taking into consideration the totality of circumstances, "this degree of control, and given the fact that the wastes would not have been created

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *See id.* at 845 (citing *Colorado v. Idarado Mining Co.*, No. 83-C-2385, 1987 U.S. Dist. LEXIS 14254, at *3-*4 (D. Colo. Apr. 29, 1987).

³²⁸ *See United States v. Dart Indus.*, 847 F.2d 144 (4th Cir. 1988).

³²⁹ *See United States v. New Castle County*, 727 F. Supp. 854 (D. Del. 1989).

³³⁰ *FMC Corp. v. United States Dep't of Commerce*, 29 F.3d 833, 844 (3d Cir. 1994) (en banc).

³³¹ *Id.* The majority noted that the federal government was involved with the facility as a whole, not just with government-owned equipment and machinery that were used in the production process at the Fort Royal facility. *See id.* at 845.

if not for the government's activities," the majority in *FMC Corp.* held that the federal government was liable as an operator under CERCLA.³³²

Chief Judge Sloviter of the Third Circuit argued in dissent in *FMC Corp.* that Congress had not waived the federal government's sovereign immunity for the government's activities involved in the case, and that the "quantum and nature of the government's activities set forth on this record do not rise to the statutory 'operator' and 'arranger' level."³³³ Judge Sloviter asserted that:

it is factually incorrect to give the impression that the government was supervising operating personnel at the American Vis-

³³² *Id.* at 844-45. The majority of the Third Circuit added that it could not "reject the district court's 'inherently fact-intensive' conclusion that the government was an operator of the facility." *Id.* at 845 (quoting *Lansford—Coaldale, Joint Water Auth. v. Tbnolli Corp.*, 4 F.3d 1209, 1222 (3d Cir. 1993); see also *Cadillac Fairview/California Inc. v. Dow Chem. Co.*, 1997 U.S. Dist. LEXIS 3081, *64-68 (C.D. Cal. 1997) (holding United States liable as an operator under section 107(a) of plants that produced chemicals for United States under contract, because United States had authority to control the cause of contamination at time hazardous substances were released into environment, and substantial control over the plants operations). The court in *FMC Corp.* also affirmed the district court's judgment that the United States was liable as an arranger under section 107(a)(3) without discussion because the *en banc* panel of the Third Circuit was equally divided on this issue. See *FMC Corp. v. United States Dep't of Commerce*, 29 F.3d 833, 845-46 (3d Cir. 1994) (*en banc*). Judge Greenberg, in his earlier, subsequently vacated opinion for a three judge panel in *FMC Corp. v. United States Department of Commerce*, had relied upon *United States v. Aceto Agricultural Corp.* to hold that the United States was liable under section 107(a)(3) as an arranger for disposal of hazardous substances at the Front Royal facility. See *FMC Corp.*, 37 Env't Rep. Cas. (BNA) 1689, 1697 (3d Cir. 1993), *withdrawn and opinion and judgment vacated upon granting of en banc hearing*, 10 F.3d 987 (3d Cir. 1994) (citing *United States v. Aceto Agric. Corp.*, 872 F.2d 1373, 1379-82 (8th Cir. 1989)). Judge Greenberg had argued that the federal government was liable under *Aceto* as an arranger because it supplied some of the raw materials to the facility's owner, effectively owned the high tenacity nylon as it was being produced at the facility and as a final product, and knew that the generation of hazardous substances was inherent in the facility's production process. See *FMC Corp. v. United States Dep't of Commerce*, 37 Env't Rep. Cas. (BNA) 1689, 1697 (3d Cir. 1993); see also *Cadillac Fairview/California, Inc. v. Dow Chem. Co.*, 1997 U.S. Dist. LEXIS 3081, *69 (C.D. Cal. 1997) (holding United States liable as an "arranger" under section 107(a)(3) of CERCLA "because of its ownership of all of the materials used and generated at the plants [operated by Dow Chemical Co.], its concession that waste generation was inherent in the styrene plant operations, and its specific ordering of waste or by-product transfers between the Copolymer Plant and the Styrene Plant by its agent operators for treatment").

Judge Sloviter, dissenting from Judge Greenberg's majority decision for the three judge panel, argued that Judge Greenberg had misapplied *Aceto* because the federal government did not own the raw materials processed by the facility of the final product, and only facilitated the availability to the facility of the necessary raw products (which Judge Sloviter argued was insufficient for arranger liability). See *FMC Corp.*, 37 Env't Rep. Cas. (BNA) at 1702-03 (Sloviter, C.J., dissenting).

³³³ *FMC Corp.*, 29 F.3d at 846 (Sloviter, C.J., dissenting).

cose plant or had an input in the firing or retention of American Viscose's employees. . . . While government officials were concerned about the activities at the plant, their actions were in response to American Viscose's requests for assistance rather than part of any overarching scheme to control the workings of the plant.³³⁴

Moreover, Judge Sloviter argued that government price controls during World War II were not "the involvement in day-to-day management decisions" necessary for operator liability.³³⁵ In addition, Judge Sloviter suggested that American Viscose, the owner of the facility during World War II, should be liable under section 107, instead of the federal government.³³⁶ The judge reasoned that because FMC failed to produce evidence that American Viscose did not make an adequate profit from its World War II production, American Viscose should pay for the "cleanup costs as part of the cost of initial production."³³⁷

The approach followed by *FMC Corp.* therefore determines the liability of a governmental entity under section 107, as a result of governmental involvement with a private business facility that produced a product or materials under government contact, direction, or assistance, on a case-by-case basis through application of the standards usually used by a court to determine operator or arranger liability. While the Third Circuit suggested in *FMC Corp.* that a different holding might have been reached if the federal government had been concerned only with its equipment and machinery or had acted as "an ordinary purchaser of a product from a manufacturer," the court found that it could not say that the government's activities at the facility were limited to government-owned equipment and machinery when the government's overriding concern was the efficient operation of the facility as a whole.³³⁸

Distinguishing *FMC Corp.*, other courts have held that the federal government is not liable under section 107, either as an operator of a privately owned facility or as an arranger for disposal at the facility,

³³⁴ *Id.* at 853.

³³⁵ *Id.* at 854.

³³⁶ *See id.*

³³⁷ *See id.*

³³⁸ *See FMC Corp. v. United States Dep't of Commerce*, 29 F.3d 833, 845 (3d Cir. 1994) (en banc); *see also Elf Atochem North America, Inc. v. United States*, 914 F. Supp. 1166, 1169-70 (E.D. Pa. 1996) (holding that United States can be held liable under section 107 as owner of equipment from which there was a release of a hazardous substance).

where the government acted merely as a purchaser of a product manufactured and sold by the facility.³³⁹ In *United States v. Vertac Chemical*, the Eighth Circuit, following the Third Circuit's analysis in *FMC Corp.*, held that based on a "fact-intensive inquiry and the totality of circumstances," the United States was not liable as an operator.³⁴⁰ The court reasoned that the United States did not "exercise actual or substantial control over the operations" at a privately owned factory that contracted with the United States to produce the herbicide Agent Orange during the Vietnam War.³⁴¹ The Eighth Circuit found in *Vertac Chemical* that a "key fact" in *FMC Corp.* for determining operator liability was that the federal government ordered American Viscose, the owner of the facility, to convert its facility to production of high-tenacity rayon, a process which generated hazardous substances that were disposed of on-site.³⁴² In *Vertac Chemical*, however, Hercules, Inc., the owner of the facility, bid for the federal government's Agent Orange contract, and made its own decision to change its operations to produce Agent Orange.³⁴³ The court in *Vertac Chemical* also stressed that another important fact in *FMC Corp.* was that the United States "exerted considerable day-to-day control over American Viscose."³⁴⁴ By contrast, the court found that the United States did not exert day-to-day control over Hercules, Inc., and was therefore not liable as an operator.³⁴⁵ The court held that the United States did not exert control, because "no representative of the United States ever managed or supervised any Hercules personnel during the relevant time period."³⁴⁶ Moreover, the court stated that:

[T]he United States was never actively involved on a regular basis in, and thus never exerted substantial control over, operations at the Jacksonville facility while Hercules was producing Agent Orange. Moreover, the facts that Hercules was required to comply with the worker health and safety regulations under the Walsh-Healey Act, and that on two occasions inspectors visited

³³⁹ See *United States v. Vertac Chem. Corp.*, 46 F.3d 803, 809-11 (8th Cir. 1995), *cert. denied* 515 U.S. 1158 (1995); *Maxus Energy Corp. v. United States* 898 F. Supp. 399, 407-08 (N.D. Tex. 1995); *United States v. Iron Mountain Mines, Inc.*, 881 F. Supp. 1432, 1449-52 (E.D. Cal 1995).

³⁴⁰ See *Vertac Chem. Corp.*, 46 F.3d at 808.

³⁴¹ See *id.*

³⁴² See *id.* at 809.

³⁴³ *Id.*

³⁴⁴ See *id.* (quoting *FMC Corp.*, 29 F.3d at 844).

³⁴⁵ See *United States v. Vertac Chem. Corp.*, 46 F.3d 803, 809 (8th Cir. 1995).

³⁴⁶ See *Vertac Chem. Corp.*, 46 F.3d at 809.

the Jacksonville plant to investigate such compliance, are insufficient bases for imposing CERCLA liability on the United States as an operator of the facility.³⁴⁷

Furthermore, the court in *Vertac Chemical* held that the United States was not liable as an arranger for disposal of hazardous substances at the Hercules, Inc., facility.³⁴⁸ The Eighth Circuit reasoned that the United States could not be an arranger because it did not have the authority to control the hazardous substances that were disposed of, which the court viewed as necessary to satisfy section 107(a)(3)'s constructive possession element.³⁴⁹ The fact that the United States had "statutory or regulatory authority to control activities which involved the production, treatment or disposal of hazardous substances was not sufficient to subject the United States to liability under section 107(a)(3)."³⁵⁰

In addition, the buyer—seller relationship between the United States and Hercules, Inc., was held to be an insufficient basis to make the United States liable under section 107(a)(3) of CERCLA, even though the United States had the power to require Hercules, Inc., to perform the contract and to give it priority over its other contracts.³⁵¹ The Eighth Circuit reasoned that Hercules, Inc., had actively sought the Agent Orange contracts, had made a profit on the contracts, and "was given opportunities to negotiate some terms of the contract specifications and, as a result, some of those terms were changed or modified."³⁵² Referring to the Third Circuit's holding in *FMC Corp.* that the federal government was liable as an arranger, the court in *Vertac Chemical* stated in *dictum* "that circumstances may exist where a government contract involves sufficient coercion or governmental regulation and intervention to justify the United States' liability as an arranger under CERCLA," but concluded that "the undisputed facts in the present case do not support such a finding."³⁵³

Finally, the *Vertac Chemical* court rejected the appellants' argument that the United States was subject to arranger liability under *United States v. Aceto Agricultural Chemical*.³⁵⁴ The *Vertac Chemical*

³⁴⁷ *Id.*

³⁴⁸ *See id.* at 810–11.

³⁴⁹ *See id.* at 810.

³⁵⁰ *Id.* at 810.

³⁵¹ *United States v. Vertac Chem. Corp.*, 46 F.3d 803, 810–11 (8th Cir. 1995).

³⁵² *Id.* at 811.

³⁵³ *Id.*

³⁵⁴ *See id.* (citing *Auto v. United States*, 872 F.2d 1373, 1382 (8th Cir. 1989)).

court distinguished *Aceto Agricultural Chemical* on the grounds that in its case the United States did not supply the raw materials to Hercules, Inc., and did not own or possess the raw materials as the work in process.³⁵⁵

Maxus Energy Corp. v. United States followed this holding in *Vertac Chemical* and held that under *Aceto Agricultural Chemical* the United States could not be held liable as an arranger for disposal of hazardous substances at a privately owned facility that produced the herbicide Agent Orange under a contract with the United States.³⁵⁶ The court in *Maxus Energy Corp.* held that *Aceto Agricultural Chemical* was not controlling in its case because the relationship between the United States and Diamond Alkali Co., the owner—operator of the facility, was that of buyer—seller, not manufacturer—formulator as in *Aceto Agricultural Chemical*.³⁵⁷ Therefore, two elements of *Aceto Agricultural Chemical* were not satisfied because the United States “never owned the raw materials manufactured into Agent Orange” and therefore “could not have retained ownership of hazardous substances throughout the manufacturing process . . .”³⁵⁸ The *Maxus Energy Corp.* court also held, on the basis of *Vertac Chemical’s* actual control test, that the United States was not liable as an operator of the facility in question, because

the United States did not specify any particular production process to be used in manufacturing herbicides pursuant to the contracts. United States personnel did not hire, fire, discipline, or manage any Diamond personnel working in the herbicide production process at the Newark Plant, and did not control or participate in Diamond’s waste disposal activities. Diamond personnel, who directed the manner of disposal of wastes at the Newark Plant, did not consult United States personnel regarding such waste disposal.³⁵⁹

³⁵⁵ See *id.*

³⁵⁶ See *Maxus Energy Corp. v. United States*, 898 F. Supp. 399, 407 (N.D. Tex. 1995).

³⁵⁷ See *id.* at 406, 408.

³⁵⁸ *Id.* at 407.

³⁵⁹ *Id.* at 408. The court in *Maxus Energy Corp.* also rejected the alternative argument that the United States should be held liable as an operator under the “authority to control” test. See *id.* This test was applied in *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 842 (4th Cir 1992). See *supra* note 189 and accompanying text. The court reasoned that under the facts of the case, the United States had not been shown to have the authority to control the facility’s operations or decisions involving the disposal of hazardous substances at the facility. See *Maxus Energy Corp. v. United States*, 898 F. Supp. 399, 408 (N.D. Tex. 1995). Finally, the court in *Maxus Energy Corp.*, followed the holding in *Vertac Chemical Corp.* that the United States’ regulation of the facility under the Walsh-Healey Act and the Defense Production Act of 1950

Under *FMC Corp.*, *Vertac Chemical*, and *Maxus Energy Corp.*, a governmental entity will not be liable under section 107, either as an operator of a facility or as an arranger of disposal of hazardous substances at a facility, solely because the government, through a contract or the exercise of regulatory authority, has a privately owned facility produce materials for purchase and use by the governmental entity (or for purchase and use by other persons as part of a governmental program). Such activity by a governmental entity would not satisfy any of the tests used to determine operator and arranger liability under CERCLA, unless the government actually controls, or acquires the authority to control, day-to-day operations and management of the facility and disposal of hazardous substances generated at the facility. However, when a governmental entity becomes as involved in day-to-day operations and management of a privately owned facility as the United States was involved in *FMC Corp.*, that a governmental entity may be held liable under section 107 as an operator of the facility or as an arranger of disposal of hazardous substances at the facility. A governmental entity will not become liable when it merely purchases a product or materials from a privately owned facility. However, future decisions will have to determine if all of the activities in which the United States engaged in *FMC Corp.* must be present in order to hold a governmental entity liable on the basis of governmental involvement with a private business facility, or whether CERCLA operator or arranger liability can be imposed when some, but not all, of the United States' activities in *FMC Corp.* are present in a particular case.

was not a sufficient basis for finding the level of control by the United States over the facility necessary to impose liability as an operator under CERCLA. *See id.*

In *United States v. Iron Mountain Mines, Inc.*, and *East Bay Municipal Utility District v. United States Department of Commerce*, the courts distinguished *FMC Corp.*, and held that the United States was liable, neither as an operator of a facility nor as an arranger of disposal, because the United States, pursuant to a contract, only purchased materials produced by a privately owned facility and encouraged and regulated the production of the materials, and was not involved in "hands-on," day-to-day management or operation of the facility. *See United States v. Iron Mountain Mines, Inc.*, 881 F. Supp. 1432, 1449-51 (E.D. Cal. 1995); *see also East Bay Mun. Util. Dist. v. United States Dep't of Commerce*, 43 Env't Rep. Cas. (BNA) 1918 (D.D.C. 1996). The court in *East Bay Municipal Utility District* held that the United States did not become liable as an operator of a privately owned facility simply because government policies were the reason why the facility produced a particular product during World War II, or because government financing and price subsidies helped the private facility to stay in business during the war. *See East Bay*, 43 Env't Rep. Cas. (BNA) at 1927, 1930.

G. *Governmental Liability as a PRP as a Result of Cleanup Activities*

Almost uniformly, courts have held that neither a state nor the federal government can be held liable under either section 107 or section 113(f) solely on the basis of government cleanup actions, responding to or remediating the release or threatened release of a hazardous substance under CERCLA³⁶⁰ or under other authority.³⁶¹ Most of these decisions have based their holding of governmental non-liability upon a finding that Congress under CERCLA has not waived state and federal government sovereign immunity for EPA and state cleanup activities,³⁶² although some (as an alternative holding) also have held that such governmental cleanup activities are not sufficient to make the government liable as an operator of a facility or as an arranger of disposal.³⁶³ Alternatively, a court may hold that

³⁶⁰ See *FMC Corp. v. United States Dep't of Commerce*, 29 F.3d 833, 841 (3d Cir. 1994) (stating in *dictum* that federal, "state and local governments are immune from CERCLA liability for the consequence of cleanup activities in response to emergencies created by others . . ."); see also *United States v. Cordova Chem. Co.*, 59 F.3d 584 (6th Cir. 1995); *United States v. American Color & Chem., Inc.*, 858 F. Supp. 445, 449-50 (M.D. Pa. 1994), *counterclaims dismissed*, 885 F. Supp. 111 (M.D. Pa. 1995); *Auto-Ion Litig. Group v. Auto Ion Chem., Inc.*, 910 F. Supp. 328, 331-32 (W.D. Mich. 1994); *Stilloe v. Almy Bros.*, 782 F. Supp. 731, 736 (N.D.N.Y. 1992); *United States v. Atlas Minerals & Chem., Inc.*, 797 F. Supp. 411, 420-421 (E.D. Pa. 1992); *In re Paoli R. Yard PCB Litig.*, 790 F. Supp. 94, 97 (E.D. Pa. 1992), *aff'd*, 980 F.2d 724 (3d Cir. 1992); *United States v. Shaner*, Civ. A. No. 85-1372, 1992 WL 154652, at *5 (E.D. Pa. 1992); *United States v. Western Processing, Inc.*, 761 F. Supp. 725, 730 (W.D. Wash. 1991); *United States v. Azrael*, 765 F. Supp. 1239, 1243 (D. Md. 1991), *motions to dismiss denied*, 774 F. Supp. 376 (D. Md. 1991); *CPC Int'l, Inc. v. Aerojet-Gen. Corp.*, 777 F. Supp. 549, 577-78 (W.D. Mich. 1991), *aff'd in part and rev'd in part on other grounds sub nom.*, *United States v. Hardage*, 32 Env't Rep. Cas. (BNA) 1059, 1061 (W.D. Okla. 1989); *B.R. MacKay & Sons, Inc. v. United States*, 633 F. Supp. 1290, 1296 n.9 (D. Utah 1986).

³⁶¹ See *United States v. Skipper*, 781 F. Supp. 1106, 1112 (E.D.N.C. 1991) (federal government not subject to contribution counterclaim under section 113(f) on the basis of response actions undertaken pursuant to section 311 of the Clean Water Act, 33 U.S.C. § 1321, prior to the enactment of CERCLA); *United States v. Berks Assoc., Inc.*, Civ. A. No. 91-4868, 1992 WL 68346, at *1 (E.D. Pa. 1992) (same holding as in *Skipper*). *But see Iron Mountain Mines, Inc.*, 881 F. Supp. at 1447 (holding that governmental entities are not immune from liability under section 107 for improper or negligent cleanup activities undertaken in a regulatory or remedial capacity to clean up pollutants not generated by the government on non-governmental property).

³⁶² See *FMC Corp.*, 29 F.3d at 841; *American Color & Chem.* 858 F. Supp. at 449-50; *Auto-Ion Litig. Group*, 910 F. Supp. at 332; *Stilloe*, 782 F. Supp. at 736; *Atlas Minerals & Chem.*, 797 F. Supp. at 420; *In re Paoli R. Yard PCB Litig.*, 790 F. Supp. at 96; *Shaner*, 1992 WL 154652 at *3-*5; *Berks Assoc.*, 1992 WL 68346 at *3; *Western Processing*, 761 F. Supp. at 728; *Azrael*, 765 F. Supp. at 1244-46; *Skipper*, 781 F. Supp. at 1111-12; *Hardage*, 32 Env't Rep. Cas. (BNA) at 1061; *B.R. MacKay & Sons*, 633 F. Supp. at 1296 n.9.

³⁶³ See *In re Paoli R. Yard PCB Litig.*, 790 F. Supp. at 97; *Stilloe*, 782 F. Supp. at 736; *CPC Int'l*, 777 F. Supp. at 577-78; *Western Processing*, 761 F. Supp. at 730-31.

a governmental entity is not subject to liability for its cleanup activities because such activities are immunized from liability by section 107(d)(1)³⁶⁴ or section 107(d)(2),³⁶⁵ without having to reach the question of whether CERCLA waives governmental sovereign immunity for cleanup activities or whether governmental cleanup activities are sufficient for operator or arranger liability.

As discussed below, various reasons have been given by courts in support of their holdings that governmental cleanup activities are not subject to liability under section 107. The reason that one court gave for holding that the United States' waiver of sovereign immunity under section 120³⁶⁶ "does not extend to response or remedial actions undertaken by the EPA is that, when the EPA undertakes such actions, it is not acting like a private party; it is acting to ameliorate a dangerous situation that, but for the prior actions of generators and transporters of the hazardous waste, would not exist."³⁶⁷ Because CERCLA's waiver of sovereign immunity in section 101(20)(D)³⁶⁸ for state and local governments is "virtually identical" to section 120's waiver of the federal government's sovereign immunity,³⁶⁹ this argument is equally applicable to state and local government response or remedial cleanup actions.

Exemption of governmental cleanup actions from CERCLA liability also has been supported by arguments that "allowing contribution counterclaims [against a governmental entity that has brought a suit under section 107] . . . would undermine Congress' intent to ensure that those who benefit financially from a commercial activity should internalize the health and environmental costs of that activity into the costs of doing business . . . [and] would conflict with the primary objective of CERCLA, which is to ensure prompt cleanups;"³⁷⁰ and "would also contravene the Congressional intent to impose strict liability under CERCLA, subject only to the defenses set forth in 42 U.S.C. § 9607(b)."³⁷¹ This latter argument apparently is premised upon a view that permitting a defendant, in an action brought by the state or federal government under section 107 to recover governmen-

³⁶⁴ 42 U.S.C. § 9607(d)(1) (1994).

³⁶⁵ *Id.* § 9607(d)(2); see *supra* notes 102-08 and accompanying text.

³⁶⁶ 42 U.S.C. § 9620.

³⁶⁷ *Atlas Minerals & Chem.*, 797 F. Supp. at 421.

³⁶⁸ 42 U.S.C. § 9601(20)(D).

³⁶⁹ *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 10 (1989).

³⁷⁰ *United States v. Azrael*, 765 F. Supp. 1239, 1245 (D. Md. 1991), *motions to dismiss denied*, 774 F. Supp. 376 (D. Md. 1991).

³⁷¹ *Atlas Minerals & Chem.*, 797 F. Supp. at 421 n.20.

tal response costs, to bring a contribution counterclaim against the plaintiff governmental entity on the basis of the governmental response actions, would in effect constitute a defense because the result of such governmental liability would be to reduce the damages for which the defendant is liable (because the defendant's counterclaim would offset and reduce the response costs recovered by the plaintiff governmental entity from the defendant). This argument, however, confuses the issue of what constitutes an affirmative defense to liability under section 107 (thus leading to no CERCLA liability at all on the part of a defendant) with the issue of when a plaintiff governmental entity in an action under section 107 is subject to liability itself when the defendant brings a contribution counterclaim against the plaintiff under section 113(f) (thus reducing the defendant's liability to the governmental plaintiff by the amount of the defendant's successful contribution counterclaim against the plaintiff).

The provisions of section 107(d),³⁷² which exempt certain governmental cleanup activities from liability under section 107, also have been found to "demonstrate that Congress did not intend to subject states and the [Federal] Government to liability under section 107 for their actions during cleanups,"³⁷³ although this argument ignores the fact that sections 107(d)(1) and 107(d)(2) only immunize certain governmental cleanup activities—those consistent with the NCP (section 107(d)(1) and those by state and local governments (but not the federal government) in response to an emergency (section 107(d)(2)).³⁷⁴

A governmental entity generally has been held to be immune from liability under section 107 for governmental cleanup activities even when such cleanup activities have been conducted in a manner incon-

³⁷² 42 U.S.C. § 9607(d). See *supra* notes 86–108 and accompanying text.

³⁷³ *Azrael*, 765 F. Supp. at 1245. *Azrael* also incongruously stated that including the federal government or a state "within the scope of Section 107 when it performs cleanups of hazardous waste sites is also inconsistent with Congress' intent to address complaints such as those asserted in defendants' counterclaims [based upon EPA and the states carrying out their responsibilities under CERCLA and state law to clean up hazardous waste sites] as defenses to a cost recovery action under Section 107(d)." *Id.* Contrary to the court's statement, however, section 107(d)'s defenses will be invoked by *governmental entities* who are sued under section 107 on the basis of their cleanup activities, not by persons sued under section 107 by the government to recover governmental response cost. The provisions in section 107(d)(1) and (d)(2) concerning liability for negligence have been interpreted by these courts as "not an authorization for litigation against the United States, but [as] merely clarifying] Congress' intent that the CERCLA remedial scheme not be viewed as occupying the field to the exclusion of tort claims." *United States v. Western Processing Co., Inc.*, 761 F. Supp. 725, 729 (W.D. Wash. 1991).

³⁷⁴ See *supra* notes 86–108 and accompanying text.

sistent with the NCP or otherwise have been conducted in an improper or negligent manner or in a manner that released additional hazardous substances.³⁷⁵ In addition to basing such holdings on the previously stated reasons in support of immunity of governmental cleanup activities from liability, these courts also have supported immunity for even improper governmental cleanup activities upon Congress' rejection of a proposed amendment to section 107 that would have added governmental misconduct and negligence as a separate defense to CERCLA liability;³⁷⁶ and upon the provision in section 107(a)(4)³⁷⁷ denying federal and state governments recovery of response costs that are not consistent with the NCP.³⁷⁸ This former argument, relying upon Congress' rejection of a governmental misconduct defense under section 107, however, also confuses the issue of what constitutes an affirmative defense in a suit under section 107, with a governmental plaintiff's liability under a section 113(f) counterclaim. The latter argument, based upon section 107(a)(4)'s limitation on governmental recovery of response costs, takes the position that section 107(a)(4)'s limitation on recoverable damages is the only remedy available to a PRP when a governmental entity acted inconsistent with the NCP or otherwise acted improperly in conducting cleanup activities.³⁷⁹

United States v. Iron Mountain Mines rejected each of the various reasons that have been given in support of immunizing governmental

³⁷⁵ See *In re Paoli R. Yard PCB Litig.*, 790 F. Supp. 94, 97 (E.D. Pa. 1992), *aff'd*, 980 F.2d 724 (3d Cir. 1992); *United States v. Skipper*, 781 F. Supp. 1106, 1113, 1115 (E.D.N.C. 1991); *Azrael*, 765 F. Supp. at 1239; *Western Processing Co.*, 761 F. Supp. at 729-30. These cases held that the United States was immune from liability under section 107 even for improper cleanup activities. The courts in *United States v. Azrael* and *Stilloe v. Almy Brothers* held that states are immune under section 107 even for improper cleanup activities. *Stilloe v. Almy Bros.*, 782 F. Supp. 731, 736 (N.D.N.Y. 1992); *Azrael*, 765 F. Supp. at 1245. *But see In re Paoli R. Yard PCB Litig.*, 790 F. Supp. at 97 (holding alternatively that even improper governmental cleanup activities are insufficient for operator liability under section 107); *Western Processing Co.*, 761 F. Supp. at 731 (holding alternatively that even improper governmental cleanup activities are insufficient for operator liability under section 107). The court in *Stilloe* held that arranger liability under section 107(a)(3) of CERCLA could not be based solely upon governmental attempts at remediation of hazardous waste problems at a site. *Stilloe*, 759 F. Supp. at 99, n.2; *see also* CPC Int'l, Inc. v. Aerojet-Gen. Corp., 777 F. Supp. 549, 577-79 (W.D. Mich. 1991), *aff'd in part and rev'd in part sub nom.*; *United States v. Cordova Chem. Co.*, 59 F.3d 584 (6th Cir. 1995) (holding that even improper governmental cleanup activities were insufficient for arranger liability under section 107(a)(3) or operator liability under section 107(a)(2)).

³⁷⁶ See *Western Processing Co.*, 761 F. Supp. at 729.

³⁷⁷ 42 U.S.C. § 9607(a)(4) (1994).

³⁷⁸ See *Skipper*, 781 F. Supp. at 1111-12.

³⁷⁹ See *id.*; *see also infra* notes 426-37 and accompanying text.

cleanup activities from liability, however, and held that governmental entities are not immune from liability under section 107 for improper or negligent activities, undertaken in a regulatory or remedial capacity, to clean up pollutants not generated by the government and not located on government property.³⁸⁰ The position of the court in *Iron Mountain Mines* is that a governmental entity is liable under section 107 when the entity's "regulatory" or "remedial" activities, of whatever nature, bring the entity within the definition of the terms owner, operator, arranger, or transporter under section 107 (as those terms are applied to private parties).³⁸¹ The federal and state governments argued that governmental cleanup activities should receive general immunity under section 107 "because private parties do not clean up pollution caused by others while governmental bodies will step forward in such circumstances,"³⁸² but the court in *Iron Mountain Mines* held that:

[T]his is an unconvincing rationale because CERCLA does encourage private cleanup of pollution caused by others by exposing current owners to liability and at the same time providing them with a cause of action for recovery of their costs. . . . In many instances private remediators will be current owners of property who had nothing to do with the creation of the hazardous waste problem that they must respond to. These private parties are not different in any respect from a government agency acting in a remedial capacity and CERCLA does not acknowledge such a difference but treats them in the same way.³⁸³

The government's argument, that it should be exempt from liability under CERCLA for regulatory/remedial actions that negligently release pollution because imposition of such liability "on governmental

³⁸⁰ See *United States v. Iron Mountain Mines, Inc.*, 881 F. Supp. 1432, 1442 (E.D. Cal. 1995). In *Iron Mountain Mines*, the federal government and the state of California sued the past and present owners of a mine under section 107 to recover response costs they incurred in cleanup activities related to acid mine drainage from the mine into streams and a river. *Id.* at 1434-35. One of the defendants filed counterclaims and third-party claims against the United States and California, alleging in part that the federal and state governments were liable under section 107 as operators of dams and a power plant which allegedly contributed to the pollution problem addressed by the governmental response actions. See *id.* at 1434-35 n.3. The court denied the federal and state governments' motions to dismiss the counterclaims on grounds of immunity for governmental regulatory or remedial actions. See *id.* at 1442.

³⁸¹ See *id.* at 1448; see also *FMC Corp. v. United States Dept't of Commerce*, 29 F.3d 833, 840 (3d Cir. 1994) (en banc) ("when the government engages in activities that would make a private party liable if the private party engaged in those activities, then the government is also liable").

³⁸² See *United States v. Iron Mountain Mines, Inc.*, 881 F. Supp. 1432, 1445 (E.D. Cal. 1995).

³⁸³ *Id.* (citations omitted).

entities responsible for releasing pollution would shift the cost of the cleanup to the government and thus would thwart 'Congress' intent to ensure that those who benefit financially from a commercial activity should internalize the health and environmental costs of the activity into the costs of doing business,"³⁸⁴ also was rejected by the court in *Iron Mountain Mines* because:

One may doubt that this statement accurately expresses the principal purpose of CERCLA. If CERCLA can be said to have a central purpose, that purpose is to achieve cleanup. In doing so CERCLA may impose liability on parties who had little culpability in creating the contamination problem at issue. This is frequently the case when a later owner becomes responsible for pollution released many years earlier, sometimes under different technology and under different industrial standards. There is no question that CERCLA places liability on new owners, but it does not work to internalize the costs of pollution into current operations in these situations. Indeed, there may be no current business operations, yet the current landowner will be liable. More importantly, even if it is critical to make polluters internalize the costs of their harmful activities, it does not follow that they should also internalize the costs of the government's negligent response during its cleanup efforts.³⁸⁵

The court in *Iron Mountain Mines*, stating that Congress in CERCLA had resolved these complex policy questions and that courts should not follow another view,³⁸⁶ concluded their rejection of this government's argument by stating that "apparently" the Third Circuit in *FMC Corp.*,³⁸⁷ "could marshal no reason to uphold the remedial cases [immunizing governmental remedial cleanup activities from liability under section 107] other than its feeling that they reached the right policy result."³⁸⁸

The *Iron Mountain Mines* court also rejected the argument that Congress intended challenges to the adequacy of governmental remedial activities to be addressed exclusively under section 107(a)(4) in a determination of consistency with the National Contingency Plan.³⁸⁹

³⁸⁴ See *id.* (quoting *United States v. Azrael*, 765 F. Supp. 1239, 1245 (D. Md. 1991)).

³⁸⁵ *Id.* at 1445-46.

³⁸⁶ See *id.* at 1446.

³⁸⁷ *FMC Corp. v. United States Dep't of Commerce*, 29 F.3d 833, 841 (3d Cir. 1994).

³⁸⁸ *United States v. Iron Mountain Mines, Inc.*, 881 F. Supp. 1432, 1446 n.17 (E.D. Cal. 1995).

³⁸⁹ See *id.* at 1446. If this argument was accepted, a defendant in a suit brought by a governmental entity under section 107 to recover governmental response costs could not bring a contribution counterclaim under section 113(f)(1) of CERCLA against the governmental plaintiff on the basis of negligent governmental cleanup activities. See *id.*

This approach was criticized by the court on the ground that under this approach it is possible or “even likely” that a landowner may have to bear the costs of earlier government cleanup actions inconsistent with the NCP if the landowner itself subsequently “cleaned up the site as CERCLA encourages,” but is unable to hold the government liable under section 107 on the basis of the government’s improper cleanup actions.³⁹⁰

The argument that permitting a claim under sections 107 or 113(f) “for governmental negligence at a cleanup site would be tantamount to creating a ‘new negligence defense’ to CERCLA liability when the government seeks to recover cleanup costs” also was rejected by the court in *Iron Mountain Mines*.³⁹¹ The court noted that section 113(j)³⁹² “expressly provides that the government’s choice of remedies can be challenged when it seeks to recover cleanup costs,” and, “further, [that] a claim against another responsible party is not fairly viewed as a defense, certainly not when CERCLA provides for contribution and does not deem one responsible party’s effort to gain contribution in any sense as a defense.”³⁹³ Turning the tables on the government, the court added that granting immunity to governmental cleanup activities “itself is a new defense to governmental liability, one not provided by the statute.”³⁹⁴

The *Iron Mountain Mines* court also rejected the argument that Congress’ failure to enact an amendment to CERCLA proposed by Senator Helms, which would have added a governmental misconduct/negligence defense to section 107, indicates “that Congress did not intend that governmental agencies would be liable for their remedial activities.”³⁹⁵ The court rejected this argument on the grounds that:

³⁹⁰ *See id.* The court failed, in this argument, to mention the possibility that the landowner might have an action under state tort law (or CERCLA) against the government pursuant to section 107(d)(1) or section 107(d)(2) for costs or damages resulting from the government’s negligence or gross negligence. Of course, a landowner might prefer section 107’s strict liability standard to a negligence or gross negligence standard. The court in *Iron Mountain Mines* did discuss section 107(d) later in its opinion, interpreting the section as providing for liability under CERCLA (not state tort law) for governmental negligence in cleanup activities and citing section 107(d) in support of its holding that CERCLA does not provide absolute immunity for governmental cleanup activities.

³⁹¹ *See id.* at 1446.

³⁹² 42 U.S.C. § 9613(j) (1994).

³⁹³ *United States v. Iron Mountain Mines, Inc.*, 881 F. Supp. 1432, 1446–47 (E.D. Cal. 1995).

³⁹⁴ *See id.* at 1447.

³⁹⁵ *See id.* at 1448.

This argument confuses rejection of a defense to liability with conferral of immunity. That Congress did not wish to provide a polluter with a *defense* to CERCLA liability because of the government's negligence does not at all suggest that it intended to exempt the government from all liability of its proportionate share. Indeed, it suggests just the reverse. . . . CERCLA throws a broad liability net and relies on the courts' sense of equity to apportion the costs of cleanup. Consistent with this scheme it would be surprising if Congress exempted an otherwise responsible person from all liability—whether that person is a governmental body or a private polluter—merely because some other person was also responsible. That is a common situation contemplated by CERCLA, and the rejection of the Helms Amendment does nothing to support the argument that the government should be immune from liability when it negligently causes harm to the environment during a remediation process. (In any event, the argument based on the rejection of the Helms Amendment, which was a proposed amendment to the original CERCLA statute, loses all force in light of SARA, which added § 9607(d)(2)).³⁹⁶

Additionally, the court in *Iron Mountain Mines* rejected the argument that Congress in CERCLA has not clearly waived sovereign immunity for causes of action against the government for governmental activities in a remedial or regulatory capacity and that “waivers of sovereign immunity must be strictly construed,” asserting that CERCLA’s “‘cascade of plain language’ emphatically waiv[es] sovereign immunity”³⁹⁷

The court also noted that absolute immunity for governmental remediators “must overcome the hurdle . . . posed by § 9607(d)(1) and its provision for liability by such persons when costs or damages result from their negligence.”³⁹⁸ The court took the position that sections 107(d)(1) and 107(d)(2) provide for governmental liability for negligence or gross negligence, not under state tort law (the interpretation adopted by courts recognizing that governmental cleanup activities are immune from liability under section 107.)³⁹⁹

In conclusion, the court in *Iron Mountain Mines* held that there is no governmental “regulatory” or “remedial” activities exception to CERCLA liability; and that CERCLA’s “general rule [is] that governmental entities are to be liable to the same extent as private parties” and that section 107(a) “does not differentiate between gov-

³⁹⁶ *Id.*

³⁹⁷ *See id.* at 1447 (quoting *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 11 (1989)).

³⁹⁸ *See United States v. Iron Mountain Mines, Inc.*, 881 F. Supp. 1432, 1447 (E.D. Cal. 1995).

³⁹⁹ *See id.*

ernmental and private entities in describing the four classes of responsible persons"⁴⁰⁰

These reasons, set forth in *Iron Mountain Mines*, for interpreting CERCLA as not immunizing governmental remedial cleanup activities from liability under section 107 are convincing. As noted earlier in this Article, CERCLA clearly waives federal, state and local government sovereign immunity so as to make governmental entities liable under CERCLA to the same extent as private entities.⁴⁰¹ Just as CERCLA's waiver leaves no room for sovereign immunity from CERCLA liability for governmental regulatory activities,⁴⁰² CERCLA's waiver also leaves no room for sovereign immunity for governmental remedial cleanup activities.

The court in *Iron Mountain Mines* did not address the question of whether governmental remedial cleanup activities by themselves are sufficient to make the government liable under section 107 as an operator or arranger,⁴⁰³ but other courts have held that governmental

⁴⁰⁰ See *id.* at 1448. The court noted that section 107(d)(1) (which applies to any "person") also does not "provide for special treatment for governmental entities," although it observed that "Section 107(d)(2) provides additional protection to state or local governments who respond to emergencies caused by releases from facilities owned by others . . ." See *id.*

⁴⁰¹ See *supra* notes 24-85 and accompanying text.

⁴⁰² See *FMC Corp. v. United States Dep't of Commerce*, 29 F.3d 833, 838-42 (3d Cir. 1994) (en banc).

⁴⁰³ See *United States v. Iron Mountain Mines, Inc.*, 881 F. Supp. 1432, 1452 (E.D. Cal. 1995). However, the court in *Iron Mountain Mines* held that counterclaims—which alleged that the state of California (in cooperation with the federal government) actively participated in operating several dams that aggravated the pollution of streams and rivers caused by acid drainage from the defendants' mine—were sufficient to state a claim under section 107 and to survive a motion to dismiss for failure to state a claim. *Id.* The court reasoned that these allegations pled facts indicating that the state of California "is involved in the day-to-day control of the dams and has authority to determine the timing and quantity of releases from the dams . . . activity that allegedly determines the concentration of sulfuric acid in the water of the Sacramento River. *Id.* This is just the type of control that is required to create 'operator' liability." See *id.* On the other hand, the *Iron Mountain Mines* court held that the counterclaims allegation—that the state was liable under section 107 as an "arranger" of disposal at the dam—were deficient, because they had "not adequately alleged that the State owned or possessed the hazardous waste in question." See *id.* This "arranger" liability claim consequently was dismissed without prejudice for failure to state a claim. See *id.* Furthermore, the court in *Iron Mountain Mines*, without prejudice dismissed (for failure to state a claim) separate counterclaims alleging that the United States was liable under section 107 as an operator of the defendant's mine and as an arranger of disposal of wastes at the mine during World War II, because the United States' involvement with the mine during this period was viewed as essentially that of a purchaser of a product which encouraged its production. See *United States v. Iron Mountain Mines, Inc.*, 881 F. Supp. 1432, 1449-51 (E.D. Cal. 1995); see also *supra* note 359. These two rulings on the counterclaims in *Iron Mountain Mines* might be interpreted as indicating that the court would not hold a governmental entity liable under section 107 solely for governmental actions in a regulatory or cleanup capacity that do not involve governmental day-to-day control of the

remedial cleanup activities, even when conducted improperly so as to release additional hazardous substances, are not sufficient by themselves to make the entity liable under section 107 either as an operator of a facility⁴⁰⁴ or as an arranger for disposal of hazardous substances at a facility.⁴⁰⁵

Governmental cleanup activities at a site, even if conducted negligently in a way that released additional hazardous substances, have been held insufficient for operator liability, on the grounds that a governmental entity's "regulatory response to severe environmental problems left by others does not constitute the possession or control necessary for [it] to become an operator."⁴⁰⁶ Such governmental cleanup activities should not be held to be within actual control definitions⁴⁰⁷ of operator of a facility under section 107, because governmental cleanup of wastes disposed of by another person at a facility owned by another person does not involve actual control over day-to-day business operations of the facility⁴⁰⁸ or actual control over the activities at the facility that caused the pollution being cleaned up by the government.⁴⁰⁹ However, a governmental entity may be held liable as an operator of a facility under these actual control tests if its activities exceed physical handling and removal of hazardous substances at a facility, or go beyond remediation of contaminated soil, water, and groundwater, and other response⁴¹⁰ actions under CERCLA, and extend to governmental supervision and management of the facility's employees, finances, and business operations of the facility on a day-to-day basis.⁴¹¹ Governmental cleanup activities at a facility also

facility's business operations and activities, or of hazardous substances disposal or releases at the facility.

⁴⁰⁴ *In re Paoli R. Yard PCB Litig.*, 790 F. Supp. 94, 97 (E.D. Pa. 1992), *aff'd*, 980 F.2d 724 (3d Cir. 1992); *Stilloe v. Almy Bros., Inc.*, 782 F. Supp. 731, 736 (N.D.N.Y. 1992); *United States v. Western Processing Co.*, 761 F. Supp. 725, 731 (W.D. Wash. 1991).

⁴⁰⁵ *See CPC Int'l v. Aerojet-Gen. Corp.*, 777 F. Supp. 549, 577-80 (W.D. Mich. 1991), *aff'd in part and rev'd in part on other grounds sub nom.*; *United States v. Cordova Chem. Co.*, 59 F.3d 584 (6th Cir. 1995); *Stilloe v. Almy Bros., Inc.*, 759 F. Supp. 95, 99 n.2 (N.D.N.Y. 1991), *motion to dismiss granted*, 782 F. Supp. 731 (N.D.N.Y. 1992).

⁴⁰⁶ *See CPC Int'l*, 777 F. Supp. at 578; *see also Stilloe*, 782 F. Supp. at 736 ("Even if . . . DEC's physical handling of the hazardous waste during . . . cleanup activities resulted in damage to plaintiff, this activity, without more, does not convert DEC into an operator within the meaning of CERCLA").

⁴⁰⁷ *See supra* notes 187-88 and accompanying text.

⁴⁰⁸ *See supra* note 187 and accompanying text.

⁴⁰⁹ *See supra* note 188 and accompanying text.

⁴¹⁰ *See* 42 U.S.C. § 9601(23)-(25) (1994) (defining "response," "removal," and "remedial action").

⁴¹¹ *Cf. United States v. Dart Indus.*, 847 F.2d 144, 146 (4th Cir. 1988) (stating that "there is no allegation that DHEC went beyond this governmental supervision and directly managed Caro-

should be excluded from the authority to control test⁴¹² for operator liability because governmental cleanup activities under CERCLA or other statutory authority at a facility owned by another person, in response to previous disposal of hazardous substances by other persons, should not be found to give a governmental entity the authority or power to control the operations or decisions at the facility involving the disposal of hazardous substances.

Governmental cleanup activities at another person's facility have been held insufficient for arranger liability under section 107(a)(3) on the grounds that the nexus that is required between the allegedly responsible arranger and the owner of the hazardous substances (in order to satisfy section 107(a)(3)'s "owned or possessed" element)⁴¹³ is not present "when the only connection between the entity allegedly responsible for the damage and the hazardous waste itself is the fact that the party in question was attempting to remediate the hazardous waste problems at the site."⁴¹⁴ In essence, a governmental entity is held not liable as an arranger under section 107(a)(3), solely as a result of its cleanup of hazardous substances disposed of by another person at a facility owned by another person, because such governmental cleanup activities alone do not satisfy section 107(a)(3)'s requirement that an arranger must have "owned or possessed" the hazardous substances which that person arranged to be disposed of or treated.⁴¹⁵ This is a sound interpretation of section 107(a)(3) of CERCLA.

CERCLA's purposes are not furthered by a holding that a governmental entity's cleanup activities at a facility are sufficient by themselves to make the entity liable under section 107, either as an opera-

lawn's employees or finances at the Fort Lawn site"). However, even if state or local governmental entity has undertaken such actual control of a facility, it may be exempt from "owner or operator" liability if it "acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign." See 42 U.S.C. § 9601(20)(D).

⁴¹² See *supra* note 189 and accompanying text.

⁴¹³ See *supra* note 198 and accompanying text.

⁴¹⁴ *Stilloe v. Almy Bros., Inc.*, 759 F. Supp. 95, 99 n.2 (N.D.N.Y. 1991), *motion to dismiss granted*, 782 F. Supp. 731 (N.D.N.Y. 1992). The court in *Stilloe* also held that a claim that a governmental entity was liable as an "arranger" under section 107(a)(3) as a result of governmental cleanup activities, was deficient because the plaintiff had not alleged in his complaint that the governmental entity "contracted or otherwise arranged for the disposal of hazardous waste . . ." See *id.* at 99.

⁴¹⁵ See *CPC Int'l, Inc. v. Aerojet-Gen. Corp.*, 777 F. Supp. 549, 577 (N.D.N.Y. 1991), *aff'd in part and rev'd in part on other grounds sub nom.*; *United States v. Cordova Chem. Co.*, 59 F.3d 584 (6th Cir. 1995). The court held that for liability to attach under section 107(a)(3) "to a party without actual ownership or possession of a facility, a nexus must exist in which a party has assumed responsibility for or control over the disposition of hazardous waste," and that the

tor of the facility or as an arranger for disposal or treatment of hazardous substances' at the facility. Holding a governmental entity liable under section 107, solely on the basis of its cleanup of hazardous substances disposed of by other persons at a facility not owned by that entity, will not further CERCLA's "central purpose . . . to achieve cleanup,"⁴¹⁶ because such potential liability may deter or "discourage the government from making cleanup efforts"⁴¹⁷ or at least will decrease the amount of funds available to governments to undertake cleanups under CERCLA and other statutory authority (by the amount by which a governmental entity is held liable under section 107 for its cleanup activities). In addition, an interpretation of CERCLA that permits governmental entities to be held liable as a result of their cleanup activities would contradict CERCLA's "essential purpose of making those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created,"⁴¹⁸ as well as "Congress' intent [in CERCLA] to ensure that those who benefit financially from a commercial activity should internalize the health and environmental costs of that activity into the costs of doing business,"⁴¹⁹ because such liability might allow persons who contributed to hazardous waste problems to transfer some of their liability to governmental entities that responded to these problems.

When governmental cleanup activities were in accordance with the National Contingency Plan or at the direction of an on-scene coordinator and were in response to an incident creating a danger to public health or welfare or the environment, a holding that such cleanup activities are not sufficient for operator or arranger liability will simply mirror the exemption from liability provided by section 107(d)(1)⁴²⁰ of CERCLA.⁴²¹ Section 107(d)(1), however, would still have inde-

Michigan Department of Natural Resources (MDNR) was not liable as an arranger under section 107(a)(3) for its allegedly improper cleanup activities at a site owned by another person because "a nexus of control or possession is lacking in the case against MDNR because MDNR's involvement in cleanup activities at the site was only regulatory. MDNR merely worked to eliminate or reduce severe environmental problems that had been left by prior owners and threatened public health and the environment." *Id.*

⁴¹⁶ *United States v. Iron Mountain Mines, Inc.*, 881 F. Supp. 1432, 1445-46 (E.D. Cal 1995).

⁴¹⁷ *FMC Corp. v. United States Dept of Commerce*, 29 F.3d 833, 841 (3d Cir. 1994) (en banc).

⁴¹⁸ *Id.* (quoting *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1221 (3d Cir. 1993)).

⁴¹⁹ *United States v. Azrael*, 765 F. Supp 1239, 1245 (D. Md. 1991), *motions to dismiss denied*, 774 F. Supp. 376 (D. Md. 1991).

⁴²⁰ 42 U.S.C. § 9607(d)(1) (1994).

⁴²¹ See *supra* notes 86-101 and accompanying text.

pendent utility, because its exemption applies to any "person" (not just governmental entities).⁴²² Furthermore, a holding that state or local government cleanup actions in response to a hazardous substance emergency at another person's facility are not sufficient for operator or arranger liability under section 107, will exempt a state or local government from liability under section 107 to the same extent as section 107(d)(2)⁴²³ of CERCLA,⁴²⁴ but will not conflict with or contradict section 107(d)(2) to any extent.

The author has found no indication in CERCLA's legislative history that Congress intended that section 107(d) was to be interpreted as prohibiting the courts from interpreting operator and arranger under section 107 to exclude governmental cleanup activities not exempted from liability under section 107(d)(1) and 107(d)(2). Congress simply may have enacted section 107(d) to make sure that the cleanup activities encompassed by those sections would not be subjected to CERCLA liability, leaving it to courts to determine what other cleanup activities should be exempted from CERCLA liability.⁴²⁵

V. DENIAL OF RECOVERY OF GOVERNMENTAL CLEANUP COSTS INCONSISTENT WITH THE NCP

A holding that even governmental cleanup activities that are inconsistent with the NCP⁴²⁶ are not sufficient for operator or arranger liability under section 107 does not leave PRPs without a remedy in such situations. In an action under section 107(a)(4)(A)⁴²⁷ by a state or the federal government to recover governmental response costs, the government is not entitled to recover response costs that are inconsistent with the NCP.⁴²⁸ However, a defendant in an action under section 107(a)(4) has the burden of establishing that governmental response costs for which the federal or a state government seeks

⁴²² 42 U.S.C. § 9607(d)(7).

⁴²³ *Id.* § 9607(d)(2).

⁴²⁴ See *supra* notes 102-08 and accompanying text.

⁴²⁵ *Cf.* *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 695-98 (1995) (Congress' explicit prohibition of certain modifications of wildlife habitat in section 7(a)(2), of the Endangered Species Act (ESA) did not preclude interpretation of "takings" prohibition in section 9(a)(1) of ESA, as prohibiting the same, and other, modifications of wildlife habitat).

⁴²⁶ See *supra* note 91 and accompanying text.

⁴²⁷ 42 U.S.C. § 9607(a)(4)(A).

⁴²⁸ See *United States v. Atlas Minerals & Chem., Inc.*, 797 F. Supp. 411, 417 (E.D. Pa. 1992). A claim by a defendant in an action under section 107(a)(4) that the government's cleanup activities were inconsistent with the NCP is not a defense to PRP liability, but rather only affects the amount of response costs recoverable by the government in the action. See *Cadillac Fairview/Cal., Inc. v. Dow Chem. Co.*, 840 F.2d 691, 695 (9th Cir. 1988).

recovery were not consistent with the NCP.⁴²⁹ State and federal government response costs are presumed to be consistent with the NCP unless the defendant in an action under section 107(a)(4) shows that the EPA acted arbitrarily and capriciously in choosing the particular response actions undertaken at the facility or site.⁴³⁰ A defendant has a difficult burden in meeting this arbitrary and capricious standard.⁴³¹ The NCP does not impose a duty upon EPA to mitigate damages or to minimize cleanup costs,⁴³² and makes cost-effectiveness a criterion in selection of response actions only when EPA is selecting a permanent remedy from among alternatives.⁴³³ However, if the government engages in response actions at a facility that are inconsistent with the NCP and further contaminates a site, necessitating additional response actions to clean up such contamination, the defendants in an action brought by the government under section 107(a)(4)(A) to recover its response costs should not be liable for the costs of these additional response actions to correct the problems caused by the earlier inconsistent response actions (or for the costs of the earlier inconsistent response actions).⁴³⁴

Further, if governmental cleanup activities (even those consistent with the NCP) cause damages to the property of a PRP or increase the cost of governmental cleanup activities for which a PRP is liable, the injured PRP may have a claim (or a counterclaim, if the PRP is being sued under section 107) under section 107(d)(1)⁴³⁵ or section 107(d)(2)⁴³⁶ for costs or damages as the result of negligence or gross negligence by the government, as well as recoupment counterclaims for damages against a governmental plaintiff who has sued the defendant under section 107.⁴³⁷

⁴²⁹ See *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726, 747 (8th Cir. 1986).

⁴³⁰ See *id.* at 748; *United States v. Hardage*, 982 F.2d 1436, 1442 (10th Cir. 1992).

⁴³¹ This burden is much more difficult than defeating the recovery sought by a private party under section 107(a)(4)(B). A private party who has brought an action under section 107(a)(4)(B) to recover its response costs has the burden of showing that its response actions were both consistent with the NCP and necessary. See *Cadillac Fairview/Cal.*, 840 F.2d at 965. However, the NCP only requires private parties to be in "substantial compliance" with specified provisions of the NCP. See *Reading Co. v. City of Philadelphia*, 823 F. Supp. 1218, 1239-40 (E.D. Pa. 1993).

⁴³² See *Atlas Minerals*, 797 F. Supp. at 417 n.13.

⁴³³ See *United States v. American Cyanamid Co.*, 786 F. Supp. 152, 162 (D.R.I. 1992). Cost-effectiveness is not a relevant criteria when EPA selects a removal action under CERCLA. See *id.* at 161.

⁴³⁴ See *Atlas Minerals*, 797 F. Supp. at 422.

⁴³⁵ 42 U.S.C. § 9607(d)(1) (1994); see *supra* notes 86-101 and accompanying text.

⁴³⁶ 42 U.S.C. § 9607(d)(2); see *supra* notes 102-08 and accompanying text.

⁴³⁷ See *infra* notes 438-64 and accompanying text.

VI. RECOUPMENT COUNTERCLAIMS

As discussed later in this section, several courts have held that

when a governmental entity sues to recover response costs under CERCLA it waives its sovereign immunity as to all [recoupment] counterclaims arising under CERCLA or state law involving the same "transaction or occurrence" as the government's CERCLA claim, so long as the dollar amount of the counterclaims does not exceed the government's recovery for response costs.⁴³⁸

Some of these courts have allowed a defendant in a governmental cost-recovery action under section 107 to bring a recoupment counterclaim seeking recovery of the costs of negligent or otherwise improper governmental response costs, or of damages for injuries, destruction, or taking of defendant's property resulting from the government's response actions, which if successful will reduce the amount that a governmental plaintiff recovers in the action.

Recoupment is a common law, equitable doctrine that permits a defendant to assert a defensive claim against a plaintiff, arising from the same contract or transaction as the plaintiff's claim, to reduce the amount of the damages recoverable by plaintiff.⁴³⁹ Although a recoupment counterclaim is the common-law precursor to the modern compulsory counterclaim under Rule 13(a) of the Federal Rules of Civil Procedure, in federal courts recoupment counterclaims have survived "the codification of compulsory counterclaims and enjoy continuing vitality as a means of asserting an otherwise time-barred counterclaim."⁴⁴⁰

Under a theory of recoupment, a defendant in an action brought by the government may assert any counterclaim arising from the same transaction or occurrence as the government's action, even though the counterclaim otherwise would be barred by sovereign immunity or the statute of limitations were it brought as a separate action. The claim in recoupment may not exceed the government's recovery but may only offset it. Recoupment builds on the notion that the government waives sovereign immunity and the defense of statute of limitations when it brings suit.⁴⁴¹

⁴³⁸ See *United States v. Iron Mountain Mines, Inc.*, 881 F. Supp. 1432, 1453 (E.D. Cal. 1995) (citations omitted). The proper form for a recoupment claim by a defendant in an action under section 107 is to file a recoupment counterclaim or an independent action for recoupment, rather than asserting recoupment as an affirmative defense. *United States v. Smuggler-Duran Mining Corp.*, 823 F. Supp. 873, 878 (D. Colo. 1993).

⁴³⁹ See *Berger v. City of North Miami*, 820 F. Supp. 989, 992 (E.D. Va. 1993).

⁴⁴⁰ *Id.*

⁴⁴¹ *Iron Mountain Mines*, 881 F. Supp. at 1452-53.

The court in *United States v. Iron Mountain Mines*⁴⁴² (*Iron Mountain Mines II*) reasoned that “[w]hen recoupment is invoked against the United States it rests on federal common law, the federal law of sovereign immunity,”⁴⁴³ but held that “in the context of a CERCLA action there is no reason to extend or create a judicially implied [recoupment] remedy against the United States when Congress has expressly provided the remedy. Indeed, the possibility of conflict between the judicial remedy and the statutory scheme provides a sound reason not to imply a remedy.”⁴⁴⁴ Earlier, the court in *United States v. Iron Mountain Mines* (hereinafter *Iron Mountain Mines I*) held that a defendant, in an action by state and federal governments under section 107 to recover response costs, cannot bring recoupment counterclaims based upon state or federal statutory and common law (other than CERCLA), because Congress has not waived governmental sovereign immunity to such claims.⁴⁴⁵ *Iron Mountain Mines I* expressed concern that allowing recoupment counterclaims based upon state law in actions brought under section 107 could result in imposition of liability upon the federal government or a state under strict liability or some other standard, whereas CERCLA reviews governmental actions under a negligence standard,⁴⁴⁶ a gross negligence standard,⁴⁴⁷ or an arbitrary and capricious standard.⁴⁴⁸ The court added:

Moreover, there is no compelling need for application of the recoupment doctrine in the context of a government cost recovery action under CERCLA because CERCLA itself permits the defendant in a suit by the government to seek contribution and make claims against the government. Furthermore, to permit a claim made under another legal regime, brought by way of recoupment, simply because the government brought suit under CERCLA, could well undermine CERCLA’s scheme of allocating

⁴⁴² *United States v. Iron Mountain Mines, Inc.*, 952 F. Supp. 673 (E.D. Cal. 1996) [hereinafter *Iron Mountain Mines II*].

⁴⁴³ *Id.* at 677.

⁴⁴⁴ *Id.*

⁴⁴⁵ *Iron Mountain Mines*, 881 F. Supp. at 1456. This court interpreted CERCLA as “expressly limit[ing] its waiver of sovereign immunity to CERCLA counterclaims.” *Id.* See also *United States v. Keystone Sanitation Co., Inc.*, 867 F. Supp. 275, 282–84 (M.D. Pa. 1994) (expressing doubt that CERCLA has waived the federal government’s sovereign immunity from recoupment claims, alleging that the United States caused additional contamination at a site, but postponing a final ruling on the recoupment issue).

⁴⁴⁶ 42 U.S.C. § 9607(d)(1) (1994).

⁴⁴⁷ *Id.* §§ 9607(d)(2), 9613(j)(2).

⁴⁴⁸ See *Iron Mountain Mines*, 881 F. Supp. at 1454.

cleanup costs and of setting standards for liability for government activities.⁴⁴⁹

Subsequently, however, in light of the Supreme Court's interpretation of the Eleventh Amendment of the United States Constitution in *Seminole Tribe v. Florida*,⁴⁵⁰ the court in *Iron Mountain Mines II* held that recoupment claims based upon CERCLA could be brought against a state by a private person whom the state sued under CERCLA, either on the grounds that the state's filing of suit is a limited waiver of the state's Eleventh Amendment immunity or that such a recoupment counterclaim falls outside the Eleventh Amendment's scope because a defensive recoupment counterclaim is not a "suit" within the meaning of the Eleventh Amendment.⁴⁵¹ The court in *Iron Mountain Mines II*, however, held that a state's law of sovereign immunity determines whether a private person can bring a recoupment claim based upon state law against a state that has sued the private person under CERCLA in federal court.⁴⁵²

Several courts have rejected a recoupment counterclaim by a defendant in a suit by the federal government under section 107 seeking response costs, on the ground that the defenses set forth in section 107(b)⁴⁵³ are the exclusive defenses to liability for response costs.⁴⁵⁴ These holdings can be criticized, of course, on the ground that they confuse a recoupment counterclaim (that may reduce the amount of damages for which a defendant is liable) with an affirmative defense that excuses a defendant from liability altogether. Courts that do permit a defendant to bring a recoupment counterclaim do so only if the following three requirements are satisfied: (1) the recoupment claim arises from the same transaction or occurrence as the main

⁴⁴⁹ *Id.* at 1456. As discussed earlier, *Iron Mountain Mines* also held that governmental cleanup activities are not immune from liability under section 107. See *supra* notes 380-402 and accompanying text.

⁴⁵⁰ *Seminole Tribe of Fla. v. Florida*, 116 S. Ct. 1114, 1125-26 (1996); see *supra* notes 109-39 and accompanying text.

⁴⁵¹ *Iron Mountain Mines II*, 952 F. Supp. 673, 677-78 (E.D. Cal. 1996). The court in *Iron Mountain Mines II* further reasoned that application of the Eleventh Amendment "may depend on whether any damages awarded would be paid out of the state's treasury," and that "under this test, a claim in recoupment is not a suit 'against a state' because the relief sought is merely responsive to and no greater than the relief sought by the state and requires no payment by the state from its treasury." *Id.* at 678.

⁴⁵² See *id.* at 677 n.6.

⁴⁵³ 42 U.S.C. § 9607(b) (1994).

⁴⁵⁴ *United States v. American Color & Chem. Corp.*, 858 F. Supp. 445, 453 (M.D. Pa. 1994); *United States v. Smuggler-Durant Mining Corp.*, 823 F. Supp. 873, 878 (D. Colo. 1993).

claim; (2) the recoupment claim seeks relief of the same kind and nature as that sought by the main claim; and (3) the claim is defensive in nature and does not seek affirmative relief.⁴⁵⁵

Some courts follow a liberal interpretation of the "same transaction" and "same relief" requirements for recoupment claims in a governmental action to recover response costs, finding that a plaintiff's claim for response costs arises out of the plaintiff's response actions to clean up the site.⁴⁵⁶ Under this approach, a defendant, in an action brought by a state government to recover response costs has been permitted to bring a recoupment counterclaim against the state that sought to reduce the plaintiff's recovery by the amount of response costs attributable to the state's alleged failure to adequately conduct and supervise cleanup operations.⁴⁵⁷ This approach also has permitted a defendant, in an action brought by the United States to recover response costs to bring a recoupment counterclaim that sought to reduce the plaintiff's recovery by the amount of damages allegedly caused to defendant's property by the plaintiff while performing response actions.⁴⁵⁸ Another court, following a similar approach, has held that a plaintiff's claim, in an action by the government to recover response costs, arises both out of the plaintiff's cleanup of the site and out of the contamination of the site that was cleaned up; and that the defendant in the action therefore was permitted to file a recoupment counterclaim for the amount of damages allegedly caused by the plaintiff's cleanup activities in taking property of the defendant and

⁴⁵⁵ See *United States v. Hardage*, 750 F. Supp. 1460, 1511 (W.D. Okla. 1990), *aff'd in part and rev'd in part on other grounds*, 982 F.2d 1436 (10th Cir. 1992); see also *American Color & Chem. Corp.*, 858 F. Supp. at 451; *United States v. M/V Santa Clara I*, 819 F. Supp. 507, 513 (D.S.C. 1993); *Berger v. City of North Miami*, 820 F. Supp. 989, 992 (E.D. Va. 1993); *United States v. Atlas Minerals & Chem., Inc.*, 797 F. Supp. 411, 421 (E.D. Pa. 1992). Several courts have interpreted this first requirement as mandating a recoupment counterclaim to be compulsory in nature. *United States v. Montrose Chem. Corp.*, 788 F. Supp. 1485, 1491 n.2 (C.D. Cal. 1992); *United States v. Nicolet*, No. Civ. A. 85-3060, 1986 WL 15017, at *2 (E.D. Pa. 1986). This first requirement also was interpreted by the court in *M/V Santa Clara I* as requiring a recoupment counterclaim to be compulsory under Rule 13(a) of the FEDERAL RULES OF CIVIL PROCEDURE, and therefore to be mature as of the date the answer is filed. See *M/V Santa Clara I*, 819 F. Supp. at 514.

⁴⁵⁶ See *United States v. Amtreco, Inc.*, 790 F. Supp. 1576, 1581-83 (M.D. Ga. 1992); *United States v. Shaner*, No. Civ. A. 85-1372, 1992 WL 154652, *11 n.10 (E.D. Pa. 1992); *United States v. Moore*, 703 F. Supp. 455, 459 (E.D. Va. 1988); *Nicolet*, 1986 WL 15017, at *7.

⁴⁵⁷ See *United States v. Mottolo*, 605 F. Supp. 898, 910-11 (D.N.H. 1985). The court in *Mottolo*, however, did not allow a recoupment counterclaim to be brought against the state that sought to recover from the state cleanup costs allegedly incurred by the federal government as a result of the state's improper cleanup activities. *Id.* at 911.

⁴⁵⁸ See *Amtreco, Inc.*, 790 F. Supp. at 1581-83.

in selling to the defendant allegedly defective equipment that caused part of the contamination cleaned up by the plaintiff.⁴⁵⁹

As discussed below, a narrower interpretation of the "same transaction" requirement for recoupment claims in actions is applied by a state or the federal government to recover response costs. Under this narrower approach, a plaintiff's claim in an action under section 107 is held to arise out of the pollution of the site by the release or disposal of hazardous substances that the plaintiff cleaned up, resulting in the court denying a recoupment counterclaim that sought to reduce the plaintiff's recovery by the cost of response actions that allegedly were performed negligently or improperly (further contaminating the site), on the grounds that the counterclaim did not arise out of the same transaction as the plaintiff's claim.⁴⁶⁰ Other courts following this restrictive approach to the "same transaction" requirement have barred a defendant, in an action under section 107 by a state or the federal government to recover response costs from bringing a recoupment counterclaim based upon indemnification provisions in the defendant's lease for the facility that released hazardous substances,⁴⁶¹ or based upon a contract to assist in the development of the site.⁴⁶²

One court, although not deciding whether a defendant, in a suit brought by the United States under section 107 to recover response costs, was permitted to bring a recoupment counterclaim to reduce the government's recovery by the amount of the costs incurred by the government in responding to earlier allegedly improper EPA response actions, has noted that a claim under section 107(a)(4)(A) that response costs are inconsistent with the NCP is not necessarily redundant with a recoupment claim alleging that inconsistent response actions caused additional cleanup costs.⁴⁶³ The court indicated that it was inclined to take the view that a defendant in a governmental cost recovery action under section 107(a)(4)(A), has no liability for the costs incurred by the government to correct earlier response costs that were inconsistent with the NCP and therefore to dismiss the defendant's recoupment claims as redundant, but the court deferred

⁴⁵⁹ See *Moore*, 703 F. Supp. at 459.

⁴⁶⁰ See *American Color & Chem. Corp.*, 858 F. Supp. 445, 453 (M.D. Pa. 1994); *Hardage*, 740 F. Supp. at 1519, *aff'd in part and rev'd in part on other grounds*, 982 F.2d 1436 (10th Cir. 1992).

⁴⁶¹ See *Reading Co. v. City of Philadelphia*, 155 B.R. 890, 903, 910-12 (E.D. Pa. 1993).

⁴⁶² See *Berger v. City of North Miami*, 820 F. Supp. 989, 993-94 (E.D. Va. 1993).

⁴⁶³ See *United States v. Atlas Minerals & Chem., Inc.* 797 F. Supp. 411, 422 (E.D. Pa. 1992).

ruling on the recoupment claims because the issue had not been fully briefed or argued.⁴⁶⁴

Although recoupment counterclaims often may be redundant with section 107(a)(4)(A)'s provision denying government recovery of response costs inconsistent with the NCP, or with section 107(d)'s preservation of governmental liability for negligence and gross negligence in cleanup activities, there may be situations where a recoupment counterclaim based upon state law may give a defendant a viable cause of action against a governmental entity when CERCLA does not do so. However, as discussed earlier in this section, some federal courts permit defendants in an action under section 107 to bring only counterclaims based upon CERCLA, effectively precluding recoupment counterclaims, and other federal courts interpret the "same transaction" requirement for recoupment counterclaims so narrowly as to preclude a defendant's recoupment counterclaims. Only a few federal courts have permitted a defendant to bring a recoupment counterclaim based upon state law in a governmental action under section 107 to recover response costs. Whether or not recoupment counterclaims can be utilized by defendants in actions under section 107(a)(4)(A) to reduce their liability remains to be seen.

VII. CONCLUSION

Federal, state, and local governments generally should be liable under sections 107 and 113(f) of CERCLA to the same extent and under the same general standards as other persons (including corporations and individual corporate employees). When hazardous substances are released from a facility owned by a governmental entity (or which was owned by a governmental entity when hazardous substances were disposed of at the facility), the governmental entity should be subject to liability as an owner or operator of the facility under section 107 or section 113(f) of CERCLA to the same extent as any other person. When a governmental entity engages in an activity or operates a facility that generates a hazardous substance and the entity arranges for the substance to be disposed of or treated by another person's facility, the governmental entity should be subject to liability under section 107 or 113(f) of CERCLA to the same extent as any other person.

⁴⁶⁴ See *id.*

However, CERCLA specifically provides exemptions from liability under sections 107 and 113(f) when a state or local government involuntarily acquires ownership or control of a facility in its sovereign function,⁴⁶⁵ when a government acquires an interest in real estate to conduct a CERCLA remedial action,⁴⁶⁶ and when a governmental entity engages in certain response and cleanup actions.⁴⁶⁷ In addition, state governments are immune under the Eleventh Amendment of the United States Constitution from being sued by private persons under sections 107 and 113(f) in federal courts. Furthermore, a governmental entity should not be held liable under either section 107 or section 113(f), either as an operator of a facility or as an arranger of disposal of hazardous substances at a facility, solely on the basis of governmental regulation of waste disposal or other activities by other persons at another person's facility, governmental purchase of a product or materials produced at another person's facility, or governmental cleanup or response to the release or threatened release of hazardous substances disposed of by other persons at another person's facility.

⁴⁶⁵ 42 U.S.C. § 9601(20)(D) (1994).

⁴⁶⁶ *Id.* § 9604(j)(3).

⁴⁶⁷ *Id.* § 9607(d)(1). *See supra* notes 86–101 and accompanying text.