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Private Cost Recovery Actions Under CERCLA

Past hazardous waste disposal practices have created serious present-day problems. Following World War II, the United States dramatically increased its use of chemicals to produce the goods of everyday life. This "better living through chemistry" phenomenon, however, has not been without cost. Until very recently, the disposal of hazardous chemical waste was haphazard and essentially unregulated. Large amounts of such waste were stored, dumped, buried on-site, or shipped to ordinary landfills.

As the inevitable consequence of these short-sighted disposal practices, the hazardous waste problem exploded onto the national scene in the late 1970's and early 1980's. Environmental horror stories abound; names such as "Love Canal,"

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1. As one commentator has noted:
U.S. production of all synthetic organic chemicals was under one billion pounds in 1941; by 1970, production of the top 50 organic chemicals alone totaled 172 billion pounds. The Environmental Protection Agency (EPA) noted that production of synthetic chemicals rose from less than 50 billion [pounds] in 1950 to more than 300 billion by the late 1970s.


Hazardous wastes are produced in many segments of society: industry, hospitals, research facilities, and government. Industry is by far the largest source; according to EPA estimates, the chemical and allied products industry produces 60 percent of all industrial hazardous wastes . . . . Industrial wastes are also generated in the manufacture of automobiles, energy, paper, plastics, clothing, rubber, paint, pesticides, medicines, and most other products used daily.

COUNCIL ON ENVIRONMENTAL QUALITY, ELEVENTH ANN. REP. 216 (1980) [hereinafter cited as CEQ, ELEVENTH ANN. REP.].


3. EPA estimates that 264 million metric tons of hazardous wastes were generated in 1981. See 15 ENV'T REP. (BNA) 5 (1985) (citing EPA, NATIONAL SURVEY OF HAZARDOUS WASTE GENERATORS AND TREATMENT, STORAGE, AND DISPOSAL FACILITIES REGULATED UNDER RCRA IN 1981 (EPA 530/SW-84-005)). In 1980, EPA estimated that 90% of the hazardous waste generated was disposed of in an unsound manner. CEQ, ELEVENTH ANN. REP., supra note 1, at 218.

4. For collected reports of such stories, see M. BROWN, LAYING WASTE:
"Times Beach,"6 and "Valley of the Drums"7 have been etched

5. Love Canal, an uncompleted and abandoned nineteenth century waterway in Niagara Falls, New York, had been used as an industrial dump site since the 1930's. In 1947, the Hooker Chemical and Plastics Company purchased the site, capping it in 1953 after thousands of drums of toxic chemical wastes had been buried there. Hooker sold part of the site for one dollar to the Niagara Falls Board of Education, which constructed an elementary school and playing field on the site. A developer purchased the remaining land and built several hundred homes on the periphery of the old canal.

In 1976, six years of above-average rain and snowfall caused the chemicals dumped there to begin seeping into the basements of the homes adjoining the site. The New York State Department of Health, after investigating residents' complaints of unusually large numbers of miscarriages, birth defects, cancer, and other illnesses, declared the area a "grave and imminent peril" to the health of those living nearby.

As of July 1979, 263 families had been evacuated, 1000 additional families had been advised to leave their homes, the site was closed by a barbed wire fence, and President Carter had declared Love Canal a national disaster area. See COUNCIL ON ENVIRONMENTAL QUALITY, TENTH ANN. REP. 176-77 (1979). Love Canal was the first national disaster declared in response to something other than an act of God. See id. at 174; see also M. BROWN, supra note 4, at 3-96; A. LEVINE, LOVE CANAL: SCIENCE, POLITICS, AND PEOPLE (1982); Baurer, Love Canal: Common Law Approaches to a Modern Tragedy, 11 ENVTL. L. 133 (1980).

6. Times Beach was a town of approximately 2200 people located 25 miles southwest of St. Louis. In the early 1970's an industrial waste hauler named Russell Bliss sprayed the roads in Times Beach with waste oil in order to control the dust. The waste oil used was contaminated with 2,3,7,8-tetrachlorodibenzo-p-dioxin (dioxin), one of the most toxic synthetic chemicals known. Samples taken by EPA indicated soil dioxin levels in excess of 100 parts per billion (ppb); by comparison, the Center for Disease Control's recommended maximum soil dioxin level for residential areas is 1 ppb. See Kimbrough, Falk, Stehr & Fries, Health Implications of 2,3,7,8-Tetrachlorodibenzo-dioxin (TCDD) Contamination of Residential Soil, 14 J. TOXICOLOGY & ENVTL. HEALTH 47, 49 (1984).

Investigators traced the dioxin to Northeastern Pharmaceutical and Chemical Co. (NEPACCO), which produced dioxin as a byproduct in the manufacture of the disinfectant hexachlorophene. When the market for hexachlorophene collapsed in 1971, NEPACCO went out of business and hired Independent Petroleum Corp. to dispose of its accumulated wastes. Independent Petroleum in turn hired Russell Bliss. According to the Missouri Department of Natural Resources, Bliss sprayed about 18,500 gallons of dioxin-contaminated waste oil at up to 100 locations throughout the state.

In February of 1983, EPA announced that the government would purchase the entire town of Times Beach using $33.7 million from the federal Superfund. The State of Missouri contributed an additional $3.3 million to the buyout.

For general discussions of the Times Beach incident, see Garmon, Dioxin in Missouri: Troubled Times, 123 SCI. NEWS 60 (1983); Lerner, The Trouble at Times Beach, NEWSWEEK, Jan. 10, 1983, at 24; Posner, Anatomy of a Missouri Nightmare, MACLEAN'S, Apr. 4, 1983, at 10; Sun, Missouri's Costly Dioxin Les-
into the public consciousness. These are not isolated accidents; they are but the tip of the hazardous waste iceberg. In 1980 the Department of Justice estimated that there were five hundred to six hundred hazardous waste sites as potentially dangerous as Love Canal if left unattended.8

Congress responded to the threat posed by inactive and abandoned hazardous waste sites by enacting the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).9 Prior hazardous waste legislation, such as the Toxic Substances Control Act10 and the Resource Conservation and Recovery Act,11 was inadequate; those statutes were aimed at preventing future hazardous waste problems from developing but did not address the problems created by past disposal
practices.\textsuperscript{12} CERCLA was intended to fill that gap.

CERCLA is a comprehensive approach to the problem of abandoned hazardous waste sites. Section 9603 establishes a system for collecting information on hazardous waste sites throughout the country. Section 9604 authorizes government-conducted cleanups at sites where a responsible party cannot be located or will not take the necessary remedial action. Section 9605 requires that the National Contingency Plan (the Plan)\textsuperscript{13} be revised to provide a framework for government response actions and directs that particularly dangerous sites be ranked by degree of hazard on a list of priority response targets called the National Priorities List (the List).\textsuperscript{14} Section 9631 establishes a

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12. The RCRA does contain one provision that may be used to address past disposal practices. Section 7003, 42 U.S.C. § 6973(a), enables EPA to compel the cleanup of hazardous waste sites posing an "imminent and substantial endangerment" to public health or the environment. Experience, however, has shown § 7003 to be of limited utility. It does not apply to the thousands of dormant sites not currently posing an "imminent and substantial endangerment," a standard that is often difficult to meet. See Note, Liability for Generators of Hazardous Waste: The Failure of Existing Enforcement Mechanisms, 69 GEO. L.J. 1047, 1055 n.50 (1981) [hereinafter cited as Georgetown Note]. Furthermore, § 7003 applies only when the site owner is identifiable and financially able to remedy the problem, and it does not apply to nonnegligent off-site generators or transporters of hazardous wastes. See United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 836-37 (W.D. Mo. 1984). Some courts further restrict § 7003 by interpreting it as merely providing jurisdiction, and not as establishing standards for determining whether an injunction should be issued. See, e.g., United States v. Solvents Recovery Serv., 496 F. Supp. 1127, 1133-34 (D. Conn. 1980); United States v. Midwest Solvent Recovery, Inc., 484 F. Supp. 138, 143 (N.D. Ind. 1980). But see United States v. Diamond Shamrock Corp., 12 ENVTL. L. REP. (ENvTL. L. INST.) 20,819, 20,821, 17 Env't Rep. Cas. (BNA) 1329, 1332 (N.D. Ohio May 29, 1981).

CERCLA § 106(a), 42 U.S.C. § 9606(a), is very similar to RCRA § 7003. Both allow EPA to compel the cleanup of hazardous waste sites posing an "imminent and substantial endangerment" to the public health or welfare or the environment. Section 106(a), however, generally is more effective than RCRA § 7003, primarily because CERCLA adopts a broader definition of "responsible parties." See, e.g., United States v. Outboard Marine Corp., 556 F. Supp. 54, 57 (N.D. Ill. 1982); United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1113 (D. Minn. 1982).


13. See infra note 27.
14. See infra note 29.
$1.6 billion "Superfund" (or Fund) to finance government cleanup efforts. Section 9611 sets out the authorized uses of the Fund, and section 9612 details the procedures for making claims against the Fund. Finally, section 9607 makes those parties who were responsible for creating the problem liable for the costs of cleaning it up.


16. Section 9607(a) provides:
Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—
(1) the owner and operator of a vessel (otherwise subject to the jurisdiction of the United States) or a facility,
(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances, and
(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—
(A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;
(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; and
(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.


17. CERCLA's liability provisions are broad. Responsible parties subject to liability include the current owner and operator of the site, the owner and operator at the time of disposal, any party that transported hazardous material to a disposal or treatment facility of its own choosing, and any party that arranged for the disposal or treatment of hazardous material at the site or for the transportation of such material to the site. 42 U.S.C. § 9607(a)(1)-(3). Furthermore, CERCLA liability extends to even nonnegligent off-site generators and transporters. See United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 844 (W.D. Mo. 1984); Georgetown Note, supra note 12, at 1055.

Section 9607(a)(4) imposes liability on parties responsible for a hazardous release. Such parties are liable for:

(A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan, [and]

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan . . . .

Subsection (A) is the government cost recovery provision, which allows the government to sue for costs incurred in cleaning up a site. Any money recovered goes back into the Fund for future Fund-financed responses. Subsection (B) is the private cost recovery provision, providing two distinct types of private cost recovery actions. First, a private party may make a claim against the Superfund to recover its response costs. These types of claims are rare because the party making the claim must have "clean hands" and must satisfy certain other


The only recognized defenses to liability are set out in 42 U.S.C. § 9607(b). See 42 U.S.C. § 9607(a) (liability is "subject only to the defenses set forth in subsection (b) of this section"); United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1118 (D. Minn. 1982). A responsible party will not be held liable if it can establish, by a preponderance of the evidence, that the release or threat of release was caused solely by an act of God, an act of war, or the act of a vandal or other third party beyond the contract that could not have been prevented by the exercise of due care. 42 U.S.C. § 9607(b). Section 9607(c) establishes broad limitations on liability. Courts, however, have refused to impose liability for response costs incurred prior to the enactment of CERCLA on December 10, 1980. See United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 850 (W.D. Mo. 1984); Environmental Defense Fund, Inc. v. Lamphier, 12 ENVTL. L. REP. (ENVTL. L. INST.) 20,843, 20,844 (E.D. Va. May 14, 1982), aff'd, 714 F.2d 331 (4th Cir. 1983).


19. A responsible party theoretically could file a claim against the Fund for its response costs. See 42 U.S.C. § 9611(a)(2). EPA undoubtedly would resist such a claim on grounds that the Fund was intended to finance government responses and to compensate private "volunteers," and not to reimburse responsible parties. The fact that CERCLA imposes joint and several liability on responsible parties would strongly support this interpretation.
preconditions. In the second type of private cost recovery action, a private party sues another private party directly, and no claim is made against the Fund. These actions are more common because a party need not have "clean hands" in order to bring suit; rather, a responsible party who undertakes a cleanup may sue other responsible parties to recover a portion of its cleanup costs. This Note focuses on the latter type of claims, those against responsible parties rather than against the Fund.

Although courts agree that CERCLA authorizes private cost recovery actions, they do not agree on the circumstances in which such actions are permissible. The statutory language is ambiguous, and CERCLA's legislative history provides little guidance. As more private cleanups are conducted, often at staggering costs, the rules governing private cost recovery ac-

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20. See, e.g., 42 U.S.C. § 9612(a) (claimant must notify responsible parties 60 days before seeking recovery from the Fund); 40 C.F.R. § 300.25(d) (1984) (government preauthorization of cleanup plan is a prerequisite to a claim against the Fund).


23. As one commentator has noted:

Although Congress had worked on "Superfund" toxic and hazardous waste cleanup bills . . . for over three years, the actual bill which became law had virtually no legislative history at all. The bill which became law was hurriedly put together by a bipartisan leadership group of senators (with some assistance from their House counterparts), introduced, and passed by the Senate in lieu of all other pending measures on the subject. It was then placed before the House, . . . [and] considered on December 3, 1980, in the closing days of the lame duck session of an outgoing Congress. It was considered and passed, after very limited debate, under a suspension of the rules, in a situation which allowed for no amendments.


24. For example, FMC Corp. has spent $4 million to date in its voluntary cleanup of a hazardous waste site in Fridley, Minnesota. FMC contends the entire cleanup project will cost in excess of $6 million and has filed a private
tions become increasingly important. A review of the cases reveals four major areas of disagreement among the courts. These points of disagreement include the procedures necessary for a private cleanup to be “consistent with the national contingency plan,” the types of expenditures that rise to the level of “necessary costs of response,” the point in a cleanup when response costs are “incurred” and thus become recoverable, and, finally, the notice requirements that apply in private cost recovery actions. This Note discusses each of these problems and suggests a resolution consistent with the policies of CERCLA.

I. PRIVATE CLEANUP PROCEDURES “CONSISTENT WITH THE NATIONAL CONTINGENCY PLAN”

The requirement that private cleanup procedures be “consistent with the national contingency plan”25 is confusing because CERCLA does not define the term “consistent.”26 The Plan itself does not deal expressly with private cleanups; rather, it was promulgated to provide guidelines for government response actions utilizing Superfund money.27 Because
the $1.6 billion allocated to the Fund was insufficient to remedy the dangers posed by the thousands of hazardous waste sites throughout the country, Congress ordered EPA to compile a "National Priorities List" of the worst hazardous waste sites in the country. The National Contingency Plan for the most part limits government-sponsored cleanups to sites included on

realized by continuing a terminated immediate removal since equipment and other resources already have been mobilized, or where the public or environment would be at risk if response was delayed at a site not on the National Priorities List.

The third level of response, "remedial action," 40 C.F.R. § 300.68, provides a long-term remedy to releases from sites on the National Priorities List. Since both immediate removal and planned removal actions have spending ceilings of one million dollars, see 40 C.F.R. §§ 300.65(d), 300.67(e), the majority of Superfund money is spent on remedial actions at sites on the National Priorities List. As a consequence, the regulations governing remedial actions require extensive site investigation, the development of alternative cleanup strategies, the screening of alternatives on the basis of cost, and, finally, a consideration of the total cost of cleanup at the site in relation to the amount of money left in the Superfund. See 40 C.F.R. § 300.68(k).

28. Commenting on the lack of Superfund monies available to meet cleanup demands, one court has observed:

At the time that CERCLA was enacted, Congress was aware that the costs of the clean up envisioned would greatly exceed the amount of the Superfund . . . . [T]he low estimate for the clean up was in excess of $7 billion. The highest figure, a figure supported by the EPA, placed the total cost . . . at $44 billion. Other references placed the expected cost . . . in the range of $13.1 to $22.1 billion.


29. Section 9605(8) of CERCLA, 42 U.S.C. § 9605(8), directs that criteria be established for evaluating the degree of hazard posed by various sites, and that a list of sites posing a significant risk to public health and the environment be prepared. This list, called the National Priorities List, is promulgated as Appendix B to the National Contingency Plan, 40 C.F.R. § 300, app. B. EPA determines which sites to include on the List by using the Hazard Ranking System (HRS), 40 C.F.R. § 300, app. A. The criteria set out in the HRS for evaluating the degree of hazard include the population at risk, the hazardous potential of the substances involved, and the potential for contamination of drinking water supplies or other significant damage. The HRS ultimately yields a numerical score reflecting the degree of hazard posed by a particular site. Minor variations in the HRS score, however, do not necessarily indicate that one site is more hazardous than another. See 48 Fed. Reg. 40,658, 40,660 (1983). For this reason, EPA lists sites on the List in groups of 50, and each site within a group has approximately the same priority for remedial action. Id. EPA maintains that the List is simply an informational tool for identifying sites appropriate for remedial action; sites will not necessarily receive remedial attention in the order they appear on the List. Id. at 40,659. Furthermore, the List does not determine priorities for emergency response or planned removal actions under §§ 300.65 and 300.67 of the Plan. Id.; see supra note 27.

As of October 1984, 538 sites were included on the List, and EPA had just proposed that 208 additional sites be listed. See 15 ENV'T REP. (BNA) 756-57, 887 (1984).
the National Priorities List, thereby ensuring that Superfund monies will be spent primarily on sites representing the greatest threat to public health and the environment.

Whether private cleanups also should be so limited is unclear. In one of the earliest cases interpreting CERCLA's private cost recovery provision, a federal district court in California held that in order for a private cleanup to be "consistent with the national contingency plan," the site in question had to be included on the National Priorities List. More recent decisions quite properly have refused to follow this court's lead. Limiting private cleanups to sites on the List is not nec-

30. See supra note 27.
31. As one Senator stated:
The plan will contain guidance on cost-effectiveness. Such guidelines are intended to assure that alternative remedial options are considered when planning cleanup actions at a particular site. This guidance will also provide both criteria and procedures for selection of the most cost-effective and environmentally sound alternative for remediating the site. This selection will require a balancing of a variety of factors, including cost and engineering, to achieve the health and environmental goals of the legislation.


Defendants argue that as a minimal prerequisite to commencing suit under . . . § 9607, the site must appear on the [National Priorities] List. This appears to be correct, or the requirement that the action be "consistent with the National Contingency Plan" would have no meaning.

. . .

To permit private suits . . . would undermine the perceived Congressional intent to provide a systematic unified response to hazardous waste problems . . .

Id. at 20,379, 21 Env't Rep. Cas. (BNA) at 1114-15.

On motion for reconsideration, the court retracted this holding, stating that its previous order had been "mischaracterized." Cadillac Fairview/California, Inc. v. Dow Chemical Co., 14 ENVTL. L. REP. (ENVTL. L. INST.) 20,716, 20,717 n.1, 21 Env't Rep. Cas. (BNA) 1584 n.1 (C.D. Cal. Aug 29, 1984).
necessary because the compensation in such cases comes from one or more of the responsible parties, not from the Superfund. Additionally, prohibiting private cleanups of all but the most hazardous sites frustrates CERCLA's policy of encouraging prompt cleanup of hazardous waste. Finally, the Plan itself permits the recovery of costs incurred in cleaning up sites not included on the List. The more recent decisions therefore are correct in holding that a site does not have to be included on the National Priorities List in order for a private cleanup to be "consistent" with the National Contingency Plan.

Even those courts that agree in rejecting the listing requirement disagree with respect to the amount of government involvement that is necessary for a private cleanup to be consistent with the Plan. One court has emphatically held that no government involvement is necessary. Another court has

34. Of the estimated 20,000 hazardous waste sites in the United States, only 538 are currently on the List, with 208 additional sites proposed for listing. See 15 ENV'T REP. (BNA) 756-57, 887 (1984); supra note 29.


36. Sections 300.65 and 300.67 permit government cleanups at sites not listed on the National Priorities List, and those costs are recoverable. See 40 C.F.R. §§ 300.65, 67.

37. See supra note 33.

38. Pinole Point Properties, Inc. v. Bethlehem Steel Corp., 596 F. Supp. 283, 289-90 (N.D. Cal. 1984). The Pinole court relied primarily on § 300.25(d) of the National Contingency Plan, which states:

If any person other than the Federal government or a State or person operating under contract or cooperative agreement with the United States, takes response action and intends to seek reimbursement from the Fund, such actions to be in conformity with this Plan for purposes of section 111(a)(2) of CERCLA [42 U.S.C. § 9611(a)(2) (1982)] may only be undertaken if such person notifies the Administrator of EPA or his/her designee prior to taking such action and receives prior approval to take such action.

40 C.F.R. § 300.25(d).

When EPA promulgated the final version of the Plan, it explained this section as follows:

[Section 300.25(d)] has been rewritten to require that persons who intend to undertake response actions, and seek reimbursement from the Fund, must obtain preauthorization in order for the response action to be considered consistent with the Plan . . . .

Section 300.25(d) does not apply to private parties who undertake response actions, but do not intend to seek reimbursement from the Fund.

47 Fed. Reg. 31,180, 31,196 (1982) (emphasis added). EPA states that the preauthorization requirement is necessary both to ensure that Fund money is
held that although a private party may initiate a cleanup, the government must approve the plan prior to cleanup in order for costs to be recoverable. A third court has held that the

spent in a cost effective manner and to ensure that private response actions are conducted in an environmentally sound manner. Id. Although the first rationale does not apply in a private cost recovery situation because no claim will be made against the Fund, the second rationale applies even when no Superfund money is involved.

39. Bulk Distrib. Centers, Inc. v. Monsanto Co., 589 F. Supp. 1437, 1444 (S.D. Fla. 1984) ("before a private claimant can commence a remedial operation and cost recovery action, it must first win government approval of its cleanup plan").

The Bulk court based its argument for government preauthorization primarily on the presence of the word "other" in § 9607(a)(4)(B). Section 9607(a)(4) holds responsible parties liable for "(A) all costs of removal or remedial action incurred by the United States Government . . . " and "(B) any other necessary costs . . . incurred by any other person . . . ." 42 U.S.C. § 9607(a)(4)(A), (B) (emphasis added). The court argued that reading subsection (B) in conjunction with subsection (A) requires that some governmental response costs be incurred before a private party can sue to recover its costs. A contrary interpretation would render the word "other" mere surplusage, which is contrary to the tenet that statutes be interpreted in a manner that gives meaning to all of its terms. Bulk, 589 F. Supp. at 1447.

This argument, however, eventually collapses of its own weight. Tying subsection (B) to subsection (A) means the government must incur not merely costs, but specifically "costs of removal or remedial action," also known as response costs. See infra notes 54-55 and accompanying text. Although determining whether a particular cost constitutes a response cost is not easy, de minimus costs such as those incurred in writing a notice letter or approving a privately prepared cleanup plan, standing alone, clearly do not rise to the level of response costs. See infra notes 54-68 and accompanying text.

On the other hand, requiring government expenditures that do rise to the level of response costs, such as a Fund-financed cleanup or a government-negotiated private cleanup, would severely restrict private cost recovery actions and frustrate CERCLA's policy of encouraging prompt cleanup of hazardous waste sites. As the Bulk court itself noted:

The private cost recovery action . . . is necessary because the $1.6 Billion Superfund itself will not provide sufficient funds for the cleanup of existing dumpsites . . . . Some estimates place the number of sites requiring attention in the thousands, with projected costs for the cleanup effort ranging from $7 billion to $44 billion. Obviously, state and private actions are needed to clean up those sites beyond the reach of Fund-sponsored actions. Bulk, 589 F. Supp. at 1444 (citations omitted)(footnote omitted).

The Bulk court argued alternatively that government preauthorization of the cleanup is required in order for the cleanup to be consistent with the National Contingency Plan. Id. at 1447. The court relied primarily on a section of the Plan governing "remedial actions," which states:

As an alternative or in addition to Fund-financed remedial action, the lead agency may seek, through voluntary agreement or administrative or judicial process, to have those persons responsible for the release clean up in a manner that effectively mitigates and minimizes damage to, and provides adequate protection of, public health, welfare, and
consistency requirement demands that the cleanup be initiated by the government rather than by a private party.\textsuperscript{40}

To determine which approach best effectuates CERCLA’s policy of abating environmental hazards promptly, safely, and efficiently, it is necessary to consider the circumstances in which private cost recovery actions arise. Such actions arise primarily in three contexts. First, the government may undertake a cleanup using Superfund money, and private parties may incur associated incidental costs.\textsuperscript{41} Second, private cost recovery actions may arise if the government sends a notice letter\textsuperscript{42} to the allegedly responsible party or parties indicating that a problem exists and offering the chance for private cleanup rather than a governmental cleanup. After negotiations, the private parties may engage in voluntary cleanup activities pursuant to an approved plan, often in return for a full or partial release from liability.\textsuperscript{43} In the third context, the government is

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the environment. \textit{The lead agency shall evaluate the adequacy of clean-up proposals submitted by the responsible parties} . . . .

40 C.F.R. § 300.68(c) (emphasis added). This provision does not apply in either "immediate removal" or "planned removal" situations, however. See 40 C.F.R. §§ 300.65, 67; supra note 27 and accompanying text.

40. Wickland Oil Terminals v. Asarco, Inc., 590 F. Supp. 72, 77 (N.D. Cal. 1984) ("an authorized governmental cleanup program, initiated by the EPA or by state authorities pursuant to a cooperative agreement, must commence before a private party can state a claim for damages under CERCLA"). The Wickland court based its argument on the word “other” in § 9607(a)(4)(B) and on the language of § 300.68(c) of the National Contingency Plan. Wickland, 590 F. Supp. at 77-78.

41. See, e.g., Jones v. Inmont Corp., 584 F. Supp. 1425, 1429 (S.D. Ohio 1984) (government conducted cleanup pursuant to Plan; private parties sued to recover, among other things, costs of medical testing and provision of alternative water supplies). Other examples might include the costs of evacuating homes, drinking-water tests, or measures to prevent leakage of wastes into a homeowner's basement.

42. Before initiating a Fund-financed response activity, EPA attempts to notify all potentially responsible parties that can be identified of their potential liability. It invites those parties to engage in negotiations in an effort to develop a mutually satisfactory cleanup agreement. This procedure provides an opportunity for private cleanup in lieu of government response, thereby conserving Fund assets, and also serves to put a party on notice as to its potential liability. A notice letter is not a legal prerequisite to cost recovery, however. \textit{EPA, GUIDELINES FOR USING THE IMMINENT HAZARD, ENFORCEMENT, AND EMERGENCY RESPONSE AUTHORITIES OF SUPERFUND AND OTHER STATUTES}, 47 Fed. Reg. 20,664, 20,666 (1982). This preliminary notice letter should not be confused with the demand letter required under the National Contingency Plan when a party is making a claim against the Fund. See \textit{infra} notes 82-85 and accompanying text.

43. Negotiated settlements between EPA and responsible parties often have been successful. \textit{See generally} Cornell Note, supra note 12, at 711-30 (discussing EPA-negotiated settlements). EPA will negotiate only if potentially
not involved in the cleanup at all; rather, the private party acts on its own initiative and then seeks to recover from other responsible parties. Each of these situations raises different concerns. If a private party incurs costs incidental to a government cleanup, or if the EPA sends a notice letter and then negotiates a private cleanup, the cleanup generally will proceed in accordance with an approved plan. In both of these general situations, however, there may be individual cases in which a private party incurred cleanup costs without prior approval. For example, a homeowner may believe that government cleanup is inadequate in some respects and engage in a supplemental private cleanup effort. These costs would be concurrent with, but independent of, the government cleanup. Similarly, a private party may overlook the statement in the notice letter that prior approval is required, undertake the cleanup, and then seek to recover from other responsible parties. In these cases, the courts must determine whether these unauthorized costs are recoverable in a suit against a private party.

As a general rule, government preauthorization should be required as a precondition to suits against other private parties. Prior approval protects the public interest by ensuring that the


44. Voluntary cleanups may involve either "innocent" or "responsible" parties. For example, homeowners affected by hazardous wastes might take steps necessary to protect their homes and property before the government is involved or before the scope of the problem is fully comprehended. See, e.g., M. BROWN, supra note 4, at 6 (Love Canal homeowners repeatedly cleaned and attempted to seal basements to prevent the influx of hazardous wastes). On the other hand, a responsible party who is aware of a problem that eventually will be addressed by EPA or the state may decide to clean up voluntarily before drums corrode or toxic chemicals contaminate the soil and groundwater. See, e.g., Pinole Point Properties, Inc. v. Bethlehem Steel Corp., 596 F. Supp. 283, 287 (N.D. Cal. 1984) (no governmental action whatsoever taken with respect to plaintiffs' land); City of Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135, 1143 (E.D. Pa. 1982) (claim against generators for response costs under § 9607(a)(4)(B) allowed where city voluntarily spent portion of estimated $10 million necessary to clean up hazardous waste site).

It is important to note that, based on the literal language of the court in Wickland Oil Terminals v. Asarco, Inc., 590 F. Supp. 72, 77 (N.D. Cal. 1984), a purely voluntary cleanup would never be compensable because it could never be "initiated by the EPA or appropriate state agency." See supra note 40.
cleanup will be conducted properly and that it will completely abate the problem.\textsuperscript{45} In addition, the government has the technical expertise necessary to evaluate the adequacy of the suggested engineering practices and is intimately familiar with the laws applicable to the disposal of the removed wastes. Furthermore, having an EPA-approved plan undoubtedly would make it easier for a private party to later argue that the response costs incurred were both "necessary" and "consistent with the [substantive provisions of the] national contingency plan."\textsuperscript{46} The best approach, therefore, is to require government approval of private cleanup plans whenever possible.

In certain situations, however, requiring prior approval may lead to inequitable results. For example, if the EPA or a state agency has not been involved, the cleanup plan will not have prior approval,\textsuperscript{47} yet denying recovery would be unfair to those parties who engage in good-faith, voluntary cleanups, incur large expenses, and then seek to recover a portion of their costs from other responsible parties.\textsuperscript{48} Homeowners who act to protect their property before the government responds also would be unfairly denied recovery if prior government approval of cleanup plans were required in all cases.\textsuperscript{49} Thus, courts should create an exception to the prior-approval rule for good-faith cleanup efforts in cases in which a party was not aware of the requirement of prior approval. Such an exception would not prejudice the interests of the other responsible parties; the requirements that the costs be "necessary" and "consistent" with the substantive requirements of the National Contingency Plan should serve to protect their interests by ensuring that response costs are reasonable under the circumstances.

In addition to the procedural requirement of government


\textsuperscript{46} 42 U.S.C. § 9607(a)(4)(B); see infra notes 50-53 and accompanying text.

\textsuperscript{47} See supra note 44 and accompanying text.


\textsuperscript{49} See supra note 44. Although prior approval is desirable in this situation, as a practical matter it will not be present regardless of the law. Parties will be acting on an ad hoc basis in response to their immediate situation. Requiring prior approval probably will not modify their behavior; it will simply allow the responsible parties to avoid liability. Furthermore, the innocent victims of another's waste will be left without any remedy whatsoever if government approval is a prerequisite to filing a claim against the Superfund. See supra note 38.
preauthorization, the National Contingency Plan also imposes certain substantive requirements on a plaintiff bringing a private cost recovery action. At trial, the plaintiff has the burden of showing that the costs incurred actually were consistent with the Plan.\textsuperscript{50} For Fund-financed cleanups, the federal government has implemented extensive recordkeeping procedures that enable it to show that the response taken was both necessary and cost-effective.\textsuperscript{51} Private parties, who face a more stringent burden of proof than the federal government,\textsuperscript{52} must be able to show at least as much. A private plaintiff must demonstrate that alternative cleanup strategies were considered, and that the strategy chosen was the least costly alternative that was technologically feasible and reliable, yet still provided adequate protection of public health and the environment.\textsuperscript{53} To meet this burden, a potential plaintiff will have to create a "paper trail" documenting all steps in the decision-making process. Having an EPA-approved plan, if possible, would significantly strengthen a private party's claim that its response costs were consistent with the National Contingency Plan.

II. EXPENDITURES AS "NECESSARY COSTS OF RESPONSE"

The factfinder must determine which cleanup costs are "necessary" on a case-by-case basis. CERCLA does provide some guidance, however, in determining which expenditures will be considered "response costs." CERCLA does not define


\textsuperscript{52} Compare the requirement under § 9607(a)(4)(B), that private parties prove their response costs are consistent with the Plan, with the requirement under § 9607(a)(4)(A), that the government's response costs be not inconsistent with the Plan. Courts have interpreted the latter language in two ways. Some place the burden on the government to show that the costs were not inconsistent, see, e.g., Bulk Distrib. Centers, Inc. v. Monsanto Co., 589 F. Supp. 1437, 1444 (S.D. Fla. 1984), whereas others place the burden on the defendant to prove the government's costs were inconsistent, see, e.g., New York v. General Elec. Co., 592 F. Supp. 291, 304 (N.D.N.Y. 1984); United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 850 (W.D. Mo. 1984).

\textsuperscript{53} See 40 C.F.R. § 300.68.
the phrase "response costs," but it does define the word "response" as "remove, removal, remedy, and remedial action." Presumably, any costs associated with these activities would be recoverable. "Remove" and "removal" include actions necessary to clean up or remove hazardous substances from the environment; to monitor, assess, and evaluate a release or threat of release; to dispose of removed material; and to prevent, minimize, or mitigate damage to the environment or public health. Specific examples include installing security fencing and providing alternative water supplies, temporary evacuation and housing, and other emergency assistance. CERCLA defines "remedy" and "remedial action" as actions consistent with a permanent remedy, taken to minimize the present and future damage done by hazardous substances at the site.

55. Section 9601(23) provides:
"[R]emove" or "removal" means the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief Act of 1974 ....
42 U.S.C. § 9601(23).
56. Id.
57. Section 9601(24) provides:
"[R]emedy" or "remedial action" means those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances or contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures,
amples include containment actions, neutralization, recycling, treatment or incineration, permanent relocation of residents, and any monitoring reasonably required to assure that the actions taken protect the public and the environment.\textsuperscript{58}

Although the statutory definition of "response" includes nearly every conceivable activity associated with the cleanup of a hazardous waste site, and although the EPA takes a very broad view of the types of expenditures that are recoverable,\textsuperscript{59} courts have failed to provide consistent determinations of what types of costs constitute response costs. This inconsistency is particularly apparent in the courts' treatment of costs incurred prior to the actual cleanup. Some courts have held that response costs do not include the expenses incurred in preliminary activities such as inspecting the site, sampling and analyzing wastes, erecting security fencing, or drafting cleanup proposals.\textsuperscript{60} Other courts have reached the opposite conclusion,

\begin{quote}
\textsuperscript{58} Such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or welfare. The term does not include offsite transport of hazardous substances, or the storage, treatment, destruction, or secure disposition offsite of such hazardous substances or contaminated materials unless the President determines that such actions (A) are more cost-effective than other remedial actions, (B) will create new capacity to manage, in compliance with subtitle C of the Solid Waste Disposal Act, hazardous substances in addition to those located at the affected facility, or (C) are necessary to protect public health or welfare or the environment from a present or potential risk which may be created by further exposure to the continued presence of such substances or materials.

\textsuperscript{59} 42 U.S.C. § 9601(24).

\textsuperscript{60} See, e.g., Bulk Distrib. Centers, Inc. v. Monsanto Co., 589 F. Supp. 1437, 1450 (S.D. Fla. 1984) (costs of investigating and drafting proposals to clean up a spill, as well as attorneys' fees, are not response costs); Cadillac Fairview/California, Inc. v. Dow Chem. Co., 14 EnvTL. L. Rep. (EnvTL. L.
finding that such costs are recoverable response costs.\textsuperscript{61} This confusion apparently stems from the courts' reluctance to engage in protracted liability determinations before any remedial measures have been taken at the site. One of CERCLA's underlying purposes is to encourage site cleanup prior to the determination of liability.\textsuperscript{62} If investigatory costs were considered to be "response costs," a private party could file suit before the actual site cleanup had begun, thereby frustrating this policy. Private plaintiffs tend to file suit as early as the court will allow in order to recover costs expended and, more importantly, to obtain a declaratory judgment on the issue of liability for future cleanup expenses. This tendency is both understandable and reasonable; it is difficult for a private party undertaking a cleanup to plan rationally without knowing what other parties will be required to contribute.

Some courts have avoided the problem of early filing by holding that investigatory costs are not response costs and then


In \textit{General Electric}, an action brought by the government under § 9607(a)(4)(A), the District Court for the Northern District of New York attempted to distinguish \textit{Cadillac Fairview} and \textit{D'Imperio}, see supra note 60, on the ground that those cases involved private party claims under § 9607(a)(4)(B). To support that distinction, the court made the conclusory statement that § 9607(a)(4)(B) "establishes significantly different cost recovery criteria." \textit{General Elec.}, 592 F. Supp. at 298. There is no basis for such a distinction, either logically or in the definitional section of CERCLA. See supra notes 54-58 and accompanying text. Response costs are the same whether incurred by the government or by a private party. The only difference is the standard of proof required and, possibly, the party bearing the burden of proof. See supra note 52.

dismissing the complaint on grounds that it is not ripe for review or that it fails to state a claim.\textsuperscript{63} This approach ignores the clear language of the statute, which defines response to include preliminary investigations.\textsuperscript{64} Moreover, to deny recovery for preliminary cleanup activities deprives affected plaintiffs of a portion of the costs to which they legitimately are entitled and ultimately will discourage private parties from initiating cleanup actions.\textsuperscript{65}

A compromise approach is necessary to strike a balance between encouraging response first and reimbursement later and allowing plaintiffs to recover all the costs to which they are entitled. Some courts have resolved the problem by adopting a "ripening" approach: investigatory costs are initially deemed insufficient to support a claim, but once the actual cleanup has begun, they "ripen" into response costs.\textsuperscript{66} For example, one court stated that "[o]nce a claimant has begun to implement a . . . cleanup program, then those preliminary costs, heretofore non-recoverable (e.g., expenses for legal, architectural, engineering, and other planning) may be recaptured."\textsuperscript{67} Although this "ripening" approach is not grounded in the literal language of the statute,\textsuperscript{68} the statute does not preclude this treatment. Preliminary expenses really are not "necessary" unless the cleanup plan is carried out. This "ripening" approach encourages at least partial cleanup of problem areas before liability is apportioned and allows plaintiffs to recover the full amount to


\textsuperscript{64} See supra notes 54-58 and accompanying text.

\textsuperscript{65} Preliminary investigations can be quite expensive. For example, in Wickland Oil Terminals v. Asarco, Inc., 590 F. Supp. 72 (N.D. Cal. 1984), the plaintiff spent $150,000 just to determine the extent of its hazardous waste problem. Id. at 76.


\textsuperscript{67} Id.

\textsuperscript{68} The statute could be interpreted literally to mean that a given expenditure is or is not a response cost. Under such an interpretation, the "ripening" approach would be improper. The practical implications of such a strict construction, however, make its adoption undesirable. Furthermore, to read the language of the statute in this way would be contrary to CERCLA's dual purposes of promoting rapid response to hazardous situations and placing the financial burden on responsible parties. See Jones v. Inmont Corp., 584 F. Supp. 1425, 1430 (S.D. Ohio 1984).
which they are legitimately entitled. It thus strikes a reason-
able compromise between competing CERCLA policies and
should be adopted by other courts.

III. RESPONSE COSTS "INCURRED" IN CLEANUPS

Before commencing a private cost recovery action, a plain-
tiff must have actually "incurred" response costs. Whether a
given expenditure constitutes an "incurred" response cost is
largely dependent on the court's definition of "response cost."
Since the costs of conducting preliminary investigations and
drafting cleanup proposals either are not response costs, or only
ripen into response costs at a later time, courts agree that
"[t]he actual clean up of the release must have begun before a
cost recovery action can be reviewed."

At that point, a plaintiff may recover the costs expended, including investigatory
costs if the jurisdiction considers them response costs and the
costs of services contracted for but not yet performed. A
plaintiff also may obtain a declaratory judgment on the issue of
liability for any future expenditures necessary but not yet con-
tracted for.

The question then becomes how much actual cleaning up
has to be done before a court will entertain a private cost recov-
ery action. This is a particularly important consideration given
the potentially massive costs associated with the cleanup of haz-
ardous waste sites. Few companies have the resources neces-
sary to completely fund a large, unilateral cleanup, even if they
expect to be partially reimbursed at some future date.

The EPA guidelines for cost recovery actions under section
9607(a)(4)(A) state that the Agency may commence an action

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70. See supra notes 59-68 and accompanying text.


74. See supra note 24.
after the completion of either the entire cleanup operation or "one phase of a multi-phase response." This comports with CERCLA's policy of encouraging response first and reimbursement later. Private parties, however, should not be required to complete the cleanup prior to filing suit. The EPA guidelines reflect a policy choice made by an agency with $1.6 billion to draw on for the cleanup of hazardous waste sites. For reasons of administrative efficiency, it makes sense for the EPA to complete a cleanup once it has begun and then seek recovery from responsible parties to replenish the Fund. A private party, on the other hand, must finance a cleanup out of its own, more limited reserves. Requiring a company to finance the entire actual cleanup, or even a large portion of it, after it has already funded the entire investigatory stage may leave many companies with the difficult choice of either ignoring the hazardous waste problem or funding a cleanup that may threaten it with bankruptcy. This is particularly unfair given the company's claim that it is only partially responsible for the problem. CERCLA was intended to place the financial burden of the cleanup on all the parties responsible for the problem, not just on those parties that initiate the cleanup. Accordingly, the

75. EPA, MEMORANDUM ON COST RECOVERY ACTIONS UNDER CERCLA (Aug. 26, 1983), reprinted in ENV'T REP. (BNA), Federal Laws Index 41:2861, 41:2864-65. An example of "one phase of a multi-phase response" is a completed surface cleanup with planned later cleanup of the subsurface or groundwater. Id.

76. In Bulk Distribution Centers, Inc. v. Monsanto Co., 589 F. Supp. 1437 (S.D. Fla. 1984), Bulk argued that a unilateral cleanup would force it into bankruptcy. Id. at 1452. The court, after finding the potential bankruptcy claim "unsubstantiated," noted that even if "this were true, then the federal or state governments would have the option of interceding and cleaning up the site, and later moving to recover clean-up costs from other responsible parties." Id. at 1452 n.29. The court apparently was satisfied that despite Bulk's bankruptcy, the other responsible parties still would be held liable. The court's casual attitude toward the company's financial problems obscures a major problem in these types of cases. From the company's standpoint, and that of the local community, bankruptcy is not a trivial matter and should be avoided if at all possible. Furthermore, from the standpoint of protecting public health and the environment, forcing a company into bankruptcy is likely to delay or destroy any cleanup effort at the site. The EPA is dealing with the hazardous waste problem on a "worst case first" basis and cannot be responsible for cleaning up every spill or problem area. EPA encourages private actions whenever possible in order to conserve both administrative time and limited Superfund money. See Daniel, Guidelines for Using the Imminent Hazard, Enforcement, and Emergency Response Authorities of Superfund and Other Statutes, 47 Fed. Reg. 20,664, 20,665 (1982).

77. See Jones v. Inmont Corp., 584 F. Supp. 1425, 1430 (S.D. Ohio 1984) (noting that "[t]o require either the government or a private party to complete
more equitable rule, adopted by several courts, is that a claimant need incur only a nominal portion of the "actual cleanup" costs before the court will entertain its claim for response costs.

IV. NOTICE REQUIREMENTS APPLICABLE TO PRIVATE COST RECOVERY ACTIONS

Courts also disagree with respect to whether the notice provision contained in section 9612 of CERCLA applies to private cost recovery actions. Section 9612(a) provides:

All claims which may be asserted against the Fund pursuant to section 9611 of this title shall be presented in the first instance to the [responsible parties]. In any case where the claim has not been satisfied within sixty days of presentation in accordance with this subsection, the claimant may elect to commence an action in court against such [responsible parties] or to present the claim to the Fund for payment.

Several courts have held that section 9612(a) applies to cost recovery actions under section 9607(a) and therefore have imposed a sixty day notice requirement on plaintiffs bringing suit. The only court that has explained its holding argued that to not read the two sections together would be inefficient and costly because it would permit one party to act unilaterally when a joint effort might have been possible if the parties had attempted to settle their differences before undertaking a cleanup. This argument is unpersuasive, however, because requiring notice does not prevent unilateral action or ensure joint

cleanup prior to filing suit would defeat the dual purposes of CERCLA to promote rapid response to hazardous situations and to place the financial burden on the responsible parties.

78. See, e.g., Jones v. Inmont Corp., 584 F. Supp. 1425, 1430 (S.D. Ohio 1984) (complaint sufficient because it "allege[d] that they [had] already incurred some portion of the response costs necessary to clean up the site"); United States v. A & F Materials Co., 578 F. Supp. 1249, 1259 (S.D. Ill. 1984) (rejecting argument that entire cleanup must be completed before costs are recoverable, court stated that "§ 9607 only requires that some costs be incurred before an action can be maintained"); United States v. Price, 577 F. Supp. 1103, 1110 (D.N.J. 1983) ("§ 9607 was intended to cover only those instances where the [plaintiff] had already begun the clean-up process and was seeking reimbursement"); State ex rel. Brown v. Georgeoff, 562 F. Supp. 1300, 1316 (N.D. Ohio 1983) (claim allowed where state had already incurred response costs of $825,000, even though cleanup was only 10% complete).


cleanup efforts. The notice requirement governs when claims can be made, not when cleanups can be undertaken. Even with a notice requirement, a party could clean up the entire site before bringing suit.

Those courts that require notice disagree concerning the information that the notice must contain. One court has held that the notice of claim must be a demand for a "sum certain," which it defined as "a clear statement of the past and future costs of the response activity broken down into general categories." Another court has taken a more pragmatic approach, allowing "substantial compliance" with the sum certain requirement on the grounds that it would be unreasonable to expect a plaintiff to claim a definite sum of money given the unclear and possibly undiscoverable extent of the damages. This court concluded that the purpose of the demand letter was to put the defendant on notice of a potential claim and not to give a clear indication of the potential cleanup costs.

Other courts have rejected the notice requirement altogether, holding instead that section 9607(a) is independent of section 9612(a). This approach best effectuates the policies underlying the Act. The express language of section 9612(a) is limited to "claims which may be asserted against the Fund pursuant to section 9611." In most private cost recovery actions, plaintiffs will not have claims that may be asserted against the Fund, either because they are responsible parties or because they failed to obtain government preauthorization of the cleanup. Moreover, the express language of section 9607(a) imposes liability on responsible parties "notwithstanding any other provision or rule of law," which suggests the section

82. CERCLA defines "claim" as "a demand in writing for a sum certain." 42 U.S.C. § 9601(4).
85. Id.
88. See supra note 19.
89. See supra note 20.
90. 42 U.S.C. § 9607(a).
was meant to stand by itself. Furthermore, the policy underlying the notification requirement does not apply when the claim is being made against a responsible party rather than against the Fund. Notification was intended to conserve the limited assets of the Superfund by encouraging the responsible party to pay for the cleanup before a plaintiff makes a claim against the Fund. In this respect, the CERCLA notification requirement is different from the notice provisions of other environmental statutes such as the Clean Water Act or the Clean Air Act, which reflect a preference for initial administrative rather than private action. To effectuate the policies underlying CERCLA, therefore, the notice provision in section 9612 should not be applied to private cost recovery actions under section 9607.

CONCLUSION

As more privately-funded cleanups are conducted, private cost recovery litigation becomes increasingly significant. This Note suggests a resolution of the four major areas of disagreement among the courts concerning the manner and procedures by which such actions should proceed. Courts should require prior government approval of private cleanup plans whenever feasible, but should except from prior approval good faith, voluntary cleanups in cases in which the party initiating cleanup was unaware that prior approval was required. Preliminary costs, such as those incurred while investigating the scope of the hazardous waste problem or preparing a cleanup plan, initially should be deemed insufficient to support a claim but should be recoverable once the actual cleanup has begun. Given that complete private cleanups may be very expensive, courts should also permit claims to go forward once nominal amounts have been spent in actually cleaning up the site. Finally, the notice provisions that apply to a party making a claim


against the Fund should not apply to a party seeking recovery from other responsible parties. Adoption of these suggestions will enable the privately funded cleanup to be used as a valuable complement to government response actions and will assist in remedying the serious hazardous waste problem in the United States.

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