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THE PRIVATE PLAINTIFF'S PRIMA FACIE CASE UNDER CERCLA SECTION 107

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I. INTRODUCTION

Courts today generally recognize that, in addition to the United States government, a private plaintiff has a cause of action under section 107 of the Comprehensive Environmental Response, Compensation

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tion and Liability Act of 1980 (CERCLA).¹ In order to recover under this right of action, the private plaintiff must demonstrate the existence of five essential elements establishing a prima facie case under section 107 of CERCLA. The plaintiff must prove that: (1) defendants fall into one of the categories of "persons" defined by the statute as potentially liable; (2) plaintiffs have incurred "response costs"; (3) the matter sought to be contained is a "hazardous substance"; (4) the site has endured a "release" or is threatened by a release; and (5) the site fits the statutory definition of a "facility."² These elements remained substantially unchanged even after the Act was amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA).³

While this Article concentrates primarily on the rights of private litigants under CERCLA section 107, many of the cases discussed involve the government as a party plaintiff. Nonetheless, the elements of the prima facie case are substantially the same.⁴

1. Decisions recognizing a private cause of action under CERCLA section 107 include: *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1152 (9th Cir. 1989); *Walls v. Waste Resource Co.*, 761 F.2d 311 (6th Cir. 1985); *Kalik v. Allis-Chalmers Corp.*, 658 F. Supp. 631 (W.D. Pa. 1987); *Artesian Water Co. v. New Castle County*, 605 F. Supp. 1348 (D. Del. 1985), *aff'd*, 851 F.2d 643 (3d Cir. 1988); *Jones v. Inmont Corp.*, 584 F. Supp. 1425 (S.D. Ohio 1984). *But see* *Roe v. Wert*, 706 F. Supp. 788 (W.D. Okla. 1989).

Section 107(a) of CERCLA states in pertinent part:

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 or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
- (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, or a hazardous substance, shall be liable for—

...

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

CERCLA § 107(a), 42 U.S.C. § 9607(a) (1982 & Supp. V 1987).

2. *Ascon Properties*, 866 F.2d at 1152-53; *United States v. Bliss*, 667 F. Supp. 1298, 1304 (E.D. Mo. 1987); *see* CERCLA § 107(a), 42 U.S.C. § 9607(a) (1982 & Supp. V 1987).

3. Pub. L. No. 99-499, 100 Stat. 1612 (codified as amended in scattered sections of 42 U.S.C. (1982 & Supp. V 1987)).

4. *But see* *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823, 850 (W.D. Mo. 1984) (nongovernmental entities must show response costs were con-

II. WHO MAY BE LIABLE?

In one of the earliest South Carolina cases construing CERCLA, Judge Charles E. Simons, Jr. addressed the purposes and intent of Congress in enacting this broad-ranging statute:

As with the Black Lung Act, Congress intended through CERCLA to create a broad remedial statute which allocates to those persons responsible for creating dangerous conditions, and who profited from such activities, the true costs of their enterprises. An overriding objective in enacting CERCLA [was] to spread the economic costs of cleanup operations among "those responsible for any damage, environmental harm, or injury [resulting from] chemical poisons"⁵

Following Judge Simons' premise that Congress's intent in enacting CERCLA was to make those who created and profited from hazardous sites responsible for cleanup, the logical starting point for analyzing the plaintiff's prima facie case becomes: Who or what entities are covered by the statute? The statute itself provides the initial answer, listing as potentially liable: (1) The owner or operator of the site; (2) any person who owned or operated the site at the time hazardous substances were disposed of there; (3) any person who arranged to have his or her own waste taken to the site for disposal or treatment; and (4) any person who transported waste for disposal or treatment to a site he or she selected.⁶ These four statutory categories of potential defendants may be loosely labeled (1) owners and operators, (2) prior owners and operators, (3) generators, and (4) transporters.

A. Owner/Operator and Prior Owner/Operator Liability

The first two of the four categories above, the current owner/operator and prior owner/operator categories, have received the most intense case-law scrutiny. For example, in *United States v. Carolawn Co.*,⁷ a seminal South Carolina case interpreting CERCLA, the plaintiff sought to hold Columbia Organic Chemical Company (COCC) liable as an "owner," even though it only held title to the site at issue for ap-

sistent with National Contingency Plan; burden shifts to defendants if government is plaintiff), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

5. *United States v. South Carolina Recycling and Disposal, Inc.*, 653 F. Supp. 984, 998 (D.S.C. 1984) (*SCRDI (I)*) (quoting S. REP. NO. 96-848, 96th Cong., 2d Sess. 12 (1980)), *aff'd in part, vacated in part sub nom. United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 3156 (1989).

6. See CERCLA § 107(a)(1)-(4), 42 U.S.C. § 9607(a)(1)-(4) (1982 & Supp. V 1987).

7. 14 Env'tl. L. Rep. (Env'tl. L. Inst.) 20698 (D.S.C. June 15, 1984).

proximately one hour before passing title to three other individual defendants. The court denied COCC's motion for summary judgment, holding open the possibility of COCC's liability, but not as much for its one hour possession of title as for the fact that the plaintiff offered evidence that COCC retained some indicia of legal or equitable interest in the property after transfer of the actual title. According to Judge G. Ross Anderson, defendants may be liable as "owners" even though they lack possession of actual title *if* they retain a legal or equitable interest in the site after transfer.⁸

Likewise, Judge Simons, in a second order involving *United States v. South Carolina Recycling and Disposal, Inc. (SCRDI (II))*,⁹ looked beyond mere possession of the title to define ownership:

Apart and distinct from its participation in the operation of the Bluff Road site, COCC [the same defendant considered by Judge Anderson in *United States v. Carolawn*], as lessee of the site, maintained control over and responsibility for the use of the property and, essentially, stood in the shoes of the property owners. As evidenced by the definitional provisions of CERCLA, site control is an important consideration in determining who qualifies as a "owner" under Section 107(a).¹⁰

Accordingly, a lessee who exerts a significant amount of site control may be liable as an "owner." A *lessor*, however, may be liable as well. In *SCRDI (II)*, for example, the court indicated that the defendant COCC could be liable both as a lessee with respect to certain portions of the site and as a lessor with respect to others.¹¹ "Control" over a site which results from a state agency's regulatory administration of the site, however, will not give rise to owner or operator liability.¹²

Current owners, even if they have in no way participated in the contamination of the site, nonetheless are strictly liable. The Fifth Circuit in *Tanglewood East Homeowners v. Charles-Thomas, Inc.*¹³ reached this conclusion based in part on the relationship of section 107(a)(1) and (a)(2). The court reasoned that if subsection (a)(2) ap-

8. *Id.* at 20698-99. In a separate order grouped together with *United States v. Carolawn Co.*, Judge Anderson made it clear that owner liability is separate and distinct from operator liability. *See id.* at 20699, 20700.

9. 14 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 20895 (D.S.C. Aug. 28, 1984).

10. *Id.* at 20897 (citation omitted) (addressing status of same defendant as that considered by Judge Anderson in *Carolawn*).

11. *Id.*; accord *United States v. Argent Corp.*, 14 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 20616, 20616 (D.N.M. May 4, 1984); *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823, 845 n.26 (W.D. Mo. 1984) (*dicta*) (lessor liability), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

12. *United States v. Dart Indus.*, 847 F.2d 144, 145-46 (4th Cir. 1988).

13. 849 F.2d 1568, 1572 (5th Cir. 1988).

plies to past owners and operators guilty of contamination, then (a)(1) necessarily applies to current owners of "adulterated sites"—regardless of the current owners' involvement in creating the contamination.¹⁴ Moreover, under the language of section 107, there appears no reason for exempting prior owners who owned at the time contamination occurred regardless of whether that owner actually participated in the contamination process.¹⁵ Along these lines, courts also have rejected the notion that liability may be imposed only upon those persons who *both own and operate* polluted property, holding instead that either owner or operator status gives rise to liability.¹⁶

1. Special Cases

Several specific classes of defendants have been discussed in the case law as courts have grappled with the question of whether a particular defendant is an owner or an operator. For example, a joint venturer, according to the court in *SCRDI (II)*, may be considered an "operator" of a site that is in fact operated by the co-venturer.¹⁷ Another court has held that owner liability may be extended to the parent corporation of a manufacturing subsidiary corporation which actually held title to the polluted site, to the manufacturing subsidiary's sister subsidiary that owned a portion of the site land, and to shareholders of the parent corporation.¹⁸ Still another court has held that the wholly-owned subsidiary of the owner of a site may be a proper defendant under section 107.¹⁹

Absent an ownership relationship, however, a defendant may avoid

14. *Id.* at 1572.

15. See CERCLA § 107(a), 42 U.S.C. § 9607(a) (1982 & Supp. V 1987). This section reads: "Notwithstanding any other provision or rule of law . . . (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 . . . shall be liable . . ." CERCLA § 107(a), 42 U.S.C. § 9607(a); see also *New York v. Shore Realty*, 759 F.2d 1032 (2d Cir. 1985).

16. See *Tanglewood E. Homeowners*, 849 F.2d at 1573; *Artesian Water Co. v. New Castle County*, 659 F. Supp. 1269, 1280-81 (D. Del. 1987), *aff'd*, 857 F.2d 643 (3d Cir. 1988); *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823 (W.D. Mo. 1984), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

17. *United States v. South Carolina Recycling & Disposal, Inc.*, 14 Env'tl. L. Rep. (Env'tl. L. Inst.) 20895, 20898 (D.S.C. Aug. 28, 1984) (*SCRDI (II)*).

18. *Vermont v. Staco, Inc.*, 684 F. Supp. 822 (D. Vt. 1988). *Contra Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80 (5th Cir. 1990) (a parent corporation cannot be held liable for its subsidiary's CERCLA violations absent circumstances warranting a piercing of the corporate veil). For a detailed discussion of individual responsibility and piercing the corporate veil, see *infra* notes 28-32 and accompanying text.

19. *FMC Corp. v. Northern Pump Co.*, 668 F. Supp. 1285 (D. Minn. 1987).

liability even if intimately involved in the corporation. For example, one court has held that owner or operator liability does not accrue merely because the defendant designed and built a facility, even when the defendant trained the personnel for the facility on behalf of the owner and had a right to inspect ongoing operations.²⁰

In addition to corporate-related defendants, states also may be subject to liability. The Supreme Court recently has decided that states, despite the eleventh amendment, may be "persons" and liable to private plaintiffs under section 107.²¹ This case implicitly supports a 1985 decision from the United States District Court for the District of Delaware, *Artesian Water Co. v. New Castle County*,²² which held that a political subdivision of a state may be liable as an owner despite a state statute purporting to shield it.²³ The Supreme Court's decision in *Union Gas* makes unlikely a successful challenge to *Artesian Well* on constitutional grounds.

Lenders comprise another special category of defendants. The definition of "owner or operator" contained in CERCLA expressly excludes a person who "without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility."²⁴ This statutory language appears plainly designed to protect mortgage lenders.²⁵ In *United States v. Maryland Bank & Trust*,²⁶ however, the federal district court in Maryland held that when the mortgage lender forecloses on its security interest and actually purchases the land at the foreclosure sale, the lender exposes itself to liability for response costs like any other owner.²⁷

20. *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 685 F. Supp. 651, 656 (N.D. Ill.), *aff'd*, 861 F.2d 155 (7th Cir. 1988).

21. *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273 (1989). The Fourth Circuit expressly avoided the question of states' eleventh amendment immunity from a CERCLA suit in *United States v. Dart Industries*, 847 F.2d 144, 145 (4th Cir. 1988). The court in *Dart Industries*, however, did hold that the mere exercise of a state's regulatory function will not create owner or operator liability. *Id.* at 145.

22. 605 F. Supp. 1348 (D. Del. 1985), *aff'd*, 851 F.2d 643 (3d Cir. 1988).

23. *Id.* at 1354-55 (state statute preempted by CERCLA).

24. CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A) (Supp. V 1987).

25. This protection is particularly needed in those 13 states in which the mortgagee or financial institution actually holds title to the property while the mortgage is in force. *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 579 (D. Md. 1986).

26. 632 F. Supp. 573, 579 (D. Md. 1986).

27. *Id.* But see *United States v. Mirabile*, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20992, 20996 (E.D. Pa. Sept. 4, 1985).

2. Individual Liability

Several courts have held that corporate officers who actively participate in the management of a hazardous waste facility may be personally liable for cleanup costs, notwithstanding the corporate shield.²⁸ Judge Anderson's opinion in *United States v. Carolawn Co.*,²⁹ indicates that personal liability under section 107 is grounded in the tortious nature of the conduct which CERCLA is designed to prevent.³⁰ Accordingly, a degree of personal participation in the tort will likely be necessary in order for liability to accrue.³¹ As stated in *Carolawn Co.*:

[T]o the extent that an individual has control or authority over the activities of a facility from which hazardous substances are released or participates in the management of such a facility, he may be held liable for response costs incurred at the facility notwithstanding the corporate character of the business.³²

B. Generator Liability

The third category of "persons" potentially liable under section 107(a)(3) has been labeled the "generator" category.³³ Liability in this area accrues for any entity that arranges for the disposal or treatment of its own hazardous substances at a facility owned by another.³⁴ Judge Simons noted in *SCRDI (II)* that the plaintiff's burden of proof under section 107(a)(3) is essentially two-fold.³⁵ First, the plaintiff must es-

28. See *United States v. Carolawn Co.*, 14 Env'tl. L. Rep. (Env'tl. L. Inst.) 20699, 20700 (D.S.C. June 15, 1984); *United States v. Mottolo*, 629 F. Supp. 56, 60 (D.N.H. 1984); *United States v. Wade*, 577 F. Supp. 1326, 1341 (E.D. Pa. 1983).

29. 14 Env'tl. L. Rep. (Env'tl. L. Inst.) 20699 (D.S.C. June 15, 1984).

30. See *id.* at 20700. The *Mottolo* Court similarly assessed the nature of personal liability:

Corporate officers, however, may be individually liable for the torts of a corporation where they participate in a tortious activity. . . . It is the general rule that an officer of a corporation is liable for torts in which he personally participated, whether or not he was acting within the scope of his authority, and that such direct personal involvement by the officer is causally related to the alleged injury.

Mottolo, 629 F. Supp. at 59-60.

31. *Id.*; *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823, 846-50 (W.D. Mo. 1984), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

32. *Carolawn Co.*, 14 Env'tl. L. Rep. at 20700.

33. See CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3) (1982 & Supp. V 1987).

34. *Id.*

35. *United States v. South Carolina Recycling & Disposal, Inc.*, 14 Env'tl. L. Rep. (Env'tl. L. Inst.) 20895, 20898 (D.S.C. Aug. 28, 1984) (*SCRDI (II)*).

establish "that a person arranged for disposal or treatment of hazardous substances at a facility owned or operated by another" ³⁶ Second, the plaintiff must establish that "the facility in question contained that generator's substances or substances of the same type as that generator's." ³⁷

The plaintiff is not required to trace or "fingerprint" the origin of a particular chemical found at the site to a particular defendant. The plaintiff need only show, for example, that the defendant arranged for the disposal of its hazardous chemical "X" at a certain facility and that chemical "X" in fact later was found at that facility. The plaintiff need not show that the precise drum containing chemical "X" found at the facility was the same drum which left a particular defendant's factory gates.

Furthermore, mere proof that drums of the defendant's waste were disposed of at a certain facility (at the defendant's direction) may be sufficient to impose generator liability, whether or not the plaintiff undertakes extensive sampling and chemical analyses in order to match or "fingerprint" the defendant's waste to types at a particular site. ³⁸ As the court in *SCRDI (I)* stated:

Less resource exhaustive means [than chemical analysis] of showing that a generator's waste or similar wastes are at a site, such as by identification of a generator's drum at the site during cleanup or by way of documentary or circumstantial proof that the wastes were hauled to the site absent proof that they were subsequently taken away, should also be sufficient to satisfy this element of proof. ³⁹

Finally, the plaintiff is not even required to show that the defendant's actual wastes are at the site; the plaintiff need only prove that wastes *like* the defendant's were found there. ⁴⁰

The Fifth Circuit in *Tanglewood East Homeowners v. Charles-Thomas, Inc.* ⁴¹ has indicated that liability for "arranging" for the disposal of a hazardous substance under section 107(a)(3) may accrue even though the "arranger" did not actually participate in the process which created the waste and so, strictly speaking, was not a generator. ⁴² The defendants in *Tanglewood* were developers of a residential

36. *Id.*

37. *Id.*

38. *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 993 n.6 (D.S.C. 1984) (*SCRDI (I)*), *aff'd in part, vacated in part sub nom.* *United States v. Monsanto*, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 3156 (1989).

39. *Id.* at 993.

40. See CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3) (1982 & Supp. V 1987).

41. 849 F.2d 1568 (5th Cir. 1988).

42. *Id.* at 1573.

subdivision who purchased land which was later found to contain "creosote pools" of highly toxic waste. These "pools" had been generated by a previous owner's wood treatment facility. After purchasing the property, the defendant developers filled in and graded the creosote pools and began development. The court held that filling and grading the creosote pools could constitute "treatment" and, accordingly, that the developers and their lenders could be liable as arrangers or transporters under section 107(a)(3).⁴³

In *United States v. Mottolo*⁴⁴ the federal district court in New Hampshire held that lack of ownership of the hazardous substances themselves will not forestall liability under section 107(a)(3).⁴⁵ The court pointed out that "[t]he provision [section 107(a)(3)] clearly states that the person who arranges for disposal or transport of disposal of hazardous substances need not own or possess the waste."⁴⁶

Like the defendant in *Tanglewood*, the *Mottolo* defendant did not actually generate the waste, but merely arranged to dispose of waste generated by another. Thus, while courts typically speak of section 107(a)(3) as creating "generator" liability, it might be clearer to state that this section creates two forms: (1) generator and (2) "arranger" liability.

Furthermore, liability may accrue even when the defendant actually sells his waste to the highest bidder who then carries it to a disposal site.⁴⁷ For example, in *New York v. General Electric Co.*,⁴⁸ the defendant, General Electric, disposed of between four and five hundred fifty-five-gallon drums of used transformer oil by sale to a drag strip. The drag strip used the transformer oil for dust control. The district court held that General Electric could be liable for cleanup costs under section 107(a)(3), despite the company's contention that it simply sold the oil outright to the drag strip "in the ordinary course of commerce to be used as the drag strip owners saw fit."⁴⁹ The court reasoned that "the legislative history of CERCLA makes clear that 'persons cannot escape liability by "contracting away" their responsibility or by alleging that the incident was caused by the act or omission of a third

43. *Id.*

44. 629 F. Supp. 56 (D.N.H. 1984).

45. *Id.* at 60.

46. *Id.* at 60.

47. See *United States v. A & F Materials Co.*, 582 F. Supp. 842, 845 (S.D. Ill. 1984). But see *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 685 F. Supp. 651 (N.D. Ill. 1988) (seller of substances for use by defendant-owner not liable for contribution absent disposal as motivation for sale).

48. 592 F. Supp. 291 (N.D.N.Y. 1984).

49. *Id.* at 297.

party.'"⁵⁰

Somewhat at odds with the *General Electric* decision is *Edward Hines Lumber Co. v. Vulcan Materials Co.*⁵¹ The *Hines* court focused on the requirement in section 107(a)(3) that the defendant arrange for disposal or treatment of a substance. If the defendant sells a product outright, then inquiry must be had into the defendant's motivation for the transaction before it can be held liable for arranging disposal.⁵² If the defendant's motivation is the disposal of its own wastes, then the defendant may be liable. If, however, the defendant sold the substance for the use of the buyer, even if the buyer's manufacturing processes ultimately create waste that contains the defendant's hazardous substances, the defendant is not liable. Accordingly, the court in *Hines* held that defendants who supplied creosote and chromated copper arsenate to a manufacturing site where it was used to treat wood could not be liable for its disposal.⁵³ The court reached this conclusion without concern as to whether the defendants knew that these hazardous substances would be actually disposed of at the manufacturing site.⁵⁴

C. Transporter Liability

The language of section 107(a)(4) regarding transporter liability is largely self-explanatory. To establish transporter liability, the plaintiff must prove that a defendant "accepted hazardous substances for transport to a disposal or treatment facility selected by that [defendant]."⁵⁵

50. *Id.* (quoting S. REP. NO. 96-848, 96th Cong., 2d Sess. 31 (1980)).

51. 685 F. Supp. 651 (N.D. Ill. 1988).

52. *Id.* at 654-56. "The crucial inquiry for identifying responsible parties under § 9607(a)(3) is the reason for the transaction in the hazardous substance." *Id.* at 655 n.3.

53. *Id.* at 656.

54. *Id.*

55. *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 934, 1005 (D.S.C. 1985) (*SCRDI (I)*), *aff'd in part, vacated in part sub nom. United States v. Moneanto Co.*, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 3156 (1989); *see also* CERCLA § 101(20), 42 U.S.C. § 9601(20) (Supp. V 1987). Section 101(20) provides in part:

(B) In the case of a hazardous substance which has been accepted for transportation by a common or contract carrier and except as provided in section 9607(a)(3) or (4) of this title, (i) the term 'owner or operator' shall mean such common carrier or other bona fide for hire carrier acting as an independent contractor during such transportation, (ii) the shipper of such hazardous substance shall not be considered to have caused or contributed to any release during such transportation which resulted solely from circumstances or conditions beyond his control.

(C) In the case of a hazardous substance which has been delivered by a common or contract carrier to a disposal or treatment facility and except as provided in section 9607(a)(3) or (4) of this title, (i) the term 'owner or operator'

As in the case of parties who arrange under section 107(a)(3) for the disposal of a hazardous substance, the parties may be liable for transporting these substances whether or not they own or possess the waste.⁵⁶

III. THE LIABILITY-TRIGGERING EVENT

A. Release or Threatened Release

Having considered the question of who may be liable under CERCLA section 107, the focus now turns to what event triggers liability. This event is the "release, or a threatened release . . . of a hazardous substance."⁵⁷

What constitutes a release is defined in some detail by statute.⁵⁸ Judicial analysis of this question, therefore, has been mostly straightforward. For example, the Second Circuit held in *New York v. Shore Realty Corp.*⁵⁹ that "leaking tanks and pipelines," "continuing leaching and seepage," and "leaking drums" of hazardous materials, all constituted releases.⁶⁰ More than the mere act of disposal is required to constitute a release.⁶¹ Rather, there must be some evidence that the waste has affected or come into contact with the environment.⁶² When a contaminant is found near a disposal site, one may conclude that a release

shall not include such common or contract carrier, and (ii) such common or contract carrier shall not be considered to have caused or contributed to any release at such disposal or treatment facility resulting from circumstances or conditions beyond its control.

CERCLA § 101(20)(B)-(C), 42 U.S.C. § 9601(20)(B)-(C) (Supp. V 1987).

56. *United States v. Mottolo*, 629 F. Supp. 56, 60 (D.N.H. 1984).

57. CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4) (1982 & Supp. V 1987).

58. See CERCLA § 101(22), 42 U.S.C. § 9601(22) (Supp. V 1987). This section provides:

The term "release" means any 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), but excludes (A) any release which results in exposure to persons solely within a workplace, with respect to a claim which such persons may assert against the employer of such persons, (B) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine, (C) release of source, byproduct, or special nuclear material from a nuclear incident . . . [.] and (D) the normal application of fertilizer.

Id.

59. 759 F.2d 1032 (2d Cir. 1985).

60. *Id.* at 1045.

61. See *United States v. Wade*, 577 F. Supp. 1326, 1333-34 (E.D. Pa. 1984).

62. See *id.*

has occurred even though no proof exists that the particular contaminant actually flowed from the site.⁶³ In addition, the Ninth Circuit has held that a plaintiff need not allege the particular manner in which a release (or threatened release) occurred in order to make out a prima facie case.⁶⁴

What constitutes a "threatened release" is more problematical. Judge Simons, in *SCRDI (I)*, concluded that there were both releases and threatened releases of hazardous substances when drums of waste had "deteriorated to the point that their hazardous contents were leaking and oozing onto the ground and onto other drums."⁶⁵ In *Shore Realty* the Second Circuit stated that "corroding and deteriorating tanks, [the defendant's] lack of expertise in handling hazardous waste, and even the failure to license the facility, amount to a threat of release."⁶⁶ This language indicates that the harm from a threatened release need not be imminent or emergent, even when an actual release is nowhere on the immediate horizon.

B. "Hazardous Substance"

1. The Definition

To trigger liability under CERCLA, the release or threatened release must involve a "hazardous substance." CERCLA defines "hazardous substance" in section 101(14)⁶⁷ primarily by reference to designations made in other environmental statutes, such as the Solid Waste Disposal Act⁶⁸ and the Clean Air Act.⁶⁹ The definition is noteworthy

63. *Id.* at 1334.

64. See *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1153 (9th Cir. 1989).

65. *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 990 (D.S.C. 1985) (*SCRDI (I)*), *aff'd in part, vacated in part sub nom. United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 3156 (1989).

66. *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1045 (2d Cir. 1985).

67. CERCLA § 101(14), 42 U.S.C. § 9601(14) (Supp. V 1987).

68. See 42 U.S.C. § 6921 (Supp. V 1987).

69. See 42 U.S.C. § 7412 (Supp. V 1987). CERCLA defines "hazardous substance" as follows:

"[H]azardous substance" means (A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act (but not including any waste the regulation of which under the Solid Waste Disposal Act has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act, and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606

for its exclusions, which include petroleum, natural gas and its derivatives.⁷⁰

Section 101(14) excepts from this definition of hazardous substances, in subsection (C), any waste "the regulation of which under the Solid Waste Disposal Act has been suspended by Act of Congress."⁷¹ In *Eagle-Picher Industries v. EPA*,⁷² the defendants attempted to avail themselves of this exception by contending that mining wastes or fly ash, substances suspended from regulation under the Solid Waste Disposal Act, could not be "hazardous substances" within the meaning of CERCLA. The court rejected this contention, after noting its "superficial appeal."⁷³ The court held that a substance is hazardous under CERCLA if it qualifies under *any* of the several subparagraphs of section 101(14).⁷⁴ Thus, while mining waste and fly ash might qualify under the exception in subparagraph (C), if they qualify under any of the other subparagraphs (A) - (F), then, as was the case in *Eagle-Picher*, they will be considered "hazardous substances."⁷⁵

Of the six listed categories of hazardous substances in the statutory definition in section 101(14), at least one court has stated that a substance need be toxic under only one category in order to constitute a "hazardous substance."⁷⁶ In addition, the waste itself need not be present on the statutory list as long as its constituent elements are pre-

of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquified natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

CERCLA § 101(14), 42 U.S.C. § 9601(14) (Supp. V 1987) (citations omitted).

70. See *id.*

71. CERCLA § 101(14)(c), 42 U.S.C. § 9601(c) (Supp. V 1987) (citation omitted).

72. 759 F.2d 922 (D.C. Cir. 1985).

73. *Id.* at 927.

74. *Id.*, accord *United States v. Metate Asbestos Corp.*, 584 F. Supp. 1143, 1146-47 (D. Ariz. 1984) (asbestos mining waste is hazardous substance despite Congress's suspension of regulation of solid waste from extraction and processing of ores and minerals under Solid Waste Disposal Act); *United States v. Union Gas Co.*, 586 F. Supp. 1522 (E.D. Pa. 1984) (coal tar constituents are hazardous substances despite Congress's suspension of regulation of these as solid wastes under Solid Waste Disposal Act), *aff'd*, 792 F.2d 372 (3d Cir. 1986), *vacated and remanded on other grounds*, 479 U.S. 1025 (1987).

75. *Eagle-Picher*, 759 F.2d at 930. The court in *Eagle-Picher* also echoed the sentiment of Judge G. Ross Anderson in his *Carolawn*, opinion by further stating that material will be classified as a "hazardous substance" even if the particular waste is not specifically listed under one or more of the subparagraphs in § 101(14) if the material's constituent elements fall within one of these subparagraphs of § 101(14). *Id.* at 931-32.

76. *United States v. Carolawn Co.*, 14 Env'tl. L. Rep. (Env'tl. L. Inst.) 20696, 20697 (D.S.C. June 15, 1984).

sent.⁷⁷ In *United States v. Carolawn Co.*⁷⁸ the defendant generated "water-based paint waste," which it admitted contained trace amounts of hazardous substances. Defendant argued, however, that because the waterbased paint waste was not specifically listed as a hazardous substance under the statutory definition in section 101(14), it was not a hazardous substance—despite the presence in its waste of constituent elements that did appear on the statutory list.⁷⁹ The court rejected the defendant's argument and stated that "whether a material is hazardous under CERCLA depends on the character of its constituents. If a waste material contains hazardous substances, then the waste material is itself a hazardous substance for purposes of CERCLA. To distinguish a waste solution or mixture from its hazardous constituents defies reason."⁸⁰

2. Trace Amounts

The defendant in *Carolawn* further argued that trace amounts of hazardous substances contained in its water-based paint waste were not sufficiently concentrated to impose liability. The court answered that the presence of even trace amounts of hazardous substances was sufficient to impose liability.⁸¹ The Fourth Circuit echoed this theme regarding trace amounts in *United States v. Monsanto Co.*,⁸² in which the court held that, in order to maintain an affirmative defense under section 107(b)(3),⁸³ a defendant must show that "all" of its waste had been removed from a site prior to the release of hazardous substances there.⁸⁴ The federal district court in Pennsylvania also has rejected a defendant's contention that a hazardous substance must be found in "reportable quantities" for liability to accrue.⁸⁵ The net effect of these holdings is unclear. Taken to their logical extreme and assuming the existence of sensitive enough machinery for detecting trace chemicals, these holdings suggest that a defendant responsible for disposing of one copper penny in a landfill could be held liable for the cost of cleaning up the entire site. Such a remarkable result probably would not be countenanced, but thus far the courts have been reluctant to draw a line that would clearly preclude such an outcome.

77. *Id.*

78. 14 Env'tl. L. Rep. (Env'tl. L. Inst.) 20696 (D.S.C. June 15, 1984).

79. *Id.* at 20697.

80. *Id.*

81. *Id.*

82. 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 3156 (1989).

83. CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3) (Supp. V 1987).

84. *Monsanto*, 858 F.2d at 170-71.

85. See *United States v. Wade*, 577 F. Supp. 1326, 1339-40 (E.D. Pa. 1983).

IV. WHAT IS A FACILITY?

Having analyzed *who* may be liable under CERCLA section 107, as well as *what* event triggers liability, the focus now turns to the third element in the plaintiff's prima facie case: Where must waste be located in order for liability to accrue? The simple answer is that waste must be located at a "facility."⁸⁶ CERCLA section 101(9) defines "facility" broadly to include considerably more than a simple landfill. For example, a facility may be a "pipe or pipeline, . . . motor vehicle, rolling stock, or aircraft. . . ."⁸⁷ Courts have held the following to be facilities: a residential subdivision;⁸⁸ a race track or "drag strip";⁸⁹ a residential trailer park;⁹⁰ and a dump site whose boundaries were not necessarily co-extensive with the owner's property lines.⁹¹ The court in *United States v. Stringfellow*,⁹² considering defendant's contention that a factual dispute existed as to the boundaries of the waste site, stated that "nothing in the statute or case law supports defendants' claim that a 'facility' must be defined by or be co-extensive with an owner's property lines."⁹³ The court in *United States v. Metate Asbestos Corp.*⁹⁴ pointed out that, under the express terms of CERCLA sec-

86. CERCLA § 107(a)(1)-(4), 42 U.S.C. § 9607(a)(1)-(4) (Supp. V 1987). Prior to the Superfund Amendments and Reauthorization Act of 1986 (SARA), section 107(a)(1) imposed liability on owners and operators of "a vessel" as well as a "facility." 42 U.S.C. § 9607(a)(1) (1982) (current version at 42 U.S.C. § 9607(a)(1) (Supp. V 1987)). Liability provisions 107(a)(2), (3) and (4), however, limited liability to disposal of wastes at "facilities." 42 U.S.C. § 9607(a)(2)-(4) (1982) (current version at 42 U.S.C. § 9607(a)(2)-(4) (Supp. V 1987)). The SARA amendments added liability under sections 107(3) and (4) for disposal or treatment of waste at an "incineration vessel." See 42 U.S.C. § 9607(a)(3)-(4) (Supp. V 1987). CERCLA defines "vessel" as "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." CERCLA § 101(28), 42 U.S.C. § 9601(28) (Supp. V 1987).

87. CERCLA § 101(9), 42 U.S.C. § 9601(9) (Supp. V 1987). The statute reads: The term 'facility' means (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

Id.

88. *Tanglewood E. Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1573 (5th Cir. 1988).

89. *New York v. General Elec. Co.*, 592 F. Supp. 291, 297 (N.D.N.Y. 1984).

90. *United States v. Metate Asbestos Corp.*, 584 F. Supp. 1143, 1148 (D. Ariz. 1984).

91. *United States v. Stringfellow*, 661 F. Supp. 1053, 1059 (C.D. Cal. 1987).

92. 661 F. Supp. 1053 (C.D. Cal. 1987).

93. *Id.* at 1059.

94. 584 F. Supp. 1143 (D. Ariz. 1984).

tion 101(9)(B), a facility is simply an area at which a "hazardous substance" has been placed or "has otherwise come to be located."⁹⁵ Section 101(9) states: "The term 'facility' means . . . any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located"⁹⁶ Accordingly, the plaintiff who proves the existence of a hazardous substance nearly always will be able to show that the location at which that substance is found *a fortiori* constitutes a facility. The "facility" element of the plaintiff's prima facie case thus may be a phantom hurdle when plaintiff has already succeeded in proving a "hazardous substance."

V. RESPONSE COSTS

Having analyzed the who, what, and where of the plaintiff's prima facie case, the final element must now be addressed: What damages may be recovered? CERCLA section 107(a)(4)(B)⁹⁷ limits a private plaintiff's recovery to its "necessary costs of response incurred . . . consistent with the national contingency plan."⁹⁸ Although the subject of what costs may be "consistent with the national contingency plan" has been the source of considerable litigation, courts are divided on the issue of whether proving "consistency" is a part of the plaintiff's prima facie case.⁹⁹ Discussion of this question, however, is outside the scope of this Article. Instead, the focus here will concern what constitutes "response costs" under CERCLA section 107.

A clue to the meaning of "response costs" comes from CERCLA's definition of the terms "respond" and "response." CERCLA section 101(25) states: "The terms 'respond' or 'response' means [sic] remove, removal, remedy, and remedial action; all such terms (including the terms 'removal' and 'remedial action') include enforcement activities

95. *Id.* at 1148 (quoting 42 U.S.C. § 9601(9) (1982) (current version at 42 U.S.C. § 9601(9) (Supp. V 1987)).

96. CERCLA § 101(9), 42 U.S.C. § 9601(9) (Supp. V 1987).

97. CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B) (1982 & Supp. V 1987).

98. *Id.* The National Contingency Plan is codified at 40 C.F.R. §§ 300.1-.86 (1989).

99. *Compare* *Artesian Water Co. v. New Castle County*, 659 F. Supp. 1269, 1292 (D. Del. 1987) (consistency with national contingency plan is an element of plaintiff's prima facie case) *and* *Pinole Point Properties, Inc. v. Bethlehem Steel Corp.*, 596 F. Supp. 283, 290 (N.D. Cal. 1984) ("party seeking to recover its costs must bear the burden of pleading and proving consistency with the National Contingency Plan [and] . . . the question of consistency is a factual determination that turns on the efficacy and cost-effectiveness of cleanup action") *with* *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823, 850 (W.D. Mo. 1984) (burden of proving inconsistency with the national contingency plan is on the defendant), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

related thereto.”¹⁰⁰ In short, “response costs,” at a minimum, mean the costs of cleaning up the site.

A. Investigative Costs

A significant amount of litigation has addressed the issue of whether “response costs” include costs of investigating or monitoring a site as a prelude to or a part of actual cleanup operations. These costs generally involve determining the existence of the environmental problem, conducting tests and chemical analyses, and drilling or monitoring wells to determine the nature and extent of the problem. A majority of cases have held that these costs are recoverable.¹⁰¹ As the court in *New York v. General Electric Co.*¹⁰² noted, “removal” action is expressly defined under section 101(23) to include “‘such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances’”¹⁰³ Because of the broad remedial thrust of CERCLA, there appears to be no valid reason for distinguishing between actual cleanup costs and investigative costs. If the goal of CERCLA is the remediation of toxic sites, then evaluation and monitoring of these sites will almost always be a necessary predicate and accompaniment to that cleanup.

B. Prior Government Involvement

A second major source of litigation regarding “response costs” has focused upon whether the government must in some way become involved with a site before a CERCLA section 107 private plaintiff’s response costs may be recoverable. A majority of cases have held that no prior government involvement is necessary.¹⁰⁴ The Ninth Circuit in

100. CERCLA § 101(25), 42 U.S.C. § 9601(25) (Supp. V 1987) (footnotes omitted).

101. See, e.g., *Cadillac Fairview/California, Inc. v. Dow Chem. Co.*, 840 F.2d 691, 695 (9th Cir. 1988) (testing and security expenditures available under CERCLA section 101(23)). *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 892 (9th Cir. 1986) (testing expenses considered “cost of response”); *New York v. General Elec. Co.*, 592 F. Supp. 291, 298 (N.D.N.Y. 1984); *Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. at 850. *But see* *Bulk Dist. Centers, Inc. v. Monsanto Co.*, 589 F. Supp. 1437, 1452 (S.D. Fla. 1984) (investigatory costs only recoverable if and when actual cleanup begun); *United States v. Price*, 577 F. Supp. 1103, 1110 (D.N.J. 1983) (investigation costs only recoverable if specified in complaint and only after actual cleanup begun); *Environmental Defense Fund v. Lamphier*, 12 Env’tl. L. Rep. (Env’tl. L. Inst.) 20843, 20844 (E.D. Va. 1982), *aff’d*, 714 F.2d 331 (4th Cir. 1983).

102. 592 F. Supp. 291 (N.D.N.Y. 1984).

103. *Id.* at 298 (quoting CERCLA § 101(23), 42 U.S.C. § 9601(23) (Supp. V 1987)).

104. *Tanglewood E. Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1575 (5th Cir. 1988); *Cadillac Fairview/California, Inc.*, 840 F.2d at 694; *Wickland Oil Terminals*,

Cadillac Fairview/California, Inc. v. Dow Chemical Co.,¹⁰⁵ reversing the district court on this point, stated that "nothing in the plain language of section 107(a) . . . indicates that a party seeking to recover its costs of response must await approval of or action by a state or local governmental entity."¹⁰⁶ In contrast, CERCLA section 111(a)(2)¹⁰⁷ specifically provides that necessary costs may be recovered from Superfund only if such costs are approved under the national contingency plan and certified by the responsible federal official.¹⁰⁸ The absence of such an express provision in section 107 militates against its being engrafted onto that section by the judiciary.

In support of its decision, the *Cadillac Fairview* court noted that section 107 fails to provide any "mechanism" by which a party could seek approval from governmental entities prior to cleanup.¹⁰⁹ The court stated that "[n]either CERCLA nor the national contingency plan describes a procedure whereby a private party could coordinate its response efforts with those of a local or state government or seek the approval of state or local governmental entities before commencing a response action."¹¹⁰ The court was unwilling to place upon local government the burden of establishing some sort of approval-granting procedure.¹¹¹

Wickland Oil Terminals v. Asarco, Inc.,¹¹² a pre-*Cadillac Fairview* decision from the Ninth Circuit, also analyzed the prior government involvement question. The court in *Wickland Oil* looked to the regulations of the Environmental Protection Agency (EPA) purporting to "clarify" the obligations of a private party under section 107. It interpreted these regulations to not mandate federal approval as a prerequisite to private cost recovery.¹¹³

C. Other Damages Issues

Finally, while response costs incurred by a private party are recoverable under CERCLA section 107, it has been held that these are the

792 F.2d at 892; *Pinole Point Properties, Inc.*, 596 F. Supp. at 290. *But see Bulk Dist. Centers, Inc.*, 589 F. Supp. at 1452-54.

105. 840 F.2d 691 (9th Cir. 1988).

106. *Id.* at 694.

107. CERCLA § 111(a)(2), 42 U.S.C. § 9611(a)(2) (1982 & Supp. V 1987).

108. *Id.*

109. *Cadillac Fairview*, 840 F.2d at 695.

110. *Id.*

111. *Id.*

112. 792 F.2d 887 (9th Cir. 1986).

113. *Id.* at 892 (citing 50 Fed. Reg. 47,934 (1985) (currently codified at 40 C.F.R. § 300.71 (1989))).

only form of damages recoverable.¹¹⁴ "These costs must be part of a 'clean up' or response to a hazardous waste problem, however, and a private right of action for damages only is not available under the Act."¹¹⁵ Along these lines, the federal district court in Delaware held in *Artesian Water Co. v. New Castle County*¹¹⁶ that a water company's cost of providing alternative water supplies to its customers after discovery of groundwater contamination was not an appropriate response cost and, therefore, not recoverable under CERCLA section 107.¹¹⁷ These monies must be expended for remediation of the pollution itself.

VI. CAUSATION

Significant to any discussion on the elements of a plaintiff's section 107 prima facie case is the fact that the courts consistently have held that liability under CERCLA section 107 is strict.¹¹⁸ Accordingly, the traditional tort principle that a plaintiff must prove causation as part of his prima facie case has, at least in theory, been abrogated under section 107.¹¹⁹ The Fourth Circuit noted in *United States v. Monsanto Co.*¹²⁰ that each of the three affirmative defenses established in section 107(b) "carves out from liability an exception based on causation."¹²¹ Thus, under the congressional scheme, the burden of disproving causation falls upon the defendant.¹²²

The United States District Court for the Central District of California has indicated that when plaintiffs prove their prima facie case

114. See *Adams v. Republic Steel Corp.*, 621 F. Supp. 370, 376-77 (W.D. Tenn. 1985).

115. *Id.* at 376. In support of its holding the court quoted the following legislative history: "'A clear, uniform federal law defining a victim's cause of action [for damages arising from release of hazardous waste] is sorely needed but [this] bill does not provide one.'" *Id.* n.2 (quoting remarks by Senator Albert Gore, Jr., *Additional Views for "Superfund" Report*, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS, 6139, 6141).

116. 605 F. Supp. 1348 (D. Del. 1985), *aff'd*, 851 F.2d 643 (3d Cir. 1988).

117. *Id.* at 1361-62.

118. See, e.g., *United States v. Monsanto Co.*, 858 F.2d 160, 167 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 3156 (1989); *Tanglewood E. Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1572-73 (5th Cir. 1988) (strict liability as to current as well as prior owners); *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 799 F.2d 1312, 1316 (9th Cir. 1986); *Violet v. Picillo*, 648 F. Supp. 1283, 1290 (D.R.I. 1986), *aff'd sub nom. O'Neil v. Picillo*, 883 F.2d 176 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 1115 (1990).

119. See cases cited *supra* note 118; see also *Monsanto*, 858 F.2d at 170 n.17; *United States v. Bliss*, 667 F. Supp. 1298, 1309 (E.D. Mo. 1987) (traditional tort notions, such as proximate cause, do not apply).

120. 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 3156 (1989).

121. *Id.* at 170 (quoting *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985)).

122. *Id.*

(i.e., establish that: (1) the defendants are "persons"; (2) a release or threatened release of a hazardous substance has occurred from a facility; and (3) this release has caused the incurrence of response costs), then causation will be presumed.¹²³ The court also pointed out that "the legislative history indicates that traditional causation need not be proven."¹²⁴

An interesting example of how far courts will go to protect plaintiffs from the causation requirement is found in *Dedham Water Co. v. Cumberland Farms, Inc.*¹²⁵ In that case the defendant admittedly released volatile organic chemicals (VOCs) onto its property. The plaintiff was the owner of a neighboring site which was contaminated with VOCs. Plaintiff allegedly incurred \$19 million in response costs because of this contamination, including the cost of constructing and operating a water treatment facility.¹²⁶ The district court recognized that in a "one-site" case (i.e., when contamination has occurred on a single parcel of land), causation generally is presumed if the defendant's waste was disposed of at the site.¹²⁷ The district court asserted that a different rule applied, however, in a "two-site" case (i.e., when pollution from one site migrates to a second land parcel).¹²⁸ In the two-site situation, the court stated, the plaintiff must show that defendant's releases in fact caused the contamination of plaintiff's site: "When a plaintiff alleges that chemicals have migrated underground from another site, the plaintiff must establish that the second site was in fact the source of the pollutants in question."¹²⁹ The district court entered judgment against the plaintiff for failing to meet this causative requirement.

On appeal, the First Circuit emphatically rejected the district court's analysis, particularly its distinction between "one-site" and "two-site" cases.¹³⁰ According to the court of appeals, the critical inquiry is whether the plaintiff reasonably incurred response costs due to a release or threatened release at the defendant's site, regardless of whether or not the plaintiff's site actually was contaminated by the defendant.¹³¹ The First Circuit explained the causal connection as

123. United States v. Stringfellow, 661 F. Supp. 1053, 1060 (C.D. Cal. 1987).

124. *Id.*

125. 689 F. Supp. 1223 (D. Mass. 1988), *rev'd sub nom.* Dedham Water Co. v. Cumberland Farms Dairy, Inc., 889 F.2d 1146 (1st Cir. 1989).

126. *Cumberland Farms Dairy, Inc.*, 889 F.2d at 1156.

127. *Cumberland Farms, Inc.*, 889 F. Supp. at 1226.

128. *Id.*

129. *Id.* at 1224.

130. *See Cumberland Farms Dairy, Inc.*, 889 F.2d at 1154.

131. *Id.*; accord *Artesian Water Co. v. New Castle County*, 659 F. Supp. 1269, 1282 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988).

follows:

[Precedent cited by the district court] offers no support for the [its] conclusion that there must be a causal nexus between the defendant's conduct and the *contamination* of the plaintiff's property. Rather, the *Artesian Water* court explicitly states that there must be a causal connection between the defendant's conduct and the plaintiff's *incurrence of costs*.¹³²

The First Circuit's approach would allow recovery when the defendant's site simply presents some sort of realistic threat to the plaintiff's site and the plaintiff's response costs are expended in reasonable response to this threat.

VII. CONCLUSION

This Article has focused exclusively on the plaintiff's statutory prima facie case under CERCLA section 107. Items conceivably a part of the plaintiff's prima facie case but not directly related to section 107 have not been included.¹³³

CERCLA section 107 has been criticized repeatedly by the courts for its poor draftsmanship.¹³⁴ Careful, critical and independent analysis of the statute's language by the reader may yield a different interpretation of certain provisions than the interpretation proposed in this Article. Such differences are inevitable since section 107 has not interpreted definitively by the courts. Prudent attorneys representing private plaintiffs in actions for recovery under section 107 thus will utilize this Article not as an all-inclusive checklist of the requisite elements of a plaintiff's CERCLA section 107 case, but as a starting point for analysis. Potential defendants under section 107 similarly may view

132. *Cumberland Farms Dairy, Inc.*, 889 F.2d at 1154 n.8 (emphasis in original). Further developing its concept of the causal nexus required under section 107, the court stated:

Obviously, a New Jersey well owner who began to make local-area contamination studies because of releases occurring in California could not claim, objectively speaking, that the California releases 'cause[d]' the costs or that his expenditures were "necessary" and "consistent with the national contingency plan." Equally obvious, there can be circumstances where a defendant causes "costs" but does not cause *actual* contamination. Indeed, how else could a "threatened release" ever cause a "response cost"?

Id. at 1158 (citations omitted).

133. Examples of such items include the 60-day notice requirement found in the "claims procedure" provisions of CERCLA § 112(a), 42 U.S.C. § 9612(a) (1982 & Supp. V 1987), and the "citizen's suit" provisions of CERCLA § 310(d)(1), 42 U.S.C. § 9659(d)(i) (Supp. V 1987).

134. See, e.g., *Artesian Water Co.*, 851 F.2d at 648.

this Article as a useful overview of the areas in which they may attack plaintiffs for failing to meet burdens of proof.