State and Municipal Sewer System Authority Liability Under CERCLA: Who Should Pay for the Cleanup of Hazardous Industrial and Commercial Sewer Discharges

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STATE AND MUNICIPAL SEWER SYSTEM AUTHORITY LIABILITY UNDER CERCLA: WHO SHOULD PAY FOR THE CLEANUP OF HAZARDOUS INDUSTRIAL AND COMMERCIAL SEWER DISCHARGES?

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I. INTRODUCTION

For over twenty years, industrial customers of the Washington Suburban Sanitary Commission (WSSC) discharged hazardous substances into the sewer system. The WSSC’s regulations permitted such discharges until 1983. The WSSC, however, expected its small industrial customers to continue to discharge hazardous substances into the sewer system even after the WSSC promulgated more stringent regulations. The WSSC also failed to maintain and repair the sewer system properly. Hazardous substances subsequently leaked onto property that surrounded the sewer system. A federal district court found the WSSC liable for the resulting clean-up costs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

State and municipal sewer system authorities across the United States could face liability similar to that confronted by the WSSC.

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2 See id. at *5.

3 See id. at *24.

4 See id. at *4.

5 See id. at *3.

6 Id. at *25.
Publicly-owned sewer systems provide sewage and wastewater disposal services for domestic, industrial, and commercial customers. Industrial and commercial customers discharge hazardous substances into public sewers. Such discharges may result in hazardous waste contamination to property that surrounds the sewer system. The contamination in turn may produce CERCLA ramifications for public sewer system authorities.

The extent of public sewer system authority liability under CERCLA is unclear. Public sewer system authorities appear to fall within CERCLA's broad scope of liability. CERCLA, however, contains exceptions to liability under appropriate circumstances. Whether

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7 There are three types of sewer systems: storm sewers, which carry runoff from roads, parking lots, and other surfaces to the nearest receiving channel or body of water; sanitary sewers, which carry domestic and commercial sewage and industrial wastewater to treatment plants; and combined sewers, which carry surface runoff and sanitary sewage to treatment plants. Karl Imhoff et al., Karl Imhoff's Handbook of Urban Drainage and Wastewater Disposal 5 (Vladimir Novotny ed., 1989). The latter two types of sewer systems are the subjects of this Comment.

8 Wastewater consists primarily of water used for sanitation (i.e., personal hygiene and drinking), cooling, processing (i.e., making goods, washing products, waste byproduct removal, and transportation), and cleaning and maintenance. Id. at 89.

9 See, e.g., Westfarm Assocs. L.P. v. International Fabricare Inst., No. HM-92-9, 1993 U.S. Dist. LEXIS 15921, at *3 (D. Md. July 16, 1993); Lincoln Properties, Ltd. v. Higgins, 823 F. Supp. 1532 (E.D. Cal. 1992). The quantity of industrial and commercial wastes is about the same as the quantity of residential waste. See Imhoff et al., supra note 7, at 89 (excluding cooling water discharged by electric power industry, wastewater production from urban areas is about evenly divided between domestic and industrial sources). Industrial and commercial wastes, however, pose a greater threat of hazardous waste contamination because such wastes are far more likely to contain hazardous substances than domestic waste. Om Prakash Khambanda & Ernest A. Stallworthy, Waste Management: Towards a Sustainable Society 6 (1990); Sell, supra note 9, at 22, 68.


11 See discussion infra part II.B.1.


13 See discussion infra part II.B.1.

14 See discussion infra part II.B.1.

15 See discussion infra part II.C.
public sewer system authorities may fall within an exception will determine the proper extent of CERCLA liability.

The direct and indirect monetary costs associated with the cleanup of a contaminated site are enormous. The average clean-up costs of one CERCLA site amounts to twenty-four million dollars.16 CERCLA's potential for financially crippling liability, and the statute's allowance for contribution,17 have prompted parties to seek recovery and contribution of response costs from other parties in order to reduce their portion of clean-up costs.18 There lies growing concern among state and municipal sewer system authorities19 that industrial and commercial parties liable or potentially liable under CERCLA for the disposal of hazardous substances20 into publicly-owned sewer sys-

16 William H. Rodgers, Jr., A Superfund Trivia Test: A Comment on the Complexity of the Environmental Laws, 22 Env'l. L. 417, 422 (1992); see U.S. CONGRESS OFFICE OF TECHNOLOGY ASSESSMENT, ARE WE CLEANING UP? 10 SUPERFUND CASE STUDIES: A SPECIAL REPORT OF OTA'S ASSESSMENT ON SUPERFUND IMPLEMENTATION 9 (1988) (outlining 10 case studies of CERCLA sites with estimated clean-up costs ranging from $800,000 to $45 million). Average clean-up costs do not include transaction costs that are likely to be incurred during the clean-up process, which can amount to additional millions of dollars. See generally, JAN PAUL ACTON & LLOYD S. DIXON, SUPERFUND AND TRANSACTION COSTS: THE EXPERIENCES OF INSURERS AND VERY LARGE INDUSTRIAL FIRMS 43–49 (1992).

17 See 42 U.S.C. § 9607(a)(4)(B) (1988). In addition, any party may commence a civil action on its own behalf for injunctive relief and civil penalties against any person "alleged to be in violation of any standard, regulation, conditions, requirements, or order" under CERCLA. 42 U.S.C. § 9659 (1988).


19 State and municipal sewer system authorities are subject to CERCLA liability. Under CERCLA, "[t]he term 'person' means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. § 9601(21) (1988) (emphasis added); see Pennsylvania v. Union Gas Co., 491 U.S. 1, 8–13 (1989) (holding that states are "persons" for purposes of CERCLA liability); B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1198–99 (2d Cir. 1992) (holding that municipalities may be held liable under CERCLA); Wickland Oil Terminals v. Asarco, Inc., 654 F. Supp. 955, 957 (N.D. Cal. 1987) (holding that states and their political subdivisions are "persons" within the meaning of CERCLA).

CERCLA, however, provides that "[t]he term 'owner or operator' does not include a unit of State or local government which acquired ownership . . . involuntarily . . . by virtue of its function as sovereign." 42 U.S.C. § 9601(20)(D) (1988). The exclusion does not apply "to any State or local government which has caused or contributed to the release . . . of a hazardous substance . . . ." Id. CERCLA further provides that "[n]o State or local government shall be liable . . . for costs or damages as a result of actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person" unless there is gross negligence or intentional misconduct on the part of the government. 42 U.S.C. § 9607(d)(2) (1988).

20 "Hazardous substances" are chemicals that Congress has designated as hazardous under several other federal environmental statutes. 42 U.S.C. § 9601(14) (1988).

The term "hazardous substance" means (A) any substance designated pursuant to
tems will seek contribution of response costs from public sewer system authorities. 21

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 [42 U.S.C. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C. § 6901 et seq.] 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 [42 U.S.C. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of title 15. 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, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

CERCLA authorizes the Administrator of the EPA to promulgate regulations qualifying hazardous substances:

The Administrator shall promulgate and revise as may be appropriate, regulations designating as hazardous substances in addition to those referred to in section 9601(14) of this title, such elements, compounds, mixtures, solutions, and substances which, when released into the environment may present substantial danger to the public health or welfare or the environmental, and shall promulgate regulations establishing that quantity of any hazardous substances the release of which shall be reported pursuant to section 9603 of this title.


Federal regulations provide a consolidated list of elements, compounds, and hazardous wastes that are designated as hazardous substances under 42 U.S.C. § 9601(14). 40 C.F.R. § 302.4 (1993).

There is no quantitative threshold that must be reached before a court may find that a hazardous substance has been released for purposes of CERCLA liability. See, e.g., Arizona v. Motorola, Inc., 774 F. Supp. 566, 571 (D. Ariz. 1991); Louisiana-Pacific Corp. v. ASARCO, Inc., 735 F. Supp. 358, 361 (W.D. Wash. 1990); United States v. Nicolet, Inc., 712 F. Supp. 1205, 1207 (E.D. Pa. 1989). But see Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 669-71 (5th Cir. 1989) (imposing a quantity requirement on the imposition of liability in an attempt to limit the scope thereof despite the fact that the "plain statutory language fails to impose any quantitative requirement on the term 'release'").


Although the EPA, as a matter of policy, overlooks generators or transporters of municipal solid waste when suing for response costs under CERCLA, the EPA treats state and municipal owners and operators the same as any other PRP for purposes of CERCLA liability. See Interim Policy on CERCLA Settlements Involving Municipalities or Municipal Wastes, 54 Fed. Reg. 51,071 (1989); see also Municipalities Should Be Held Liable for Cleanup Only by EPA, Witnesses Say, [24 Current Developments] Env't Rep. (BNA) 11 (May 7, 1993). The most likely scenario for public sewer authority liability under CERCLA, however, involves third party suits against public sewer authorities by private parties seeking contribution for response costs.

Illustrative of states' and municipalities' cause for concern is United States v. Montrose Chem. Corp. 827 F. Supp. 1453 (C.D. Cal. 1993). In Montrose, the District Court for the Central District of California approved a $45.7 million CERCLA consent decree between the United States and
This Comment examines public sewer system liability under CERCLA for industrial and commercial customers’ hazardous discharges that leak prior to reaching sewage treatment facilities. Section II examines CERCLA’s language and legislative history and analyzes public sewer system liability under the statute, focusing on the “owner and operator” provision and the third party affirmative defense. Section II also reviews a current Congressional initiative that attempts to clarify the issue of municipal sewer system liability under CERCLA. Section III sets forth, compares, and reconciles the two federal district court decisions that confronted the issue of public sewer system liability under CERCLA. Section IV asserts that various policy considerations caution against the imposition of liability on a public sewer system authority absent a showing of responsibility for contamination. Finally, Section V offers conclusions and proposes certain steps that public sewer system authorities may take to avoid liability under CERCLA.

II. PUBLIC SEWER SYSTEM AUTHORITY LIABILITY UNDER CERCLA'S STATUTORY SCHEME

Determination of the scope of public sewer system authority liability begins by looking at CERCLA’s plain language. Public sewer system authorities, although not specifically mentioned in CERCLA, fall within the statute’s broad scope of liability as owners and operators of sewer systems. CERCLA’s third party affirmative defense, however, provides a possible means by which public sewer system authorities may successfully be able to avoid CERCLA liability.

A. CERCLA Background

In 1980, Congress passed CERCLA in response to growing public concern over hazardous substance contamination. Since its in-
Introduction, CERCLA's scope of liability has been a steady subject of litigation and scholarly commentary. Primarily enacted to remedy hazardous waste contamination, CERCLA attempts to achieve its goal through the designation of potentially responsible parties (PRPs). PRPs implement and finance the cleanup of facilities contaminated by the release of hazardous substances. Congress deliberately made the definition of "facility" expansive. See, e.g., 3550 Stevens Creek Assocs. v. Barclays Bank of Cal., 915 F.2d 1355, 1360 n.10 (9th Cir. 1990), cert. denied, 111 S. Ct. 2014 (1991); New York v. Shore Realty Corp., 759 F.2d 1032, 1043 n.15 (2d Cir. 1985); United States v. Mottolo, 695 F. Supp. 615, 622 (D.N.H. 1988).

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, as those terms are defined in the Atomic Energy Act of 1954 [42 U.S.C. 2011 et seq.], if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under section 170 of such Act [42 U.S.C. 2210], or, for the purposes of section 9604 of this title or any other response action, any release of source byproduct, or special nuclear material from any processing site designated under section 7912(a)(1) or 7942(a) of this title, and (D) the normal application of fertilizer.

1980 U.S.C.C.A.N. 6119, 6125 (Congress enacted CERCLA "to initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with the abandoned and inactive hazardous waste disposal sites").

26 See Owen T. Smith, The Expansive Scope of Liable Parties Under CERCLA, 63 St. John's L. Rev. 821, 837 (1989) ("CERCLA's implementation has resulted in considerable litigation, coupled with the actual cleanup of only a handful of sites").


28 See, e.g., United States v. Alean Aluminum Corp., 964 F.2d 252, 257-58 (3d Cir. 1992) ("in response to widespread concern over the improper disposal of hazardous wastes, Congress enacted CERCLA, a complex piece of legislation designed to force polluters to pay for costs associated with remediating their pollution"); B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1197 (2d Cir. 1992) ("in CERCLA Congress enacted a broad remedial statute designed to enhance the authority of the EPA to respond effectively and promptly to toxic pollutant spills that threaten[] the environment and human health").

29 See Smith, supra note 26, at 822.

30 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.


31 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, as those terms are defined in the Atomic Energy Act of 1954 [42 U.S.C. 2011 et seq.], if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under section 170 of such Act [42 U.S.C. 2210], or, for the purposes of section 9604 of this title or any other response action, any release of source byproduct, or special nuclear material from any processing site designated under section 7912(a)(1) or 7942(a) of this title, and (D) the normal application of fertilizer.
waste. PRPs may seek contribution for response costs incurred in the cleanup of a contaminated facility from other parties who may be liable for the targeted contamination.


Parties have attempted to avoid CERCLA liability by arguing that the original disposal of hazardous waste into a public sewer system and not the subsequent release from the sewer is a “release.” See Westfarm Assocs., 1993 U.S. Dist. LEXIS 15921, at *15. Courts, however, have refused to allow this “passive third party” defense. See id. at *15–16; Lincoln Properties, 823 F. Supp. at 1536.


Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 or section 9607 of this title.


Clean-up costs recoverable under CERCLA include not only the direct costs associated with the removal of hazardous waste but also site testing, studies, and similar direct or indirect response costs that are consistent with the NCP. 42 U.S.C. § 9607(a)(4)(B)–(D) (1988); see United States v. Bogas, 920 F.2d 363, 369 (6th Cir. 1990) ("[c]leanup [sic] costs recoverable under
CERCLA imposes broad-based liability on PRPs. CERCLA liability is retroactive, strict, and is joint and several where the harm is indivisible. CERCLA also imposes liability without regard to causation in cases of actual contamination. Thus, an owner of a facility that does not produce hazardous substances may nevertheless be held liable under CERCLA for the cleanup of hazardous substances that

CERCLA include not only the direct cost of removal, but of site testing, studies, and similar 'response costs,' direct and indirect); see also Mottolo, 695 F. Supp. at 631 (providing examples of the types of response costs that may be recoverable in a CERCLA action).

When a court fashions a remedy in an action under § 9613(f)(1), the court possesses broad discretion and may use "such equitable factors as the court determines are appropriate," such as ownership and operation of the contaminated site, the source of the contamination, and the cause of the release of the contamination. 42 U.S.C. § 9613(f)(1) (1988); see United States v. R.W. Meyer, Inc., 932 F.2d 568, 571-72 (6th Cir. 1991); United States v. Union Gas Co., 35 Env't Rep. Cas. (BNA) 1750, 1757 (E.D. Pa. 1992).

See, e.g., United States v. Alcan Aluminum Corp., 964 F.2d 252, 258 (3d Cir. 1992) ("CERCLA is a remedial statute which should be construed liberally to effectuate its goals"); B.F. Goodrich Co. v. Murtha, 968 F.2d 1192, 1198 (2d Cir. 1992) ("CERCLA's broad reach extends liability to all those contributing to—from generation through disposal—the problems caused by hazardous substances"); 3550 Stevens Creek Assocs. v. Barclays Bank of Cal., 915 F.2d 1355, 1363 (9th Cir. 1990) ("[CERCLA] is to be given a broad interpretation to accomplish its remedial goals"), cert. denied, 111 S. Ct. 2014 (1991).


Although CERCLA does not expressly provide for strict liability, courts have interpreted the statute so based upon, among other things, the statute's legislative history. See, e.g., General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1418 (8th Cir. 1990), cert. denied, 499 U.S. 937 (1991); Monsanto, 858 F.2d at 167 & n.11; United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 732 n.3 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987). CERCLA's strict liability, however, is not absolute. New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985). The statute contains limited affirmative defenses to liability. See infra notes 87-91 and accompanying text.

Although CERCLA does not expressly provide for joint and several liability, courts have interpreted the statute to provide for such liability. See, e.g., Monsanto, 858 F.2d at 171; Versatile Metals, Inc. v. Union Corp., 693 F. Supp. 1563, 1571 (E.D. Pa. 1988); United States v. Northern Plating Co., 670 F. Supp. 742, 748 (W.D. Mich. 1987).

CERCLA allows apportionment when harm is divisible. See O'Neil, 883 F.2d at 178; Monsanto, 858 F.2d at 171-72. However, PRPs who seek to limit CERCLA liability on the basis that the harm is divisible must prove that the harm is apportionable and that there is a reasonable and rational basis for apportionment of the harm. See United States v. Mottolo, 695 F. Supp. 615, 629 (D.N.H. 1988).

are located at the facility. To establish a prima facie case of liability under CERCLA, a plaintiff seeking contribution must establish that (1) the contaminated site is a facility; (2) a release or threatened release of a hazardous substance from the site has occurred; (3) the release or threatened release has caused the plaintiff to incur response costs; and (4) the defendant falls within a recognized category of PRPs. Only once the four requirements have been met may a party be subject to CERCLA liability.

B. Public Sewer System Authorities as PRPs

1. PRPs under CERCLA

Of the four requirements needed to establish a prima facie case of CERCLA liability, the last requirement—that the defendant fall within a recognized category of PRPs—presents the most difficulty with regard to public sewer system authority liability. CERCLA recognizes four broad-based categories of PRPs: (1) the owners and operators of a vessel or a facility; (2) the parties who owned or operated any facility during the time at which hazardous substances

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40 Shore Realty, 759 F.2d at 1043-44.
42 Although CERCLA exempts from liability “any consumer product in consumer use,” 42 U.S.C. § 9601(9) (1988), the exemption does not extend to sewage or wastewater. The exemption applies only to useful consumer products and not material that is disposed of by parties. See Dayton Indep. Sch. Dist. v. U.S. Mineral Prods. Co., 906 F.2d 1059, 1065 (5th Cir. 1990) (“[t]he provision exempting consumer products obviously was meant to protect from liability those who engage in production activities with a useful purpose, as opposed to those engaged in the disposal of hazardous substances”) (footnote omitted; see also Vernon Village, Inc. v. Gottier, 755 F. Supp. 1142, 1150-51 (D. Conn. 1990) (drinking water that contained hazardous wastes a consumer product in consumer use); Electric Power Bd. of Chattanooga v. Westinghouse Elec. Corp., 716 F. Supp. 1069, 1080 (E.D. Tenn. 1988) (electrical transformers that leaked toxic fluid a consumer product in consumer use); Knox v. AC & S, Inc., 690 F. Supp. 732, 756 (S.D. Ind. 1988) (building insulation that contained asbestos might be considered a consumer product in consumer use “to the extent that insulation is a commercial product, sold between businesses”). Thus, neither sewage nor wastewater constitute a “consumer product in consumer use” and is not exempted by CERCLA’s “consumer product” provision.
43 42 U.S.C. § 9601(20)(a) (1988) (see infra note 46 for text). Although § 9601(20)(a) imposes liability on the “owner and operator” of a vessel or a facility, courts construe the phrase so as to extend liability to either owners or operators. As the Court of Appeals for the Eleventh Circuit stated:

Although the “owner and operator” language of § 9607(a)(1) is in the conjunctive, we construe this language in the disjunctive in accordance with the legislative history of CERCLA and the persuasive interpretations of other federal courts. Additionally, we note that § 9607(a)(2) is phrased in the disjunctive. We can perceive no rational explanation, other than careless statutory drafting, for imposing liability upon “owners or
were released; (3) the generators of the hazardous substances released at a facility; and (4) the transporters of hazardous substances.\textsuperscript{44} Public sewer system authorities are neither specifically included nor excluded as a CERCLA-designated PRP.\textsuperscript{45} Public sewer system authorities, however, appropriately fall within the “owner or operator” PRP category.

CERCLA imposes liability upon the owners and operators\textsuperscript{46} of facilities where the release of hazardous substances has occurred.\textsuperscript{47} The application of owner and operator liability to public sewer system authorities is consistent with CERCLA’s statutory language. The statutory definitions of “owner” and “operator”—which simply state the terms’ plain meanings—provide little interpretive guidance.\textsuperscript{48} Public sewer system authorities, however, fall within the plain language of

\textsuperscript{44} 42 U.S.C. § 9607(a)(1)-(4) (1988).

\textsuperscript{45} See id.

\textsuperscript{46} The term “owner or operator” means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated or otherwise controlled activities at such facility immediately beforehand. Such term does not include 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.


The term “owner or operator” does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such State or local government shall be subject to the provisions of this chapter in the same manner and to the same extent, both procedurally and substantively, as any non governmental entity, including liability under section 9607 of this title.


CERCLA's "owner and operator" category because public sewer system authorities own and operate sewer facilities from which hazardous substances may leak. The inclusion of public sewer system authorities as owners and operators also is consistent with courts' expansive interpretation of the terms. Unless there exists some explicit or implicit liability exception for public sewer system authorities, they may be subject to liability under CERCLA's plain language as the owners and operators of sewer systems.

CERCLA's legislative history provides little guidance into the meaning and application of the terms owner and operator. The legislative history that does exist, however, provides no indication of any express or implied exception to owner and operator liability for public sewer system authorities. Rather, the legislative history reflects Congressional desire to interpret the terms as broadly as possible. The extension of owner and operator liability to public sewer system authorities is consistent with such a broad scope of liability.

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49 See supra notes 7-11 and accompanying text.
51 Because CERCLA was hastily drafted, the statute poses more interpretation problems than other statutes. Frank P. Grad, A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980, 8 COLUM. J. ENVTL. L. 1, 2 (1982) ("In the instance of the 'Superfund' legislation, a hastily assembled bill and a fragmented legislative history add to the usual difficulty of discerning the full meaning of the law"); see, e.g., United States v. Alcan Aluminum Corp., 964 F.2d 252, 258 n.5 (3d Cir. 1992) ("CERCLA was passed in great haste during the waning days of the 96th Congress. As a result the statute is riddled with inconsistencies and redundancies"); United States v. Mottolo, 605 F. Supp. 898, 902 (D.N.H. 1985) ("CERCLA has acquired a well-deserved notoriety for vaguely-drafted provisions and an indefinite, if not contradictory, legislative history").

The legislative history behind the meaning of the terms owner and operator is of little assistance. See H.R. Rep. No. 172, 96th Cong., 2d Sess., pt. 1, at 36-37 (1980), reprinted in 1980 U.S.C.C.A.N. 6160, 6181-82 (stating that owners "include not only those persons who hold title ... but those who, in the absence of holding a title, possess some equivalent evidence of ownership" and that an operator is a party "carrying out operational functions for the owner of the facility pursuant to an appropriate agreement").

52 See supra note 51.
Courts often look to the Resource Conservation and Recovery Act (RCRA)\(^54\) and the Clean Water Act (CWA)\(^55\) for assistance in the interpretation of CERCLA's terms and the application of CERCLAs provisions.\(^56\) Neither RCRA nor the CWA, however, support the possibility of an implicit exception to owner and operator liability for public sewer system authorities. Public sewer system authorities fall within RCRA's scope of liability as the "owners and operators of facilities for the treatment, storage, or disposal of hazardous waste."\(^57\) RCRA contains an exception which excludes domestic sewage and mixtures that contain domestic sewage from RCRA's scope of liability.\(^58\) Thus, under the exception, industrial and commercial sewage

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\(^56\) See Grad, supra note 51, at 35; see also 42 U.S.C. § 9601(32) (1988) (CERCLA liability is construed as the standard of liability under the CWA); United States v. Shell Oil Co., 605 F. Supp. 1064, 1070 (D. Colo. 1985) (CERCLA must be construed in light of previous statutes relating to environmental protection, notably RCRA). Looking to RCRA and the CWA is particularly appropriate in this situation, since there is an absence of guidance in the statute and legislative history as to the liability of public sewer system authorities.


The term "solid waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agriculture operations, and from community activities, but does not include solid or dissolved material in domestic sewage. 40 C.F.R. § 261.4(a)(1)(i) and (ii) (1992). The domestic sewage exception covers industrial and commercial waste discharged into sewer systems containing domestic waste, even if the industrial and commercial waste would be considered hazardous if disposed of by other means. EPA Administrator Permit Regulations, 55 Fed. Reg. 30,682 (1990); see Comite Pro Rescate de la Salud v. Puerto Rico Aqueduct And Sewer Auth., 888 F.2d 180, 184–87 (1st Cir. 1989), cert. denied, 494 U.S. 1029 (1990). Such industrial and commercial discharges, however, could subject a public sewer system authority to potential liability under the CWA. See infra notes 65–66 and accompanying text; see also H.R. REP. No. 899, 89th Cong., 1st Sess., at 23 (1965), reprinted in 1965 U.S.C.C.A.N. 3608, 3628 ("[t]he term 'solid waste disposal' is defined to exclude organic solids in untreated domestic sewage, which are already subject to the [CWA]").
mixed with domestic sewage is exempted from RCRA liability. The domestic sewage exception provides an indirect exemption to RCRA liability for public sewer system authorities engaged in the disposal of waste that is purely or partially composed of domestic waste.

Although the domestic sewage exception indirectly exempts public sewer system authorities under RCRA in limited circumstances, the exception does not indicate any implicit exception to CERCLA liability for public sewer system authorities. Rather, the existence of RCRA's domestic sewage exception supports the conclusion that public sewer system authorities may be owners and operators under CERCLA. Congress knew about RCRA's domestic sewage exception when it enacted CERCLA. Congress, however, failed to include in CERCLA any provisions similar to the domestic sewage exception. The failure to create any type of sewage or sewage facility exception for CERCLA in the face of the known RCRA exclusion supports the conclusion that no exception was intended for CERCLA. Even if the domestic sewage exception did extend to CERCLA, courts have held that the focus of the exception is not the waste disposal facility involved but the source of the waste involved. Thus, for example, a public sewer system authority would be subject to liability if purely industrial or commercial waste were discharged into a sewer system. Because the focus of the exception is not the waste disposal facility involved but the type of sewage, public sewer system authorities would fall within CERCLA's owner and operator provision. Thus, RCRA's domestic sewage exception does not implicitly exempt public sewer system authorities from falling within CERCLA's owner and operator provision.

The CWA also supports public sewer system authority status as an owner and operator under CERCLA. Far from excluding public sewer system authorities from liability, the CWA includes such entities within its regulatory umbrella. All public sewer system authori-

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59 See Comite Pro Rescate, 888 F.2d at 186, 188; see also EPA Administered Permit Regulations 55 Fed. Reg. 30,092.
60 See Comite Pro Rescate, 888 F.2d at 184, 187–88. Public sewer system authorities and their customers, however, could still face liability under the CWA.
61 See B.F. Goodrich Co. v. Murtha, 968 F.2d 1192, 1200 (2d Cir. 1992) (analyzing CERCLA's legislative history and concluding that CERCLA's definition of "hazardous substance" makes no distinction upon whether the substance's source was industrial, commercial, or domestic).
62 See Comite Pro Rescate, 888 F.2d at 184–87.
64 The CWA refers to public sewer system authority facilities as "publicly-owned treatment works" (POTWs). See 33 U.S.C. §§ 1292(2), 1311(b)(1)(A)–(B) (1988).
ties must monitor and regulate the discharge of hazardous substances through the use of a National Pollutant Discharge Elimination System (NPDES) permitting system. If a public sewer system authority releases hazardous substances in violation of the NPDES, the authority is subject to criminal, civil, and administrative penalties for the violation.

In summary, CERCLA broadly extends liability to the owners and operators of facilities. Public sewer system authorities fall within the plain language of this category of PRP. Nothing in CERCLA supports the exclusion of public sewer system authorities as owners or operators. Both RCRA and the CWA, which provide guidance regarding CERCLA's scope of liability, support the imposition of owner and operator liability for public sewer system authorities. Thus, given CERCLA's plain language and the lack of any explicit or implicit exception to the plain language liability, public sewer system authorities must be considered owners and operators under CERCLA.

2. The Proposed Toxic Cleanup Equity Act of 1993

Recognizing that municipal sewer system authorities fall within the scope of CERCLA liability, members of Congress have attempted on several occasions to amend CERCLA in order to protect these entities from liability. One of the recent amendment initiatives began in 1991, when members of Congress proposed the Toxic Cleanup Equity and Acceleration Act of 1991. The legislation was modified and reintroduced in both houses of Congress as the Toxic Cleanup Equity and Acceleration Act of 1993 (TCEAA). The TCEAA was subsequently

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67 See supra note 44.
68 See supra notes 46–50 and accompanying text.
70 See infra notes 71–74 and accompanying text.
revised and expanded in scope by its sponsors.\textsuperscript{73} The modified version of the TCEAA in turn was reintroduced in both houses of Congress in May, 1993, as the Toxic Cleanup Equity Act of 1993 (Equity Act).\textsuperscript{74} In addition to Congressional support, these reform efforts have received endorsement from major national environmental and municipal organizations.\textsuperscript{75} Neither the Equity Act nor its predecessor, however, have been enacted by Congress.

The Equity Act attempts to clarify and modify municipal liability issues under CERCLA.\textsuperscript{76} Municipal sewer system liability under CERCLA and the potential for the imposition of financially crippling contribution and recovery costs have caused a great deal of concern among officials at all levels of government.\textsuperscript{77} The Equity Act, a response to such concern,\textsuperscript{78} places various limits and exemptions on municipality\textsuperscript{79} liability under CERCLA. Among the relief mechanisms located in the Equity Act that protect municipalities are caps on municipal liability and limits on payments that municipalities would pay for CERCLA response costs.\textsuperscript{80} The Equity Act also contains

\textsuperscript{73} See 139 CONG. REC. S5948 (daily ed. May 13, 1993) (statement of Sen. Lautenberg).

\textsuperscript{74} The Toxic Cleanup Equity Act of 1993 (Equity Act), S. 965, 103d Cong., 1st Sess. (introduced May 13, 1993); H.R. 2137, 103d Cong., 1st Sess. (introduced May 17 1993). The Equity Act was first introduced on May 13, 1993. The Equity Act’s principal sponsors are Senator Frank Lautenberg (Dem.-N.J.) in the Senate and Representative Robert Torricelli (Dem.-N.J.) in the House of Representatives. Id.

\textsuperscript{75} 139 CONG. REC. S5948 (daily ed. May 13, 1993) (statement of Sen. Lautenberg) (noting the approval of the Equity Act by the National League of Cities, the National Association of Counties, the United States Conference of Mayors, the National Association of Towns and Townships, the Sierra Club, the Environmental Defense Fund, the Natural Resources Defense Council, the United States Public Interest Research Group, and Friends of the Earth).

\textsuperscript{76} S. 965 § 2.

\textsuperscript{77} The purpose of the Equity Act is to “amend [CERCLA] to provide relief to local taxpayers, municipalities, and small businesses regarding the cleanup of hazardous substances . . . .” 139 CONG. REC. S5948 (daily ed. May 13, 1993). The Equity Act also recognizes that “many of the Nation’s local governments are facing a financial crisis, and their ability to provide essential public services is being threatened . . . .” S. 965 § 2.

\textsuperscript{78} See id.

\textsuperscript{79} Id. at § 3(A).

The term “municipality” means any political subdivision of a State and may include cities, counties, villages, towns, townships, boroughs, parishes, schools, school districts, sanitation districts, water districts, and other local government entities. The term also includes any natural person acting in his or her official capacity as an official, employee, or agent of a municipality.

\textsuperscript{80} See id. at § 3. The Equity Act directs most of its attention to providing relief for municipalities against liability for the generation and transportation of municipal solid waste (MSW). For an analysis of the effects of the Equity Act on municipal liability for the transport and disposal of MSW, see James J. Reardon, Jr., Comment, Limiting Municipal Solid Waste Liability Under CERCLA: Towards the Toxic Cleanup Equity and Acceleration Act of 1993, 20 B.C.
favorable settlement provisions for municipalities that are found liable under CERCLA.\textsuperscript{81}

The Equity Act also contains a provision that specifically addresses municipal sewer system authority liability. The Equity Act would exempt municipalities from liability based solely upon municipal ownership or operation of a sewer system.\textsuperscript{82} Under section 3(B) of the Equity Act:

\begin{quote}
[\textit{I}n no event shall a municipality incur liability under this Act for the acts of owning or maintaining a public right-of-way over which hazardous substances are transported, or of granting a business license to a private party for the transportation, treatment, or disposal of municipal solid waste or sewage sludge. For the purposes of this subsection, "public right-of-way" includes, but is not limited to, roads, streets, flood control channels, or other public transportation routes, and pipelines used as a conduit or sewage or other liquid for semiliquid discharges.\textsuperscript{83}
\end{quote}

Under section 3(B), sewer system pipelines clearly fall within the Equity Act's exemption for municipal liability.\textsuperscript{84} Such an exemption effectively immunizes municipal sewer system authorities from liability for contamination that originates from a public sewer system pipeline.\textsuperscript{85} Thus, as to municipal sewer system authorities, the Equity Act in its present form would foreclose CERCLA liability and settle the issue of liability for the hazardous discharges of industrial and commercial customers.\textsuperscript{86}

\textbf{C. Public Sewer System Authority Liability Loophole: CERCLA's Third Party Affirmative Defense}

Even if public sewer system authorities fall within a recognized PRP category, the issue of CERCLA liability remains unsettled, as states and municipalities may avoid liability through one of CERCLAs affirmative defenses.\textsuperscript{87} CERCLA recognizes three affirmative
defenses to liability. A PRP may avoid liability if the PRP can establish that the release or threatened release was caused solely by an "act of God," an "act of war," or an "act or omission of a third party." The three enumerated exceptions to liability are the only substantive defenses expressly available to PRPs. The defenses are construed narrowly by courts to prevent the circumvention of CERCLA's broad remedial purpose.

A public sewer system authority could attempt to invoke the third party affirmative defense to avoid liability for the discharges of its industrial and commercial customers. In order to invoke CERCLA's third party defense successfully, a public sewer system authority must establish that (1) a third party was the sole cause of the release; (2) the third party was not an employee or an agent of the authority; (3) the acts or omissions of the third party did not occur in connection with a direct or indirect contractual relationship with the authority; (4) the authority exercised due care with respect to the hazardous substances; and (5) the authority took precautions against the foreseeable acts and omissions of third parties. Each element must be established by a preponderance of the evidence.

89 Id. CERCLA provides:
There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—(1) an act of God; (2) an act of war; (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail) . . . .

91 See United States v. Argent Corp., 21 Envtl. Rep. Cas. (BNA) 1354, 1356 (D.N.M. 1984) (noting that defenses enumerated in § 9607(b) are "extremely limited").
92 See infra notes 145–59 and accompanying text.
93 The party who asserts the defense must affirmatively prove the absence of causation. United States v. Monsanto Co., 858 F.2d 160, 168 (4th Cir.) (42 U.S.C. § 9607(b)(3) "sets forth a limited affirmative defense based on the complete absence of causation"), cert. denied, 490 U.S. 1106 (1988).
Of the elements necessary for successful invocation of the third party affirmative defense, the first element presents the clearest application problem. Although a third party must be the sole cause of the release, the appropriate causation standard to apply is unclear. The causation standard, however, is crucial in the determination of whether and how public sewer system authorities may avoid CERCLA liability.

Neither CERCLA's plain language nor its legislative history provide much assistance in defining the appropriate causation standard. Case law that addresses the proper interpretation of "caused solely by" is relatively undeveloped. Some courts, however, have attempted to define the appropriate causation standard. The District Court for the Northern District of California in Lincoln Properties, Ltd. v.

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96 See infra notes 153–59 and accompanying text.
97 See infra notes 114–18 and accompanying text.
98 See infra notes 153–59 and accompanying text.
99 Section 9607(b) states that contamination must be "caused solely by" one of the enumerated defenses. 42 U.S.C. § 9607(b) (1988). CERCLA's legislative history provides general guidelines as to the meaning of the phrase "caused solely by:"

The Committee intends that the usual common law principles of causation, including those of proximate causation, should govern the determination of whether a defendant "caused or contributed" to a release or threatened release. Whether a person caused or contributed to a release is a factual inquiry to be determined with reference to the particular circumstances of the case. Thus, for instance, the mere act of generation or transportation of hazardous waste, or the mere existence of a generator's or transporter's waste in a site with respect to which cleanup [sic] costs are incurred would not, in and of itself, result in liability under section [9607(a)]. The Committee intends that for liability to attach under this section, the plaintiff must demonstrate a causal or contributory nexus between the acts of the defendant and the conditions which necessitated response action ...

... In order to successfully interpose a listed defense, the defendant must demonstrate causation in accordance with the principles described above ...

With respect to the third party defense, a defendant is also required to establish that he exercised due care with respect to the hazardous waste concerned, taking into consideration the characteristics of such waste. The defendant must show that he exercised due care with respect to all reasonably foreseeable acts or omissions of a third party ... In general, the Committee intends that for a defendant to establish that he exercised due care, the defendant must demonstrate that he took all precautions with respect to the particular waste that a similarly situated reasonable and prudent person would have taken in light of all relevant facts and circumstances.


The EPA has not promulgated any regulations that interpret the third party defense's "caused solely by" requirement and has not otherwise provided any guidance as to the standard to be applied to the requirement.

100 See infra notes 114–18 and accompanying text.
101 See infra notes 114–25 and accompanying text.
Higgins directly addressed the issue of the proper causation standard to apply to the third party affirmative defense. After the court determined that a proximate cause standard was the appropriate standard, the court used the standard to hold that a municipality was not liable under CERCLA for industrial discharges that leaked from a municipally-owned sewer system.

Although the facts of Lincoln Properties are set out in greater detail in the next section, it is necessary to provide a brief overview of the facts of the case. The owners of a shopping center were sued for clean-up costs of the contamination of several of the shopping center’s tenants. The tenants discharged hazardous substances into a sewer system. The hazardous substances later leaked onto surrounding property. The shopping center owners attempted to obtain response costs from the municipality that owned a portion of sewer system where hazardous substances leaked. The municipality sought to invoke CERCLA’s third party affirmative defense, claiming in part that the hazardous waste contamination was caused solely by the tenants who discharged the hazardous substances. In determining the appropriate meaning of the affirmative defense’s “caused solely by” requirement, the court looked for guidance to a similar provision in the CWA and case law that interpreted the provision.

103 Id. at 1540-42.
104 Id. at 1542.
105 Id.
106 See discussion infra part III.A.
108 See id.
109 Id.
110 Id.
111 Id. at 1539.
112 The court used 33 U.S.C. § 1321(f)(1)-(3) for comparison. See id. at 1541-42. Section 1321(f)(1)-(3) states, in relevant part:

Except where an owner or operator [of a vessel or onshore or offshore facility] can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator . . . [shall be liable for costs incurred by the government in removing the hazardous substance or oil].


CERCLA specifically provides that the CWA is to be used to determine the appropriate measure of liability. Under CERCLA, “[t]he terms . . . ‘liable’ or ‘liability’ shall be construed to be the standard of liability which obtains under section 1321 of [the CWA].” 42 U.S.C. § 9601(32) (1988).

The *Lincoln Properties* court identified three possible constructions for CERCLA's "caused solely by" affirmative defense requirement. The first possible construction created a fault-based standard whereby any fault on the part of the PRP claiming the defense would violate the "caused solely by" requirement. The second possible construction created a standard whereby the requirement would be violated when a claimant's negligent omissions or affirmative conduct causes contamination. Although not every affirmative act would vitiate the requirement, a claimant would be able to invoke the defense successfully only if the act is "indirect and insubstantial" in the

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114 Id. at 1541-42.
115 Id. at 1541. The court relied on *United States v. Bear Marine Services*, 509 F. Supp. 710 (E.D. La. 1980), for support of the first construction. Id. In *Bear Marine*, the District Court for the Eastern District of Louisiana concluded that fault would preclude successful invocation of the third party affirmative defense under the CWA. 509 F. Supp. at 715. The *Bear Marine* court stated that "[t]he legislative history makes it clear that the exceptions [under the CWA] are to be strictly construed and that they must, in fact, be sole causes of the discharge." Id. (emphasis in original). The *Bear Marine* court emphasized that "[t]he discharger must be totally free of fault; any fault on the part of the discharger vitiates the 'sole cause' exceptions." Id.; accord *Grundy Oil Co. v. United States*, 28 Env't Rep. Cas. (BNA) 1118, 1119 (Cl. Ct. 1988) ("any error on the part of the [claimant] that contribute[s] to the cause of the accident would preclude recovery").

116 *Lincoln Properties*, 823 F. Supp. at 1541-42. The Court of Claims' decision in *Reliance Insurance Co. v. United States*, 677 F.2d 844 (Cl. Ct. 1982), was relied upon for support of the second construction. Id. Although the *Reliance* court did not analyze 33 U.S.C. § 1321(f)(1)-(3), the court did analyze the "caused solely by" language as found in another provision of the CWA. 677 F.2d at 847; see 33 U.S.C. § 1321(i) (1988 & Supp. IV 1992). The court first construed the "caused solely by" requirement in relation to a claimant's omissions. The court concluded that "[a]sent a legal duty to act, a pre-existing, passive condition cannot be fairly held an omission for causative purposes." *Reliance*, 677 F.2d at 848. The court then proceeded to discuss the affects of a claimant's affirmative conduct on the "caused solely by" requirement and concluded that affirmative conduct by a claimant would violate the requirement unless the conduct was sufficiently indirect or insubstantial to the occurrence of a spill:

It is implicit in this limitation that the conduct of the owner or operator cannot be a contributing cause of the spill. Thus, correlative to any inquiry into whether a spill was caused solely by a third party is an evaluation of the owner's or operator's own conduct. Where the act or omission of an owner or operator is a necessary antecedent to the spill, it is a contributing cause which bars recovery. . .

. . . Only in those instances which Congress believed to be completely beyond the control of the owner or operator would they be excused from liability. Any conduct, however slight, on the part of an owner or operator contributing to a spill would negate relief, even though such conduct might have operated in concert with greater third-party conduct to produce the spill. In other words, only where the owner's or operator's conduct was so indirect and insubstantial as to displace him as a causative element of the discharge would he be relieved of responsibility and, correspondingly, financial liability.

Id. at 848-49 (citations and footnotes omitted); see *Kyoei Kaiun Kaisha, Ltd. v. M/V Bering*
chain of events leading to the release." The third possible construction created a standard whereby the requirement would be violated by a claimant whose conduct is a proximate cause of the release or threatened release.

After analyzing the three possible constructions in the context of CERCLA’s third party affirmative defense, the court held that the term “caused solely by” in the defense incorporated the third construction—a proximate cause standard. The court concluded that a fault-based construction was inconsistent with the third party affirmative defense’s due care provisions. A construction that differentiated between acts and omissions was also inconsistent with the third party affirmative defense because the defense’s provisions made no such distinction between acts and omissions. In contrast, the court found that a proximate cause standard was consistent with the overall structure and language of the third party affirmative defense. The court also determined that a proximate cause standard provided the

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118 Id. The decision of the Court of Appeals for the Fifth Circuit in United States v. West of England Ship Owner’s Mutual Protection & Indemnity Association, 872 F.2d 1192 (5th Cir. 1989), was relied upon for support of the third construction. Id. The West of England court relied on the CWA’s statutory language and legislative history to conclude that causation and not fault is the focus of the third party affirmative defenses. 872 F.2d at 1196-97. The court then concluded that a spill is not “caused solely by” a third party if the claimant’s acts or omissions constitute a proximate cause of the spill. Id. at 1198; see Union Petroleum Corp. v. United States, 651 F.2d 734, 745 (Ct. Cl. 1981) (spill “caused solely by” third parties where conduct of criminal intruders caused spill and claimant took reasonable steps to prevent third party conduct); Chicago, Milwaukee, St. Paul & Pacific R.R. v. United States, 575 F.2d 839, 841 (Ct. Cl. 1978) (same).

[The court holds that “caused solely by” as used in CERCLA, incorporates the concept of proximate or legal cause. If the defendant’s release was not foreseeable, and if its conduct—including acts as well as omissions—was “so indirect and insubstantial” in the chain of events leading to the release, then the defendant’s conduct was not the proximate cause of the release and the third party defense may be available. This interpretation seems most consistent with the language of CERCLA’s third party defense provision. It also has the advantage of providing a consistent interpretation of language now frequently used, without explanation, in the defense sections of various environmental statutes.

Id.; accord United States v. Rohm and Haas Co., 790 F. Supp. 1255, 1264 (E.D. Pa. 1992) (contamination not caused solely by third party where defendant’s trucks were used to transport wastes and trucks were cleaned and maintained at waste water pretreatment plant located on defendant’s portion of site).

121 Id.
122 Id.
strictest construction of the affirmative defense. Thus, a proximate cause standard would provide a viable exemption to liability without sacrificing CERCLA's broad remedial purpose. Taking into account all of these factors, the court interpreted a proximate cause standard into the "caused solely by" requirement.

III. JUDICIAL APPLICATION OF CERCLA LIABILITY TO PUBLIC SEWER SYSTEM AUTHORITIES

Case law provides additional guidance into the proper application and scope of public sewer system liability under CERCLA. Two federal district courts have confronted the issue of public sewer system liability.

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123 See id.

124 See id. at 1540, 1542-43. CERCLA's legislative history endorses the application of proximate cause as a basis for causation:

The Committee intends that the usual common law principles of causation, including those of proximate causation, should govern the determination of whether a defendant "caused or contributed" to a release or threatened release. . . .


In addition to its consistency with CERCLA's plain language and overall structure and its conformity with CERCLA's legislative history, a proximate cause standard for the "caused solely by" requirement, by allowing public sewer system authorities to avoid liability in appropriate circumstances, see infra notes 147-59 and accompanying text, would also advance important policy considerations. See discussion infra part IV.

125 Other courts have refused to adopt Lincoln Properties's proximate cause standard. For example, in Violet v. Picillo, the District Court for the District of Rhode Island without discussion expressly rejected the application of a proximate cause standard to 42 U.S.C. § 9607(b)'s "caused solely by" requirement. 648 F. Supp. 1283, 1294 (D.R.I. 1986), later proceeding sub nom. O'Neil v. Picillo, 682 F. Supp. 706 (D.R.I. 1988), aff'd, 883 F.2d 176 (1st Cir. 1989); accord United States v. Marisol, Inc., 725 F. Supp. 833, 838 (M.D. Pa. 1989) (defense insufficient where defendant claimed that contamination proximately caused by acts and omissions of third parties). However, the court in Violet provided little reasoning for its rejection of a proximate cause standard and did not attempt to determine a more appropriate standard. As the court concluded:

[T]he doctrine of supervening, intervening cause describes an act of a third person or other force, which by its intervention, prevents the principal actor from being held liable to another, notwithstanding the principal's prior actions. Superseding, intervening cause is a part of the general tort law principle of proximate causation. [Defendant's] argument flows naturally from its view that liability under CERCLA requires proof of causation. However, the doctrine of proximate causation does not apply to CERCLA.

648 F. Supp. at 1294 (citations omitted). Furthermore, the cases that the Violet court cited in support of its rejection of a proximate cause standard discussed causation in the context of 42 U.S.C. § 9607(a) rather than § 9607(b). See id.
liability under CERCLA. The two courts reached different conclusions as to the imposition of CERCLA liability to public sewer system authorities. The two courts, however, applied similar analyses to determine the parameters of public sewer system authority liability under CERCLA.

A. The Lincoln Properties and Westfarm Associates Decisions

Lincoln Properties, Ltd. v. Higgins was the first case to address the issue of public sewer system liability under CERCLA. The court held that, although a municipal sewer system authority owned a portion of sewer system that leaked hazardous substances, the municipality could invoke the third party affirmative defense and avoid CERCLA liability.

Lincoln Properties, Ltd. (Lincoln) owned a shopping center on a thirty acre parcel of land in San Joaquin County, California (County). Lincoln leased shopping center space to dry cleaners. The dry cleaners used perchloroethylene (PCE), a commercial cleaning solvent, in the course of their business. Although a County ordinance prohibited the discharge of cleaning solvents into the municipal sewer system, PCE was discharged into the sewer system. Discharged PCE eventually contaminated a County well and ground water and soil beneath the shopping center. Lincoln conceded that it was liable in the first instance for CERCLA clean-up costs based on its ownership of the shopping center. Lincoln, however, sued the County for

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127 See discussion infra part III.A.
128 See infra notes 183–85 and accompanying text.
130 Id. at 1533–35, 1538, 1542–44.
131 Id. at 1542.
132 Id. at 1532.
133 Id.
136 Id. at 1544.
137 Id. at 1532.
138 Id.
139 Id.
contribution. Lincoln sought response costs from the County based on the County’s alleged ownership of a portion of leaking sewer system located underneath the shopping center and the County’s undisputed ownership of several wells with cracked casings through which PCE might have escaped.

The County moved for summary judgment as to all of Lincoln’s claims asserted against it. The court granted the County’s motion for summary judgment. The court concluded that a trier of fact could infer that at least some PCE was released through leaks in the sewer system owned by the County and that the County could thus be liable for such releases. The court, however, found that CERCLA’s third party affirmative defense precluded liability for the release of PCE from the County’s sewer system.

The court concluded that the County satisfied all of the requirements of CERCLA’s third party affirmative defense. No one contested that the third parties involved—the dry cleaners—were not the County’s agents or employees. The court found that no relevant contractual relationship existed between the County and the third parties. The court also pointed to several factors that led it to find that the County exercised due care and took reasonable precautions. The County tested and inspected joints in the sewer system and maintained the sewer system in accordance with industry standards. The County also possessed an ordinance that prohibited the discharge of PCE and other cleaning solvents into the sewer system.

The requirement that the release of PCE be “caused solely by” third parties posed the most significant obstacle to the court’s application of the affirmative defense. Applying a proximate cause standard, however, the court concluded that third parties solely caused
the PCE contamination. 155 There existed no evidence that the County engaged in conduct that contributed to the release of PCE aside from the County’s mere ownership of the sewer system. 156 Although dry cleaners discharged PCE into the County’s sewer system, the dry cleaners’ conduct violated a specific municipal ordinance and thus was unforeseeable to the County. 157 The County also took reasonable precautions to prevent foreseeable releases of hazardous waste. 158 Under such circumstances, the court concluded that the County’s conduct was indirect and insubstantial to the PCE contamination. 159 Thus, the County’s acts and omissions did not proximately cause the contamination and the County satisfied the “caused solely by” requirement of CERCLA’s third party affirmative defense.

The subject of public sewer system liability under CERCLA was also addressed, with different results, by the District Court for the District of Maryland in Westfarm Associates L.P. v. International Fabricare Institute. 160 The court held that a state-established sewer system authority was liable under CERCLA for contamination caused by its leaking sewers and that the authority could not invoke the third party affirmative defense because the release of hazardous substances was not caused solely by third parties. 161 After discovering the presence of PCE in ground water under its property, Westfarm Associates, L.P. (Westfarm) brought action against International Fabricare Institute (Fabricare). 162 Fabricare occupied land adjacent to Westfarm’s property and used PCE in several of the dry cleaning and related operations conducted on its premises. 163 Fabricare disposed of PCE into the public sewer system from 1969 until 1992. 164 PCE escaped from public sewer pipes into surrounding property. 165 Westfarm and Fabricare subsequently asserted claims under CERCLA against the Washington Suburban Sanitary Commission (WSSC). 166

The WSSC, a state agency that provides water and sewage services to the residents of two Maryland counties, owned the sewer system

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156 Id. at 1542–43.
157 See id.
158 See id. at 1543–44.
159 See id. at 1542–43.
161 Id. at *24–25.
162 Id. at *1.
163 Id. at *1, *2.
164 Id. at *2–3.
165 Id. at *16 & n.7.
166 Id. at *6.
into which Fabricare disposed PCE.\textsuperscript{167} The sewer system fell into disrepair and many sewer pipes were cracked.\textsuperscript{168} Although the court concluded that the WSSC was on constructive notice that its sewer system contained cracks, the WSSC neglected to repair the sewer system.\textsuperscript{169} Since 1918 the WSSC prohibited discharges of "any noxious or malodorous . . . substance . . . capable of creating a public nuisance or hazard to life . . . ."\textsuperscript{170} Only beginning in 1983, however, did the WSSC impose limits on the discharge of "toxic organics" into the sewer.\textsuperscript{171} The WSSC's regulations also allowed discharges of other hazardous substances into the sewer system.\textsuperscript{172}

The court in \textit{Westfarm Associates} granted Westfarm's motion for summary judgment and held that the WSSC could be liable for CERCLA response costs for the cleanup of PCE released from its sewer system.\textsuperscript{173} The court also held that the WSSC could not invoke CERCLA's third party affirmative defense.\textsuperscript{174} The WSSC failed to satisfy the affirmative defense's requirements that it exercise due care and take reasonable precautions against third parties' foreseeable acts and omissions and that third parties solely cause the contamination.\textsuperscript{175} Several factors combined to influence the court to decide that the WSSC satisfied none of the three requirements.\textsuperscript{176} The WSSC designed the sewer to leak and neglected to repair cracked sewer pipes.\textsuperscript{177} The WSSC also expected customers such as Fabricare to pour hazardous substances into the sewer; and its regulations—up until 1983—allowed discharges of hazardous substances such as PCE into the sewer system.\textsuperscript{178} Such conduct, the court concluded, caused the release

\textsuperscript{167} Id. at *3–4.
\textsuperscript{168} Id. at *4.
\textsuperscript{169} Id. at *24, *37.
\textsuperscript{170} Id. at *3, *5. The WSSC amended its regulations in 1992 to prohibit discharges of "malodorous or toxic . . . substances that . . . are capable of creating a public nuisance or hazard to human health or the environment . . . ." Id. at * 5 (emphasis added). The amended regulations, by extending prohibitions to discharges that threaten human health or the environment, provided a broader prohibition than the earlier regulations.
\textsuperscript{171} Id. at *5.
\textsuperscript{172} See id. at *24. The WSSC designed its sewer to allow pipe leakage at a rate of 200 gallons per inch diameter, per mile, per day. Id. at *4. Although the court noted this fact, the designed leakage was not determinative of the court's decision. Rather, the WSSC's conduct, and not the sewer system's overall design, constituted the focus of the court's holding. See infra notes 175–78 and accompanying text.
\textsuperscript{173} See \textit{Westfarm Assocs.}, 1993 U.S. Dist. LEXIS 15921, at *20–21.
\textsuperscript{174} Id. at *41.
\textsuperscript{175} Id. at *25 & n.8.
\textsuperscript{176} See id. at *24–25.
\textsuperscript{177} Id. at *25.
\textsuperscript{178} Id.
of hazardous substances and vitiated the third party affirmative defense.\footnote{\textit{ibid}. at *24-25.}

B. \textit{Reconciling the Lincoln Properties and Westfarm Associates Decisions}


The courts in \textit{Lincoln Properties} and \textit{Westfarm Associates} applied the same analysis to the issue of public sewer system liability. Both courts concluded that sewer systems are CERCLA “facilities.”\footnote{Westfarm Assocs., 1993 U.S. Dist. LEXIS 15921, at *4, *20–21, \textit{Lincoln Properties}, 823 F. Supp. at 1538.} Both courts also concluded that public sewer system authorities may be PRPs under CERCLA as “owners” of sewer systems.\footnote{Westfarm Assocs., 1993 U.S. Dist. LEXIS 15921, at *25, \textit{Lincoln Properties}, 823 F. Supp. at 1543.} The courts, however, reached divergent conclusions on the issue of the applicability of CERCLA's third party affirmative defense.\footnote{\textit{Id.} at 1542.} This disagreement, however, may be properly considered the result of differing factual circumstances in the two cases.

The facts of \textit{Lincoln Properties} supported the application of CERCLA's third party affirmative defense.\footnote{See \textit{Westfarm Assocs., 1993 U.S. Dist. LEXIS 15921, at *11–12; \textit{Lincoln Properties}, 823 F. Supp. at 1558.}} The County's commercial sewer customers were the sole cause of the contamination. No County conduct contributed to the release of hazardous substances.\footnote{See \textit{Westfarm Assocs., 1993 U.S. Dist LEXIS 15921, at *4, \textit{Lincoln Properties}, 823 F. Supp. at 1558.}} The County also exercised due care and took reasonable precautions against the foreseeable acts and omissions of its commercial customers.\footnote{See \textit{Lincoln Properties, Ltd. v. Higgins}, 823 F. Supp. 1528, 1542–44 (E.D. Cal. 1992).} The County built and maintained sewer lines in accordance with industry
standards and promulgated an ordinance that prohibited the discharge of PCE and other cleaning solvents into the sewer system. The County also could not be expected to foresee that its ordinance prohibiting the discharge of hazardous substances would be violated. Under such circumstances, the County’s conduct was indirect and insubstantial to the release of PCE and the County thus met the “caused solely by” third parties requirement.

In contrast, the WSSC failed to exercise due care and take reasonable precautions against the foreseeable acts and omissions of third parties. The WSSC’s conduct also proximately caused contamination. The WSSC designed its sewer system to leak and failed to upkeep its sewer lines properly even when it was on notice that portions of its sewer line needed repair. Although the WSSC possessed an ordinance that regulated discharges into the sewer system, the court found that the ordinance provided insufficient protection against hazardous discharges. Finally, a WSSC representative admitted that the WSSC foresaw that some of its industrial customers would release hazardous substances into the sewer system. Far from exercising due care and taking reasonable precautions, the WSSC permitted the discharge of potentially hazardous waste into its improperly maintained sewer system. Furthermore, the WSSC, unlike the County in Lincoln Properties, through its conduct directly contributed to the release of hazardous substances. Because the WSSC’s conduct proximately caused the PCE contamination, the WSSC failed to satisfy the “caused solely by” requirement of CERCLA’s third party affirmative defense.

In sum, the decisions in Lincoln Properties and Westfarm Associates both addressed the issue of public sewer system authority liability under CERCLA. The two cases, however, contain significant factual differences. The different factual circumstances surrounding each case, in turn, helps to explain why CERCLA’s third party affirmative defense was not applicable.

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189 Id. at 1544.
190 Id. at 1543 n.25.
191 Id. at 1543.
193 Id. at *24.
194 See id.
195 Id.
196 See id.
197 See supra notes 187–90 and accompanying text.
198 See supra notes 193–95 and accompanying text.
defense was appropriate in *Lincoln Properties* and inappropriate in *Westfarm Associates*.

**IV. CERCLA LIABILITY AND PUBLIC SEWER SYSTEM AUTHORITIES: POLICY ARGUMENTS**

Several considerations caution against the application of CERCLA liability to public sewer system authorities for the discharges of their industrial and commercial customers absent direct responsibility for contamination. Such arguments are by no means determinative on the matter of public sewer system liability under CERCLA. They are, however, significant factors that a court should consider when determining whether or not to impose liability on a public sewer system authority.

One policy consideration that favors a public sewer system authority liability shield is the cost of CERCLA liability to states and municipalities. CERCLA would expose public sewer system authorities to enormous liability for the cleanup of hazardous waste contamination. If public sewer system authorities challenge the imposition of liability they must litigate the issue. Such litigation, and the transaction costs associated with litigation, is expensive and often lasts for years.

The threat of exposure to CERCLA liability may also compel public sewer system authorities to expend limited resources to design and install preventative measures and implement additional oversight.

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199 Such policy arguments may also be considered by a court in apportioning liability if the court holds a particular public sewer system authority liable under CERCLA. See 42 U.S.C. § 9613(0(1) (1988) (courts may consider equitable factors when assessing the proper proportion of liability as between several liable parties).


201 See *supra* note 16 and accompanying text. The cost of liability is of greater concern to municipalities, because their resources and their revenue generating capabilities are far less than that of states.

202 See Lynnette Boomgaard & Charles Breer, *Surveying the Superfund Settlement Dilemma*, 27 LAND & WATER L. REV. 83, 91 (1992) (stating that full-blown litigation often takes years to complete and can amount to $200–300,000 every six months for small groups of mid-volume to de minimis PRPs); Kit R. Krickenberger & Pamela Rekar, *Superfund Settlements: Breaking the Logjam*, [19 Current Developments] Env't Rep. (BNA) 2384, 2386 (Mar. 10, 1989) (noting one CERCLA suit for response costs in which parties spent $2.5 million in overall litigation costs); see also Frank Viviano, *Superfund Costs May Top S & L Bailout: U.S. Toxics Cleanup Mired in Lawsuits*, S.F. CHRON., May 29, 1991, at A1 (noting that, to date, eight billion dollars has been spent towards the cleanup of CERCLA sites while $12 billion has been spent in CERCLA transaction and litigation costs). "Transaction costs" entail interest costs, search costs for the identification of other PRPs, and other associated CERCLA clean-up costs. Transaction costs increase substantially when the number of PRPs increase. *Acton & Dixon, supra* note 16, at 51.
procedures to prevent future liability. The impetus to implement preventative measures would be great because of the difficulty in obtaining insurance for environmental liability.203 The expense of preventative measures, however, is prohibitive. The cost of determining the presence of hazardous substances alone is often overwhelming to states and municipalities.204

The costs of CERCLA liability and liability prevention lead to a misallocation of state and municipal resources. Some state and municipal financial resources are limited by constitutional or statutory constraints.205 Expending limited resources to defend against, pay off, and prevent CERCLA liability may result in the neglect or abandonment of other government functions and threatens the ability of states and municipalities to carry out such functions.206


Adding to the difficulties facing states and municipalities is the fact that last year the Clinton Administration reduced federal funding for state and municipal sewage treatment by $720 million. Gregory Gordon, U.S. Budget Slashes Funds for Treatment of Sewage, STAR THIB., Aug. 16, 1993, at 1A.

205 See Keith Schneider, Industries and Towns Clash About Who Pays to Get Rid of Poisons, N.Y. TIMES, July 18, 1991, at A14 (reporting that a town in California with a $55 million annual budget could be liable for $20 to $30 million in CERCLA costs over a decade and that a town in Connecticut with a $1.6 million annual budget could face up to one million dollars in CERCLA liability).

The following testimony before a Senate subcommittee by a member of the city council of Alhambra, California illustrates the tough choices that municipalities face:

Local governments, small businesses, and others find themselves in a horrific "Catch 22" when they receive notice of [CERCLA] lawsuits. If they cannot afford, or do not think it is right, to settle such claims, they must spend millions to defend themselves and pray that somewhere down the line a judge will put an end to this madness. The price paid in the interim is extreme. . . . [O]ne of the cities in our group—Bell, California—had no alternative but to lay off two policemen in order to meet its share of our joint defense costs, and I am certain that these normally hidden, but devastating, social costs are being duplicated in targeted communities throughout the country.

Imposing CERCLA contribution costs on public sewer system authorities is also an unfair method of allocating costs for the cleanup of contaminated sites. States and municipalities would pass CERCLA costs on to the general public in the form of higher taxes or usage rates.\(^{207}\) Such increased costs would produce no resulting public benefit.\(^{208}\) In addition, ratepayers are already finding that it is increasingly difficult to afford sewer services.\(^{209}\)

Industrial and commercial dischargers would be able to more fairly allocate clean-up costs by passing off such costs to customers and purchasers. Clean-up costs are then made part of the expense involved in making the product or providing the service and will reflect the true social cost of the product or service.\(^{210}\) Such an allocation would pass on costs to the parties who benefit from a particular service or product, rather than have the public subsidize the cleanup.

Under a "cost spreading" approach to liability, public sewer system authorities may appear to be desirable targets for CERCLA liability. Public sewer system authorities may be better able to spread the costs of CERCLA liability among the general public.\(^{211}\) The fact that

\(^{207}\) For example, in United States v. Montrose Chem. Corp., discussed supra note 21, the public sewer system authorities that agreed to pay CERCLA response costs planned to obtain the revenue for such costs from user fees. See Johannessen, supra note 21, at 327. Public sewer system authorities could attempt to raise user fees only for industrial and commercial customers. Although the imposition of increased fees on industrial and commercial customers may be more equitable than the imposition of increased fees on all customers, the fee suffers from the same inherent unfairness as a general tax or rate increase because not all industrial and commercial customers discharge hazardous substances into sewer systems. Imposing increased fees on all industrial and commercial customers, regardless of their conduct, is also contrary to CERCLA's purpose of holding those responsible for contamination responsible for cleanup. See infra note 217.

\(^{208}\) Compare this situation with the situation presented in B.F. Goodrich Co. v. Murtha. 958 F.2d 1192 (2d Cir. 1992). The Court of Appeals for the Second Circuit in B.F. Goodrich held that a municipality could be found liable for CERCLA clean-up costs for its role in arranging for the disposal of MSW. Id. at 1198. The court rejected the policy argument that the imposition of CERCLA liability on municipalities for transporting and arranging for disposal of MSW would result in shouldering the burden of response costs on municipal taxpayers with no resulting benefit. Id. at 1204. Unlike the situation with the disposal of industrial and commercial sewer waste, however, municipal taxpayers obtain direct, although slight, benefits from the disposal of MSW. See id. (municipal taxpayers benefit from the disposal of hazardous household substances).

\(^{209}\) Residential users in many sewer districts find it difficult to afford sewer system authorities' rapidly rising service rates. See Scott Allen, Cost of Clean Water is Hot Political Issue, HOUS. CHRON., July 4, 1993, at C7; see also Andy Dabilis, Water Rates Too High for Many People to Pay, BOSTON GLOBE, Jan. 12, 1992, at 1 (Northwest Weekly).


\(^{211}\) Taken to its logical extreme, the cost spreading approach to liability would favor a national tax as the proper means to pay for CERCLA, as the best way to spread costs would be on a
public sewer system authorities may be able to more effectively spread costs, however, does not mean that they should be held liable under CERCLA. Spreading CERCLA costs among the general public would be unfair because the public would be subsidizing industrial and commercial establishments and their customers for the social costs of their goods and services. In addition, the imposition of a general tax is inconsistent with Congressional intent. A cost spreading approach would amount to a CERCLA “tax” on the general public. However, Congress explicitly rejected the idea of a general tax when it created CERCLA. Thus, although public sewer system authorities may be better able to spread clean-up costs than their industrial or commercial customers, such an approach is unfair and, more importantly, contrary to Congressional intent.

CERCLA’s underlying purposes also counsel against the imposition of liability on public sewer system authorities. CERCLA possesses two essential purposes: the promotion of the prompt and effective cleanup of hazardous waste sites and the imposition of liability on those responsible for hazardous waste contamination. Extending CERCLA liability to public sewer system authorities, however, promotes neither purpose. The extension of CERCLA liability to public sewer system authorities would promote time consuming litigation and delay action to clean up contaminated facilities. Furthermore, the true responsible parties, absent circumstances such as were evi-

212 Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 92 (3d Cir. 1988), cert. denied, 488 U.S. 1029 (1989). As the Court of Appeals for the Third Circuit explained:

Expenses can be borne by two sources: the entities which had a specific role in the production . . . of the hazardous condition, or the taxpayers through federal funds. CERCLA leaves no doubt that Congress intended the burden to fall on the latter only when the responsible parties lacked the wherewithal to meet their obligations. Id.; see In re Bell Petroleum Servs., Inc., 3 F.3d 889, 897 (5th Cir. 1993) (“CERCLA is a strict liability statute, one of the purposes of which is to shift the cost of cleaning up environmental harm from the taxpayers to the parties who benefited from the disposal of the wastes that caused the harm”).

However, the expenditure of public funds is necessary at sites where no private PRPs can be located or where private PRPs lack the financial resources necessary to effect a cleanup. See Smith Land & Improvement, 851 F.2d at 92. Given this, private PRPs should be liable for as much of the cleanup of a contaminated facility as possible. A narrow construction of the third party affirmative defense prevents this because it allows private PRPs to decrease liability by obtaining response costs from public sewer system authorities through contribution actions when such contribution is wholly inappropriate.

213 See, e.g., B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1198 (2d Cir. 1992); Barmet Aluminum Corp. v. Reilly, 927 F.2d 289, 291 (6th Cir. 1991).

214 See Municipalities Should Be Held Liable for Cleanup Only by EPA, Witnesses Say, [24 Current Developments] Env’t Rep. (BNA) 10 (May 7, 1993) (“many industrial PRPs have been
dent in *Westfarm Associates*, would be industrial and commercial dischargers, not public authorities. Placing a portion of the economic burden for cleanup on states and municipalities would amount to public subsidization of contamination cleanup and would allow those who are truly responsible to shirk their responsibility. Such public subsidization of response costs thwarts Congressional intent to impose liability on responsible parties. Rather, clean-up costs should be placed upon those responsible for the contamination and not the general public.

There exist several policy concerns that favor the exclusion of public sewer system authority liability under CERCLA. Fiscal and time concerns favor total immunity in order to protect state and municipalities from CERCLA’s financial burdens and to promote the prompt cleanup of contaminated sites. These concerns, however, must be balanced with other policy considerations: fairness and consistency with CERCLA’s purpose of holding the parties responsible for contamination liable for clean-up costs. These other policy concerns do not support total immunity because total immunity would allow public sewer system authorities to avoid liability even when they are responsible for hazardous waste contamination. The reconciliation of these various policy concerns requires an approach to

suing local governments as a delaying tactic, knowing that ‘proving that they didn’t put toxic wastes into garbage will take years and a lot of money’

215 See *supra* notes 163–72 and accompanying text.

216 See *supra* note 10 and accompanying text.

217 See *supra* note 213.

218 Unlike RCRA and the CWA, CERCLA is primarily remedial in nature. See United States *v.* Alcan Aluminum Corp., 964 F.2d 252, 258 (3d Cir. 1992); B.F. Goodrich Co. *v.* Murtha, 958 F.2d 1192, 1198 (2d Cir. 1992). However, by imposing liability on responsible parties CERCLA attempts to affect future behavior and prevent future hazardous waste contamination. See Grad, *supra* note 51, at 2. The extension of liability to public sewer system authorities, however, does little to promote the future prevention of hazardous waste. Although public sewer system authorities can monitor sewer systems for hazardous waste discharges, states and municipalities lack adequate resources to be effectual monitors for the prevention of hazardous waste contamination. See *supra* notes 203–05 and accompanying text. More importantly, the focus of prevention should be the dischargers of hazardous substances, not public sewer system authorities. Industrial and commercial customers, by exercising direct control over their discharges, are in the best position to control discharges. However, allowing industrial and commercial customers to decrease their CERCLA liability by suing public sewer system authorities for contribution provides less of an incentive for industrial and commercial customers to regulate their discharges. Thus, although public sewer system authorities do possess monitoring capabilities, industrial and commercial customers make far more effective monitors. Public sewer system authority liability, however, may chill effective oversight by industrial and commercial dischargers.

219 See *supra* notes 200–02 and 205–06 and accompanying text.

220 See *supra* notes 207–10 and 213–18 and accompanying text.
public sewer system liability that lies somewhere between absolute immunity and absolute liability. The proper approach is the use of CERCLA’s third party affirmative defense and *Lincoln Properties’s* proximate cause standard to the “caused solely by” third parties requirement.

V. APPLICATION OF CERCLA LIABILITY TO PUBLIC SEWER SYSTEMAuthorities

Public sewer system authorities should not receive a blanket of immunity under CERCLA. Rather, courts should use *Lincoln Properties’s* proximate cause approach to the “caused solely by” third parties requirement of CERCLA’s third party affirmative defense.221 Such an approach strikes a correct balance between liability and protection from liability under CERCLA.222 Applying *Lincoln Properties’s* proximate cause standard, states and municipalities should be able to use the third party affirmative defense as a shield against CERCLA liability by taking appropriate steps in the construction, maintenance, and oversight of sewer systems.223 Given such protection for public sewer system authorities, the Equity Act, insofar as it deals with municipal sewer system authorities, is unnecessary and, in fact, inappropriate.224

A. Steps Public Sewer System Authorities Should Take to Enhance the Likelihood of the Application of CERCLA’s Third Party Affirmative Defense

Because of CERCLA’s high economic stakes,225 public sewer system authorities must take appropriate steps to avoid liability.226 Unless Congress revises CERCLA,227 public sewer system authorities cannot

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221 See *supra* notes 154–59 and accompanying text.
222 See *supra* notes 186–98 and accompanying text.
223 See *infra* notes 233–44 and accompanying text.
224 See discussion *infra* part V.B.
225 See *supra* note 16.
226 Industrial and commercial sewer system customers are taking steps to reduce the possibility of hazardous waste contamination from sewers and thus reduce the chances of CERCLA liability. See, *e.g.*, Mike Pulley, *Dry Cleaners Gasp as Toxic Chemical Shows Up in Wells*, Bus. J.-SACRAMENTO, Sept. 23, 1991, at 1 (discussing industry attempts to persuade members to send wastewater to toxic recyclers rather than to dispose wastewater into sewer systems); Anne K. Rhodes, *Technology, Efficient Operation Key Elements in Environmental Strategy*, OIL & GAS J., Nov. 29, 1993, at 39 (discussing industry attempts to prevent hazardous waste contamination through use of concrete trenches for sewer pipes).
227 *E.g.*, *supra* notes 71–74 and accompanying text. CERCLA is due to expire in 1994 and, at the date of publication, was in the process of obtaining congressional reauthorization. See
escape owner or operator status: the statute's plain language and relevant case law support the inclusion of public sewer system authorities as owners and operators.\textsuperscript{228} Liability, however, is not absolute. Public sewer system authorities may utilize CERCLA's third party affirmative defense as a shield against liability.\textsuperscript{229} The \textit{Lincoln Properties} and \textit{Westfarm Associates} decisions provide useful examples of appropriate and inappropriate conduct, respectively, on the part of


\textsuperscript{228} See discussions supra parts II.B.1 and II.B.

\textsuperscript{229} See supra notes 145–59 and accompanying text. Even when a public sewer system authority is found liable under CERCLA, the authority may attempt to minimize its liability by settling as a \textit{de minimis} party if the government determines that the authority played only a minor role in the release of hazardous substances. CERCLA's \textit{de minimis} provisions are set forth in 42 U.S.C. § 9622(g), which reads in relevant part:

Whenever practicable and in the public interest, as determined by the President, the President shall as promptly as possible reach a final settlement with a potentially responsible party in an administrative or civil action under section 9606 or 9607 of this title if such settlement involves only a minor portion of the response costs at the facility concerned and, in the judgment of the President, the conditions in either of the following subparagraph (A) or (B) are met: (A) Both of the following are minimal in comparison to other hazardous substances at the facility: (i) The amount of the hazardous substances contributed by that party to the facility. (ii) The toxic or other hazardous effects of the substances contributed by that party to the facility. (B) The potentially responsible party—(i) is the owner of the real property on or in which the facility is located; (ii) did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility; and (iii) did not contribute to the release or threat of release of a hazardous substance at the facility through any action or omission. This subparagraph (B) does not apply if the potentially responsible party purchased the real property with actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substance. (2) The President may provide a covenant not to sue with respect to the facility concerned to any party who has entered into a settlement under this subsection unless such a covenant would be inconsistent with the public interest . . . (5) A party who has resolved its liability to the United States under this subsection shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially responsible parties unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

42 U.S.C. § 9622(g) (1988). CERCLA's \textit{de minimis} provisions provide a mechanism by which PRPs who contributed minimal amounts of hazardous substances to a facility may resolve their liability expeditiously. See id. Under § 9622(g)(5), the government may provide PRPs with a covenant not to sue, whereby PRPs' liability for matters covered in the agreement are discharged, subject to a reopener clause to cover conditions unknown at the time of the agreement. \textit{Id.} PRPs who settle under § 9622(g) also receive protection against third party contribution actions. 42 U.S.C. § 9613(f)(2) (1988).
public sewer system authorities for application of the affirmative defense.\textsuperscript{230}

Although CERCLA's third party affirmative defense is intended to apply in limited circumstances,\textsuperscript{231} public sewer system authorities should be able to invoke the defense and avoid CERCLA liability for contamination resulting from industrial and commercial discharges.\textsuperscript{232} A public sewer system authority should ordinarily satisfy all five of the defense's requirements.\textsuperscript{233} The requirement that there not exist a contractual relationship between the public sewer system authority and the third party should present no obstacle to application of the affirmative defense. The presence of a contractual relationship forecloses application of the affirmative defense only when the contract is somehow connected to the conscious handling of hazardous substances.\textsuperscript{234} Although public sewer system authorities may possess contractual relationships with their industrial and commercial customers, such contracts typically do not cover the disposal of hazardous substances.\textsuperscript{235} The requirement that the third party not be an employee or an agent of the claimant should also ordinarily be satisfied because the focus of concern is contamination caused by the conduct of public sewer system authorities' industrial and commercial customers, not their agents or employees.\textsuperscript{236}

A public sewer system authority should ordinarily be able to satisfy the requirements that it exercise due care with respect to hazardous substances and take precautions against the foreseeable acts and omissions of third parties. Appropriate conduct is illustrated by Lincoln Properties and Westfarm Associates.\textsuperscript{237} For example, public sewer system authorities should implement and maintain programs for the

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Public sewer system authorities could also attempt to minimize liability if found liable in a CERCLA court action by arguing that the court take into account equitable considerations when it allocates financial responsibility, as is allowed by 42 U.S.C. § 9613(f)(1) (1988). See supra note 34.\textsuperscript{238}

\textsuperscript{230} See supra notes 186–98 and accompanying text.


\textsuperscript{233} See supra notes 148–59 and accompanying text.


\textsuperscript{236} See supra note 10.

\textsuperscript{237} See supra notes 187–98 and accompanying text.
regular inspection and upkeep of sewer systems.\textsuperscript{238} Public sewer system authorities also should take steps to ensure, as much as is economically practical,\textsuperscript{239} that hazardous materials are not discharged into sewer systems. Preventative measures should include the institution of pretreatment and source control programs.\textsuperscript{240} Although many public sewer system authorities possess ordinances that govern the release of industrial and commercial wastewater into sewer systems,\textsuperscript{241} authorities should verify that ordinances prohibit the discharge of all CERCLA hazardous substances. All of these measures should make it more likely that a court will find that a public sewer system exercised due care and took reasonable precautions against foreseeable third party acts and omissions.

Finally, applying the proximate cause standard adopted by the court in \textit{Lincoln Properties},\textsuperscript{242} the contamination that results from hazardous waste discharged into a sewer system by industrial and commercial customers would ordinarily be "caused solely by" the industrial and commercial customers. Public sewer system authorities' normal conduct or lack thereof will not be the proximate cause of the release absent extraordinary circumstances. Although hazardous substances are discharged into the sewer system, the public sewer system authority's conduct is normally indirect and insubstantial. However, as \textit{Westfarm Properties} illustrates, a public sewer system authority's conduct and lack thereof can rise to the level of proximate cause.\textsuperscript{243} Negligent upkeep of a sewer system or failure to establish adequate safeguards will also fail to meet the "caused solely by" requirement because such conduct will place a public sewer system

\textsuperscript{239} See supra notes 203--D6 and accompanying text on the practical limits of state and municipal preventative measures.
\textsuperscript{240} See \textit{Westfarm Assocs.}, 1993 U.S. Dist. LEXIS 15921, at *24. Public sewer system authority industrial pretreatment and source control programs reduce contamination in industrial wastewater. \textit{COMMITTEE ON WASTEWATER MANAGEMENT FOR COASTAL URBAN AREAS ET AL., MANAGING WASTEWATER IN COASTAL URBAN AREAS} 9, 28, 55 (1993). There currently exists no federal mandate for public sewer system authorities to implement pollution prevention programs. \textit{Id.} at 298. Nationally, about 12,000 individual industrial firms are covered by federal pretreatment requirements, while as many as 200,000 are not. \textit{Id.} at 401. Of this latter number many are subject to local limits which are determined on the basis of NPDES permits for pretreatment facilities. \textit{Id.}
\textsuperscript{241} See \textit{Imhoff et al., supra} note 7, at 250. In addition, several cities, in response to the threat of CERCLA liability on the basis of sewer system ownership, have changed their regulations to more strictly regulate what substances may and may not be disposed into a sewer system. \textit{See} Pulley, supra note 226, at 1.
authority at fault and establish that the authority's acts or omissions were more than indirect or insubstantial to the release of hazardous substances.\(^{244}\)

B. The Equity Act as a Solution to Public Sewer System Liability under CERCLA

As discussed previously, the Equity Act—a proposed and as of yet unenacted amendment to CERCLA—Attempts to shield municipalities from CERCLA liability.\(^{245}\) The Equity Act, however, suffers from two significant flaws. First, by its own terms, the Equity Act applies only to municipalities.\(^{246}\) Thus, state sewer system authorities would not be shielded against liability by the proposed amendment's provisions. The second flaw lies in the Equity Act's overbreadth. Under the Equity Act, a municipal sewer system authority would be exempt from CERCLA costs for the cleanup of hazardous substances released from sewer pipes owned and maintained by the authority regardless of the authority's conduct.\(^{247}\) Thus, even if a municipal sewer system authority is negligent or reckless or directly causes contamination it is shielded against liability.\(^{248}\) By exempting a municipal sewer system authority even though it may be directly responsible for contamination, the Equity Act gives municipalities too much protection. The Equity Act's broad exemption for municipalities would also, in some instances, permit a responsible party to avoid liability. Such broad immunity, however, is unfair and is inconsistent with CERCLA's purpose of holding those parties who release hazardous waste responsible for the resulting clean-up costs.\(^{249}\)

The Equity Act, as it relates to public sewer system authority liability, is an improper approach. A more appropriate Congressional approach would be to clarify the "caused solely by" language of CERCLA's third party affirmative defense so as to employ a proximate cause standard and to clarify the availability of the defense to public sewer system authorities. The use of a proximate cause standard

\(^{244}\) See id. at *24–25, *36.

\(^{245}\) See supra notes 76–85 and accompanying text.


\(^{247}\) See id.

\(^{248}\) See id.

\(^{249}\) See supra note 213. Insofar as CERCLA attempts to prevent contamination, absolute immunity does not promote the prevention of contamination because municipalities are provided with no incentive to take any measures to prevent releases that may invoke CERCLA response costs.
would provide ample protection to public sewer system authorities and would also ensure that public sewer system authorities are held accountable for contamination that they are responsible for.250 Even more importantly, the adoption of a proximate cause standard will not substantially enlarge the third party affirmative defense to the detriment of CERCLA's remedial purpose. Of the three possible standards discussed by the court in Lincoln Properties,251 the court found the proximate cause standard to be the strictest.252 The proximate cause standard will allow a party to meet the "caused solely by" standard only in limited situations that fall within CERCLA's purpose to hold those responsible for contamination liable for cleanup. In addition, a party that asserts CERCLA's third party affirmative defense would still have to satisfy the defense's four other requirements in order to avoid liability.253

VI. CONCLUSION

State and municipal sewer system authorities may be PRPs under CERCLA as the owners or operators of contaminated facilities. Public sewer system authorities, however, should normally be able to invoke successfully the third party affirmative defense to avoid CERCLA liability. Westfarm Associates and Lincoln Properties addressed the issue of public sewer system liability and reached different conclusions as to liability. The two cases, however, do not conflict with one another. Rather, both cases represent the correct approach to public sewer system authority liability under CERCLA. Westfarm Associates is an example of an instance in which a public sewer system authority failed to take the ordinary steps necessary to defend itself against CERCLA liability. The decision should not be interpreted as a detrimental expansion of CERCLA liability to public sewer system authorities. Courts should recognize that Westfarm Associates is not legally inconsistent with Lincoln Properties and that the two cases are factually distinguishable. The factual differences, in turn, account for the differences in outcome.

The protection of state and municipality fiscal health favors the exclusion of public sewer systems from liability for the conduct of its industrial and commercial customers. However, the promotion of economic fairness and the desire for consistency with CERCLA's pur-
pose of holding parties who are responsible for contamination liable for the resulting cleanup are also important policy concerns. Factoring in these concerns, public sewer system authorities should not always be shielded from CERCLA liability. Rather, public sewer system authorities should be held liable for the contamination for which they are responsible.

States and municipalities should not have to face potentially enormous costs and possible financial ruin for the conduct of third parties when they act responsibly. CERCLA's third party affirmative defense constitutes an appropriate safeguard. However, the causation standard used for the requirement that contamination be "caused solely by" third parties is unclear and there is little legislative or judicial guidance as to what is the proper standard to apply. Adopting a construction similar to that adopted by the court in *Lincoln Properties*, rather than adopting legislation such as the Equity Act, should allow public sewer system authorities to avoid liability in appropriate circumstances without providing authorities with absolute immunity.