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PRIVATE PARTY CLEANUP: CONSISTENCY UNDER THE 1990 NATIONAL CONTINGENCY PLAN

Jeffrey W. Pusch*

I. INTRODUCTION

Suppose a current owner of real property contaminated by hazardous substances must clean up the property to sell it. In an attempt to recover its cleanup costs, the current owner likely would consider suing the former owner thought to be responsible for the contamination. Assuming the former property owner indeed is responsible for the contamination, is the current owner likely to obtain reimbursement for the cleanup costs? The answer for such a landowner now is more optimistic than ever, provided this landowner acts pursuant to changes in the National Contingency Plan (NCP),1 one of the major regulations related to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).2

Congress passed CERCLA to address hazardous waste contamination in the United States.3 The United States Environmental Protection Agency (EPA) initially received $1.6 billion to respond to hazardous substances releases and administer the cleanup of 400

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1 The National Contingency Plan (NCP) establishes standards for the assessment of cleanup actions. National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R § 300 (1990); see, e.g., Artesian Water Co. v. New Castle County, 659 F. Supp. 1269, 1291–92 (D. Del. 1985), aff’d, 851 F.2d 643 (3d Cir. 1988) (cleanup actions are to be taken within guidelines of NCP).
2 42 U.S.C. §§ 9601–9675 (1988). This Comment will refer to CERCLA and the Superfund Amendments and Reauthorization Act of 1986 (SARA) collectively as CERCLA.

217
hazardous waste sites. Hazardous waste contamination, however, is much more widespread than Congress originally thought. In 1985, the federal Office of Technology Assessment estimated that there were as many as 10,000 potential Superfund sites in the United States. Cleanup of these sites will cost close to $100 billion and last into the coming decades. Subsequent to CERCLA’s passage in 1980, Congress passed the Superfund Amendments and Reauthorization Act of 1986 (SARA), which further attempts to confront the reality of widespread hazardous waste contamination in the United States. Because the EPA does not possess sufficient resources to undertake cleanup of all hazardous waste sites, one of the underlying principles of SARA is to facilitate the cleanup of these sites by responsible parties.

This Comment discusses one aspect of CERCLA that is essential to promoting hazardous waste cleanup, the statutory provision granting private parties the ability to recover their cleanup costs from other responsible parties. In particular, this Comment assesses private parties’ incentive to undertake voluntary hazardous waste cleanup actions given post-SARA changes to the standard governing private party compliance with NCP guidelines in such actions. Section II discusses CERCLA’s private cause of action for cleanup costs. Section III outlines the development of the NCP from 1968 to 1985 and the judicial standard of conformance with the 1985 NCP for private party cleanup actions. Section IV then discusses SARA and its effect on the formulation of the 1990 NCP. These recent changes in the NCP provide new incentives for private party cleanup of hazardous waste sites, not because they offer dramatic new latitude in private party efforts, but simply because they clarify the standard for assessing private party obligations under the NCP and thereby decrease defendants’ ability to use judicial disagreement surrounding private parties’ duties under the NCP to their advantage.

6 Id.
7 Id.
10 See infra notes 13–64 and accompanying text.
11 See infra notes 65–120 and accompanying text.
12 See infra notes 121–154 and accompanying text.
II. CERCLA

A. Potentially Responsible Parties and Liability

Through enacting CERCLA, Congress intended to establish a means for addressing the array of problems associated with hazardous waste disposal sites.13 Accordingly, CERCLA imposes a wide net of liability.14 A release or threatened release of a hazardous substance at a facility triggers CERCLA liability.15 CERCLA broadly defines the terms “hazardous substance,”16 “facility,”17 and “release.”18 A facility includes any site or area where a hazardous substance is located.19 A release includes any spilling, leaking, emitting, escaping, or dumping of hazardous substances into the environment.20 Persons in charge of facilities must notify the National Response Center as soon as they know of a release.21 Failure to notify can result in both a fine and prison sentence.22

Potentially responsible parties (PRPs) may be liable for governmental and private party response costs.23 Response costs are those costs incurred to remove or remediate a release, or prevent a threatened release, of a hazardous substance.24 Under CERCLA, PRPs include members of four broad groups: current owners and operators of a facility; any person who owned or operated a facility at the time of the hazardous substance disposal; any person who arranged for the disposal, treatment, or transport of the hazardous substance; and any person who transported the hazardous substance.25

CERCLA is a strict liability statute, allowing only a limited number of defenses that the Act narrowly defines.26 To qualify for one

15 Id. § 9604(a)(1).
16 Id. § 9601(14).
17 Id. § 9601(9).
18 Id. § 9601(22).
19 Id. § 9601(9).
20 Id. § 9601(22).
21 Id. § 9603(a).
22 Id. § 9603(b).
23 Id. § 9607(a)(4)(A)–(C). Unlike the federal government, a state, or an Indian tribe, private parties may not recover for natural resource damages. See id. at § 9607(f).
24 Id. § 9601(23)–(25).
25 Id. § 9607(a)(1)–(4).
26 See id. § 9607(b); see also United States v. Aceto Agric. Chem. Corp., 872 F.2d 1373, 1377–78 (8th Cir. 1989); New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985).
of these affirmative defenses, a responsible party must demonstrate, by a preponderance of the evidence, that the release of a hazardous substance and the resulting damage were caused by an "act of God," an act of war, or an act or omission by a third party.27 A responsible party may not qualify for the third-party defense if the third party is an employee or agent of the responsible party, or if the act or omission of the third party occurred while the third party maintained a contractual relationship, directly or indirectly, with the responsible party.28 The third-party defense is also unavailable unless a responsible party exercised due care with the hazardous substances and took precautions against foreseeable acts or omissions of third parties.29

B. The Private Cause of Action Under CERCLA

CERCLA allows private parties to clean up hazardous waste sites and then recover certain cleanup costs from other liable parties.30 According to the statute, private parties may recover "necessary" response costs that are "consistent" with the NCP.31 It was initially unclear whether private parties had a cause of action to recover cleanup costs under CERCLA.32 Courts and commentators have blamed this confusion on the speed with which Con-

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28 Id. § 9601(35) (SARA defines contractual relationship to include subsequent owners in title).
29 Id. § 9607(b)(3).
30 Id. § 9607(a)(4)(B). The statute states that "covered persons"—PRPs—shall be liable for "any other necessary costs of response incurred by any other person consistent with the national contingency plan." Id.; see also Amland Properties Corp. v. Aluminum Co. of Am., 711 F. Supp. 784, 790 (D.N.J. 1989). The court stated that the following five elements comprise a private party claim for cost recovery under § 9607(a)(4)(B): a claimant must fall within one of the four categories of "covered persons;" there must have been a release or threatened release at a facility; the release or threatened release must have caused the claimant to incur costs; the costs must be "necessary costs of response;" and the claimant's response actions must have been consistent with the National Contingency Plan. Id.
gress drafted and passed the final bill.\textsuperscript{33} Indeed, the haste of the bipartisan Congressional leadership group in assembling, introducing, and passing CERCLA precluded the development of an extensive legislative history.\textsuperscript{34} A number of defendants have challenged the availability of a private cause of action under CERCLA, but courts have concluded that CERCLA allows a private cause of action for the recovery of hazardous waste cleanup costs.\textsuperscript{35} In reaching this conclusion, these courts have looked both to the plain language of CERCLA and the statute’s remedial purpose.\textsuperscript{36} A private cause of action therefore is now firmly established.\textsuperscript{37}

\textbf{C. Consistency in Removal and Remedial Actions}

CERCLA divides hazardous waste cleanups, or “responses,”\textsuperscript{38} into two categories, “removal”\textsuperscript{39} actions and “remedial” actions.\textsuperscript{40} Removal actions address immediate threats to the public welfare or the environment and are utilized primarily for short-term abatement of

\textsuperscript{33} See Artesian Water Co., 851 F.2d at 648. Precipitous passage perhaps explains the “unartful drafting and numerous ambiguities that characterize CERCLA’s provisions.” Id.; Mauhs, supra note 32, at 475.

\textsuperscript{34} Frank P. Grad, A Legislative History of the Comprehensive Environmental Response Compensation and Liability (“Superfund”) Act of 1980, 8 COLUMBIA J. ENVTL. L. 1, 1 (1982).


\textsuperscript{36} See, e.g., Walls, 761 F.2d at 318; Jones, 584 F. Supp. at 1428; see also Jeffrey M. Gaba, Recovering Hazardous Waste Cleanup Cost: The Private Cause of Action Under CERCLA, 13 ECOLOGY L.Q. 181, 196 (1986) (discussion of courts’ analysis of issue of whether CERCLA created private cause of action).


\textsuperscript{38} 42 U.S.C. § 9601(25), as amended by SARA, defines “respond” or “response” to mean remove, removal, remedy, and remedial action. Id. All such terms, including “removal” action and “remedial action,” encompass the enforcement activities related to the actions. Id.


\textsuperscript{40} Id. § 9601(24).
toxic waste hazards. Remedial actions supplement or replace removal actions and are long-term or permanent remedies. This distinction is significant, because parties seeking to recover costs for removal actions need only comply with relatively simple NCP guidelines. Those pursuing remedial costs, however, must follow more detailed procedural and substantive NCP requirements.

The NCP sets forth both criteria for assessing the appropriate extent of a removal action and an illustrative list of generally acceptable removal actions. The following factors regarding the site of a release or threatened release of a hazardous substance must be considered in evaluating the appropriate extent of a removal action:

41 Id. § 9601(23). This section provides that [t]he terms "remove" or "removal" means [sic] the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, to mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) . . . and any emergency assistance which may be provided under the Disaster Relief Act and Emergency Assistance Act.

42 Id. See id. § 9601(24). This section provides that [t]he term "remedy" or "remedial action" means those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment.


44 See Amland, 711 F. Supp. at 796 (citing 1985 NCP); see also National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. §§ 300.420–.435 (1990) (current NCP remedial guidelines).

at the site: the actual or potential exposure of nearby human or animal populations or the food chain to the substances; the actual or potential contamination of drinking water; the presence of hazardous substances in containers that pose a threat of release; the presence of hazardous substances, at the surface, that may migrate; weather conditions that may cause hazardous substances to migrate; and the threat of fire, explosion, or other situations that may pose threats to public health or welfare or the environment. 46

As a general rule, appropriate removal actions include the installation of fences, warning signs, and security control devices where humans or animals have access to the site of release; the implementation of drainage control where there is a need to reduce hazardous substance migration; the stabilization of berms, dikes, and impoundments, and the drainage of lagoons, to maintain the structures’ integrity; the capping of contaminated soils and sludges to reduce any migration of hazardous substances; the use of chemicals and other materials to slow the spread of a release; the removal of highly contaminated soils from drainage areas; the removal of drums, barrels, and tanks containing hazardous substances, to reduce the likelihood of spillage or exposure; the containment, treatment, disposal, or incineration of hazardous materials, to reduce the likelihood of exposure; and the provision of alternative water supplies, to reduce exposure to contaminated household water. 47

Unlike a removal action, a remedial action is subject to detailed NCP requirements. 48 These include a remedial preliminary assessment (PA) 49 and site inspection (SI); 50 a remedial investigation/feasibility study (RI/FS); 51 and a remedial design/remedial action (RD/RA) 52 evaluation. A remedial PA consists of a review of existing information regarding a release. 53 If the remedial PA establishes that a removal action is appropriate, then such an action should be initiated. 54 Otherwise, a remedial SI follows and builds upon the information collected in the remedial PA through sampling and other investigatory efforts. 55 An RI/FS then assesses the site, as well as

46 Id. § 300.415(b)(2)(i)(viii).
47 Id. § 300.415(d)(1)-(9).
48 Id. § 300.420-.435.
49 Id. § 300.420.
50 Id.
51 Id. § 300.430.
52 Id. § 300.435.
53 Id. § 300.420
54 Id.
55 Id.
evaluates appropriate remedial alternatives. Finally, the RD/RA actually develops and implements the remedy for the site.

The NCP sets forth an extensive list of remedial actions that generally are appropriate for addressing the types of situations that arise at sites requiring such actions. Included in this list are techniques for removing and treating contaminated soil, sediment or waste; containing or restoring contaminated groundwater; controlling or remediating surface water; and providing alternative water supplies.

Establishing the consistency of a removal or remedial action with the relevant NCP requirements has been a contentious issue in much recent private cost recovery litigation. CERCLA distinguishes the determination of consistency with NCP requirements in actions to recover costs filed by the federal government, a state, or an Indian tribe from the determination of consistency in actions filed by "any other person." When the federal government or a state acts, the burden is on the defendant to prove that the removal or remedial action undertaken is inconsistent with the NCP. In contrast, when

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56 Id. § 300.430. An RI collects data necessary to characterize the site, in order to develop and evaluate effective remedial alternatives. Id. An FS ensures the development and evaluation of appropriate remedial alternatives. Id.
57 Id. § 300.435.
58 Id. § 300 app. D.
59 Id.


“any other person” seeks to recover costs, there is no presumption of consistency with the NCP. Rather, a private party must prove consistency with the NCP as an element in its prima facie case, frequently leading to litigation on this point.

III. THE NATIONAL CONTINGENCY PLAN

A. The 1982 NCP and the 1985 Revisions

The NCP, created in 1968 as the Multi-Agency Oil and Hazardous Material Contingency Plan, fulfilled a presidential order to study the federal government’s plans for responding to environmental disasters and, in particular, to oil spills. CERCLA required the President to revise the NCP to reflect and facilitate CERCLA’s goals. Following CERCLA’s enactment in 1980, the President delegated responsibility for revising the NCP to the EPA. Pursuant to CERCLA’s mandate to establish procedures and standards for responding to releases of hazardous substances, pollutants, and contaminants, the EPA’s revisions dramatically expanded the NCP.

The EPA released the revised NCP in July 1982. The 1982 NCP emphasized the following goals: state participation; conservation of Superfund monies through private party action; sensitivity to local opinion; reliance on established technology where practical and cost-effective; and industry and expert participation and technology sharing. It did not contain a separate provision addressing private parties’ obligations in cleanup actions; private party cleanups were expected to comply with the requirements governing all response actions.

The 1982 NCP did not provide CERCLA cleanup standards. The state of New Jersey and the Environmental Defense Fund chal-
lenged this shortcoming in federal court. Their actions resulted in a settlement in which the EPA agreed either to amend the NCP so that it incorporated relevant health and environmental standards from other EPA programs to serve as standards for CERCLA remedies, or to provide an explanation if the NCP did not include such standards.

In November 1985, the EPA promulgated revisions to the NCP. To fulfill the terms of the settlement agreement, the EPA included a provision that looks to the requirements of other federal environmental laws in order to establish a standard for remedial cleanup. This standard is known as the “applicable or relevant and appropriate requirement” (ARAR) standard. The ARAR standard, as well as many of the other major changes promulgated in the 1985 NCP, were contained in a subpart of the Code of Federal Regulations entitled “Hazardous Substances Response.” This subpart also included provisions that established methods and criteria for determining the extent of government and private party response that CERCLA authorized.

Under the 1982 NCP, courts had split over whether prior EPA approval of a private party’s cleanup plan was necessary for the party to recover the costs of implementing the plan. The 1985 NCP, however, specifically did not require prior EPA approval for private party recovery. Instead, in order to ensure that its response costs would be consistent with the NCP, a private party had to study the site in question, develop a set of alternative cleanup strategies and

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73 Id. (citing Environmental Defense Fund v. EPA, No. 82-2234 (D.C. Cir. 1982); New Jersey v. EPA, No. 82-2238 (D.C. Cir. 1982)).
74 Id.
75 Id.
76 Id.
77 Id. Generally, “applicable” requirements are promulgated under federal or state environmental regimes and would be legally applied except for CERCLA’s implied preemption of other laws. Id.; see also National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. § 300.5 (1990). “Relevant and appropriate” requirements are not specifically applicable, but they apply to conditions similar enough to those found at CERCLA sites that their application is appropriate in CERCLA cleanups. Id.
79 See National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. § 300.71 (1989).
select a cleanup plan from these alternatives, and provide for a public comment period on the remedial site it selected.\textsuperscript{82}

\section*{B. Consistency and the 1985 NCP}

Many courts addressing the issues of private cost recovery and consistency with the 1985 NCP applied the requirements of the NCP with rigor.\textsuperscript{83} These decisions followed the general rationale that CERCLA is a narrowly-drawn remedy that is limited to necessary response costs.\textsuperscript{84}

Consistency with the NCP is an essential element to a private party’s claim under CERCLA.\textsuperscript{85} The plaintiff in \textit{Channel Master Satellite Systems, Inc. v. JFD Electronics Corp.}\textsuperscript{86} sought to recover costs for the cleanup of a surface impoundment, or sludge lagoon, and soil contaminated by volatile organic compounds.\textsuperscript{87} The hazardous waste contamination was in large part due to the defendant’s use of the facilities to manufacture television antennae between 1968 and 1979.\textsuperscript{88} Channel Master claimed to have incurred over $3.9 million in its cleanup effort, excluding its attorneys’ fees.\textsuperscript{89} On the
defendant's motion for summary judgment, however, the United States District Court for the Eastern District of North Carolina held that Channel Master completely failed to demonstrate consistency with the NCP, and denied any recovery.90

Despite Channel Master's knowledge of the NCP, it did not consult or abide by any NCP provisions in its cleanup.91 Consequently, even if the cleanup effort, a remedial action subject to detailed NCP provisions, was characterized as a removal action subject to less stringent NCP requirements, it would have failed to achieve consistency with the NCP.92 According to the court, private party response actions must adhere to the regulatory scheme prescribed by the NCP, because Congress deemed consistency with the NCP to be more important than making CERCLA an unlimited mechanism for recovery.93

In Artesian Water Co. v. New Castle County,94 the United States District Court for the District of Delaware applied the requirements of the NCP strictly to a private cleanup.95 The court granted defendant New Castle County’s motion for partial summary judgment, because it found that many of Artesian Water Co.’s response costs were inconsistent with the NCP’s procedural and substantive requirements.96 Specifically, the court pointed to Artesian Water Co.’s failure to achieve consistency in three areas.97 First, it rejected the company’s attempt to substitute its own study for the NCP-mandated RI/FS.98 Artesian Water Co.’s substitute RI/FS failed, because it did not contain the necessary evaluation of alternatives for remedying the hazardous substance releases at the site.99 Second, the court rejected Artesian Water Co.’s assertions that its chosen water replacement method was the most cost-effective means of water resupply.100 The court noted that the NCP required water replacement to be cost-effective relative to other means of remedying the contamination at a site.101

90 Id. at 395–96.
91 Id. at 394.
92 Id. at 390–92.
93 Id. at 393–94 (citing Artesian Water Co. v. New Castle County, 659 F. Supp. 1269, 1299–1300 (D. Del. 1985), aff’d, 851 F.2d 643 (3d Cir. 1988)).
95 Id.
96 Id. at 1299.
97 Id.
98 Id. at 1296.
99 Id.
100 Id. at 1297.
101 Id. CERCLA provides that the NCP shall include “means of assuring that remedial
Third, according to the court, Artesian Water Co. did not comply with all otherwise applicable or relevant and appropriate federal, state, and local requirements.\textsuperscript{102} The court pointed out that the ARAR standard was intended, in part, as a substitute for prior government approval of response actions, because the standard deters poor-quality cleanups and reduces the possibility of concurrent, independent response actions by the government and a private party.\textsuperscript{103} Only Artesian Water Co.'s monitoring and evaluation costs were consistent with the NCP, according to the court, because the detailed provisions of the NCP governing remedial actions were not applicable to these costs.\textsuperscript{104}

Following the Artesian court's position, the United States District Court for the District of New Jersey in Amland Properties Corp. v. Aluminum Co. of America\textsuperscript{105} rejected the plaintiff's proposed standard of substantial compliance with the NCP to demonstrate consistency.\textsuperscript{106} The court stated that private party response actions are consistent with the NCP if they adhere to the specific requirements of the NCP, unless there is a demonstration that one or more of those requirements is inappropriate under the circumstances.\textsuperscript{107} In Amland, the plaintiff had failed to comply with certain procedural requirements of the NCP, including the RI/FS and public comment requirements.\textsuperscript{108} It also was unable to show that its failures were exonerated by any unique circumstances that rendered the requirements inapplicable to the site.\textsuperscript{109} The court buttressed its reliance on precedent\textsuperscript{110} with remarks extracted from the preamble to the 1985 NCP.\textsuperscript{111} Consequently, as in the Artesian decision, the court

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\textsuperscript{102} Artesian, 659 F. Supp. at 1296-97 (citing National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. 300.71(a)(2)(ii)(C) (1989)).

\textsuperscript{103} Id. at 1296.

\textsuperscript{104} Id. at 1299.

\textsuperscript{105} 711 F. Supp. 784 (D.N.J. 1989).

\textsuperscript{106} Id. at 796.

\textsuperscript{107} Id. at 797.

\textsuperscript{108} Id. at 799-801.

\textsuperscript{109} Id. at 801.


\textsuperscript{111} Id. at 796 ("EPA has modified § 300.71 to specify in detail what private parties must do in order to act consistently with the NCP").
awarded to the plaintiff only its preliminary monitoring costs, which were not governed by the detailed NCP remedial provisions.  

Not every court addressing the issues of private cost recovery and consistency with the 1985 NCP has applied the NCP requirements so strictly. Emphasizing Congress’s desire to induce voluntary, appropriate response actions at inactive hazardous waste sites through CERCLA, the United States District Court for the District of Missouri reasoned in General Electric Co. v. Litton Business Systems113 that the requirement of consistency with the NCP does not necessitate strict compliance with NCP provisions.114 Citing to the preamble of the 1985 NCP, the court characterized the NCP as a general plan or framework that is not intended to provide complex, detailed, site-specific decisionmaking criteria.115 Litton, the defendant, argued that General Electric had not complied with the guidelines for a remedial action on the grounds that it had not provided a public comment period.116 The court concluded, however, that the plaintiff’s overall response effort was consistent as a removal action.117 The failure to provide for a public comment period and give notice with respect to the cleanup efforts was not fatal to its recovery action.118 In other words, General Electric’s compliance with the applicable and relevant or appropriate state requirements, and the input of a state agency—the Missouri Department of Natural Resources—into the remedy selection process, together served as an effective substitute for fulfilling the NCP’s public comment and notice requirements.119 Thus, when viewed in light of their overall adherence to the NCP’s provisions, the plaintiff’s actions were consistent with the NCP.120

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112 Id. at 795.
114 Id. at 962. The decision relies upon N.L. Industries, Inc. v. Kaplan, 792 F.2d 896, 898–99 (9th Cir. 1986) (consistency with NCP does not necessitate strict compliance with its provisions). N.L. Industries relied on Wickland Oil Terminals v. Asarco Inc., 792 F.2d 887, 890 (9th Cir. 1986) (compliance with the NCP does not require prior government approval for recovery).
116 Id. at 961.
117 Id. at 960.
118 Id.
119 Id.
120 Id. at 963.
IV. THE NCP SINCE 1985

A. SARA and the NCP

President Reagan signed amendments to CERCLA, the Superfund Amendments and Reauthorization Act of 1986 (SARA), in October 1986.121 In addition to providing the Superfund with an additional $8.5 billion, SARA required a revision of the NCP.122 Specifically, the statute required the revision of the procedures and standards for remedial actions.123 Goals related to the selection of appropriate remedial actions and intended to be addressed in the new NCP included cost-effective remedy selection;124 protection of human health and the environment;125 utilization of permanent remedies as well as alternative treatment and resource recovery technologies, to the maximum extent possible;126 substantial and meaningful state participation in the initiation and development of remedial actions;127 and increased public participation.128 Overall, SARA provided statutory directives for the NCP that were complex and, to a certain degree, inherently irreconcilable.129 At the least, the statute caused the EPA a great deal of difficulty in prescribing rules that should apply to all sites.130

B. The 1990 NCP

The 1990 NCP represents both the EPA's effort to implement SARA's policies and an agency-initiated effort to rework the 1985

124 Id. § 9621(a), (b)(1).
125 Id. § 9621(b).
126 Id.
127 Id. § 9621(f).
129 See, e.g., Starfield, supra note 128, at 10,227. The EPA is directed to maximize treatment and ensure a cost-effective remedy. Id. Presumably, the tension is created by the necessity of determining at what point costs outweigh marginal benefits.
130 See id.
NCP. The EPA’s failure to promulgate a revised NCP by SARA’s statutory deadline of April 17, 1988 may be due to the magnitude of this effort. Because of this failure, several environmental groups sued the EPA in the fall of 1988, and a subsequent consent decree resulted in a timetable for the publication of the new NCP. The final rule embodying the 1990 NCP appeared in the March 8, 1990 Federal Register.

The 1990 NCP is composed of ten subparts. Subpart H, entitled “Participation by Other Persons,” addresses consistency of private party actions with the NCP. The proposed rule had provided a list of mandatory NCP provisions. For a private party cleanup to be consistent with the NCP, the party seeking recovery would have to have followed these provisions to the extent that they were pertinent to the cleanup. The final rule, however, did not include these requirements. Under the final rule, a private party cleanup is consistent with the NCP if, when evaluated as a whole, it substantially has complied with the potentially applicable NCP requirements and is what the EPA terms a “CERCLA-quality cleanup.” A

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131 See id.
132 See id.
133 See id.
136 Id. at § 300.700.
138 Id. The proposed list included provisions regarding the following issues: worker health and safety; documentation and cost recovery; the need for Superfund-financed actions; permit requirements; identification of ARARs; reports of releases to the National Response Center; removal site evaluation; removal actions; remedial site evaluation; remedial studies and selection of remedy; remedial design and action; and remedy operation and maintenance. Specific exceptions, which apply only to government actions, were made for those provisions. Id.
139 Id.
140 55 Fed. Reg. 8666, 8793 (1990). The 1990 NCP states that the “EPA’s decision to require only ‘substantial’ compliance with potentially applicable requirements is based, in large part, on the recognition that providing a list of rigid requirements may serve to defeat cost recovery for meritorious cleanup actions based on a mere technical failure by the private party that has taken the response action.” Id.

The potentially applicable NCP requirements closely parallel the proposed mandatory requirements. They include general provisions that cover the following topics: worker health and safety; documentation and cost recovery; the need for Superfund-financed actions; permit requirements; identification of and compliance with ARARs; reports of releases to the National Response Center; site evaluation for removal action; remedial site evaluation; remedial site
CERCLA-quality cleanup protects human health and the environment, utilizes permanent solutions and alternative technologies to the maximum extent practicable, and is cost-effective. The fulfillment of these requirements is necessary to achieve a CERCLA-quality cleanup.

The EPA expects that the 1990 NCP will encourage private parties to perform voluntary cleanups, because the new final rule removes unnecessary obstacles to recovering costs from liable parties. Moreover, by establishing a standard to measure the quality of cleanups under CERCLA, the EPA expects to encourage only effective cleanup efforts.

The substantial compliance standard promotes two EPA goals. It responds to concerns about the effect that a requirement of "rigid adherence to a detailed set of procedures" would have on the ability of private parties to recover their cleanup costs. Additionally, the CERCLA-quality cleanup standard aims to guarantee that a private right of action be available only for cleanups that are, in the eyes of the agency, "environmentally sound."

The EPA decided to require substantial compliance with the NCP, rather than strict compliance, because it believed that enforcing a strict compliance standard would result in the disallowance of cost recovery in otherwise successful cleanup actions due to failures to comply with mere technicalities. A substantial compliance standard, on the other hand, accommodates the limited experience of private parties in performing hazardous waste cleanups and gives voice to the agency's belief that harmless mistakes based on such inexperience should not be the basis for rejecting a private party's cost recovery claim. According to the EPA, allowing "de minimus" investigations and feasibility studies (RIs/FSs) and selection of remedies; remedial designs and remedial actions (RDs/RAs); remedy operation and maintenance; and opportunity for public comment. National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. § 300.700(c)(5)-(7) (1990); see supra note 138 for a comparison between the proposed and final rules.


142 Id.

143 See id. at 8792–93.

144 See id. at 8793.

145 Id.

146 Id.

147 Id. The EPA uses the example of the failure of a private party to provide a public hearing. Id. According to the agency, this failure should not defeat recovery if the public was afforded ample opportunity for comment. Id.

148 See id.
or "harmless deviations" from certain NCP provisions accords with the "longstanding judicial principles of harmless error and materiality." Accordingly, the EPA sets forth a "universe of requirements" that are "potentially relevant to private party actions." The agency does not view this list of requirements as carved in stone.

Awarding costs to private parties if they demonstrate that a cleanup substantially complied with NCP provisions and accomplished a CERCLA-quality cleanup is left to the courts, as before, for determination on a case-by-case basis. The preamble to the 1990 NCP notes that a private party may eliminate any risk or uncertainty with respect to compliance with the NCP by meeting all of the potentially relevant requirements that the EPA has set forth. Thus, the courts are the final authority in measuring parties' efforts under the 1990 NCP, a plan that the EPA itself has characterized as pursuing the divergent goals of promoting private party efforts while also insuring a high standard of cleanup.

V. A Closer Look at Compliance with the NCP

Under CERCLA, private parties are not necessarily obligated to perform hazardous waste cleanups. Instead, CERCLA creates an incentive for voluntary private cleanups by allowing for reimbursement from responsible parties. Given the dimension of the hazard-

149 Id. at 8794.
150 Id. at 8793.
151 Id.
152 See id. at 8794.
153 Id. at 8794; see also National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. § 300.700(c)(3)-(7) (1990) (full set of potentially relevant requirements).
154 Id. at 8792-93.
155 See Steinway, supra note 60, at 1947. Voluntary private party cleanups and subsequent private cost recovery actions often fall into three situations where there is a benefit to the litigant. First, a current owner of contaminated property who can be held liable to the state or federal government for all the cleanup costs under CERCLA or a state analogue may proceed individually with cleanup and then sue other PRPs under CERCLA for contribution. Id. In this manner, the current owner avoids the cost and uncertainty of litigating the issue of liability against the government. Id. Second, if there is no immediate threat of government enforcement or liability, and contamination is incompatible with the planned use for the property, an owner not responsible for the contamination may choose to voluntarily engage in cleanup and then sue other PRPs. Id. Third, owners of property not contaminated by hazardous waste nevertheless may be threatened by releases of hazardous waste, and therefore voluntarily engage in cleanup in the absence of an impending enforcement action by the government or cleanup by another private party. Id.
156 See supra notes 13-64 and accompanying text.
ous waste problem, Congress recognized the need to place the bur­den of cleanup on responsible parties.\textsuperscript{157}

The 1990 NCP's standard for consistency, substantial compliance with the NCP and completion of a CERCLA-quality cleanup, pur­ports to be a departure from the judicially derived standards that existed under the 1985 NCP.\textsuperscript{158} The EPA has asserted that the 1990 NCP will encourage more private party cleanup actions, without detracting from the quality of these actions, by allowing increased flexibility.\textsuperscript{159} Closer scrutiny of the new private party requirements reveals, however, that the 1990 NCP does not necessarily contain any dramatic new incentive for private parties to engage in hazardous waste cleanup.\textsuperscript{160} Rather, the 1990 NCP clarifies the standard that courts should apply in assessing private party response actions and thereby decreases defendants' ability to use judicial disagree­ment surrounding the NCP to their advantage when litigating the issue of consistency.\textsuperscript{161} From this perspective, the 1990 NCP will promote private party cleanup.

\textbf{A. Standards of Consistency Compared}

The definition of strict compliance under the 1985 NCP, as ex­pressed in \textit{Amland}, provides some flexibility for private party re­sponse actions.\textsuperscript{162} The \textit{Amland} court reasoned that a private party's response action was consistent with the NCP if the cleanup followed the requirements of the NCP, unless the party explained why a specific requirement was inappropriate to its cleanup.\textsuperscript{163} Thus, under the \textit{Amland} view of the 1985 NCP, private parties had to follow NCP provisions, where appropriate, to recover costs.\textsuperscript{164}

The \textit{General Electric} court purported to relax the strict compliance standard developed in \textit{Amland} and its predecessors, by applying a substantial compliance standard to private party response actions.\textsuperscript{165} The court reasoned that no public hearing was required, because General Electric complied with all legally applicable or rel­

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{158} \textit{See supra} notes 140--51 and accompanying text.
\item \textsuperscript{159} \textit{See id.}
\item \textsuperscript{160} \textit{See id.}
\item \textsuperscript{161} \textit{See supra} notes 83--120 and accompanying text.
\item \textsuperscript{162} \textit{See supra} notes 105--12 and accompanying text.
\item \textsuperscript{163} \textit{Amland Properties Corp. v. Aluminum Co. of Am.}, 711 F. Supp. 784, 797 (D.N.J. 1989).
\item \textsuperscript{164} \textit{Id.}
\item \textsuperscript{165} \textit{See supra} notes 113--20 and accompanying text.
\end{enumerate}
\end{footnotesize}
evant and appropriate state requirements related to the cleanup in question. Moreover, according to the court, if notice to the public was a requirement, the input of the Missouri Department of Natural Resources served as a sufficient substitute. The General Electric court concluded that neither EPA approval nor a listing on the National Priorities List, the official list of Superfund sites in the United States, is a prerequisite for a private party's recovery of its response costs. The court noted, however, that the 1985 NCP never required that federal approval precede either a private party cleanup action or any subsequent cost recovery action.

The Channel Master court, in assessing a response action performed under the 1985 NCP after the General Electric decision, acknowledged that both a strict and a liberal standard exist to determine consistency with the NCP. But, as the court pointed out, the broad language of the substantial compliance standard applied in General Electric was tied to narrow facts. General Electric, then, did not constitute a broad invitation to construe NCP provisions liberally.

The distinction between the Amland court's requirement of strict compliance and the General Electric court's substantial compliance standard is not necessarily great. Both require the party seeking recovery of its costs to demonstrate specific circumstances that justify its deviating from the NCP while still recovering cleanup costs. The true effect of the apparent difference between the two standards may be to inject an element of confusion and uncertainty into private party actions by seemingly creating two approaches to defining consistency with the 1985 NCP.

The NCP revisions proposed in 1988 were designed to enhance the probability of a successful recovery and encourage private party actions. They would have mandated compliance with a list of NCP provisions on the basis of each provision's appropriateness at a site, thereby providing a standard similar to that established by the Amland court. Establishing substantial compliance under the 1990

167 Id. at 959.
168 Id. at 962.
170 Id.
171 See supra notes 140–51 and accompanying text.
172 See supra notes 137–90 and accompanying text.
NCP involves fulfilling a diverse set of potentially applicable require­ments and, from the perspective of encouraging voluntary private party cleanups, may not represent a dramatic departure from the Amland court's standard under the 1985 NCP or even the NCP proposed in 1988.\textsuperscript{173}

Uncertainty and risk remain for the private party contemplating voluntary cleanup and a subsequent cost recovery action under the 1990 NCP.\textsuperscript{174} Ultimately, consistency with the NCP is not determined until a private party incurs cleanup costs.\textsuperscript{175} Because CER­CLA places the burden of proving consistency upon the party who engages in cleanup, that party risks having its costs ruled inconsistent with the NCP.\textsuperscript{176} The 1990 NCP does not resolve this dilemma, because the differing burdens are mandated by statute.\textsuperscript{177} Further, the 1990 NCP potentially perpetuates an additional element of un­certainty in this equation. Under the 1990 NCP, a court must con­sider both the universe of potentially applicable requirements and the quality of the cleanup effort in determining whether to award cleanup costs.\textsuperscript{178} Given both the 1990 NCP's cleanup requirements and the judicial view that the most important factor in a response action is the ultimate effectiveness of the cleanup,\textsuperscript{179} courts may be tempted to limit the parameters of substantial compliance to ensure that the quality of cleanup efforts remains as high as possible. Simply put, under the 1990 NCP, as before, private parties can not necessarily gauge how rigidly a given court will apply the applicable requirements set forth by the EPA until after a cleanup has been completed.

Because consistency with the NCP is subject to challenge before courts award full cleanup costs, private parties wishing to avoid uncertainty and risk will be inclined to follow the full set of potentially relevant requirements to minimize the possibility of having costs ruled inconsistent with the NCP. Given the enormous costs involved in hazardous waste cleanup efforts, private parties contempl­ating voluntary cleanup efforts under the 1990 NCP may not view

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\textsuperscript{173} See supra notes 140–51 and accompanying text.
\textsuperscript{174} For a discussion of the issues of uncertainty and consistency with the NCP and other disincentives under CERCLA on private party cost recovery actions, see Gaba, supra note 36, at 224.
\textsuperscript{175} See supra notes 60–64 and accompanying text.
\textsuperscript{176} See id.
\textsuperscript{177} 42 U.S.C. § 9607(a) (1988).
\textsuperscript{178} See supra notes 140–51 and accompanying text.
the substantial compliance standard as a great departure from the previous standard of strict compliance. Decisions by an individual party about whether to engage in a cleanup effort now will differ little from decisions made under the previous standard of strict compliance. Prudence and self-interest dictate that a private party only undertake the expense of voluntary cleanup if there is a reasonably certain prospect of recovering costs from the other PRPs at the site.

EPA dismisses the element of uncertainty in voluntary cleanups by inviting private parties to follow the full set of potentially relevant requirements. In effect, this means private parties can only be objectively certain that their cleanups will be held consistent if they treat the potentially applicable requirements as mandatory. In this respect, the 1990 NCP’s substantial compliance standard does not provide dramatic new incentive for private parties to engage in voluntary cleanup when compared with the prior or the proposed requirements. No party can be certain that any deviation from the NCP other than ones previously either litigated or approved by the EPA will be considered to be de minimus by a court. The true effect of the 1990 NCP therefore may simply be that it clarifies the apparent disagreement between the circuits as to the proper standard to apply in determining consistency.

VI. CONCLUSION

Encouraging private party cleanup of hazardous waste sites by responsible parties is an essential goal of CERCLA. The 1990 NCP’s standard for consistency—substantial compliance and a CERCLA-quality cleanup—will promote this goal. The flexibility that the substantial compliance standard purports to inject into private party response actions is, however, limited. The true incentive the 1990 NCP’s substantial compliance standard provides is that it resolves the conflict, which existed among the courts under the 1985 NCP, over defining consistency. Furthermore, the new standard removes the ability of defendants to exploit this conflict and escape responsibility for cleanup costs. Overall, this development should promote the continued growth of private party cleanup, which is essential if the hazardous waste problem is to be cured.

180 See supra notes 150–53 and accompanying text.

181 See supra notes 3–9 and accompanying text.