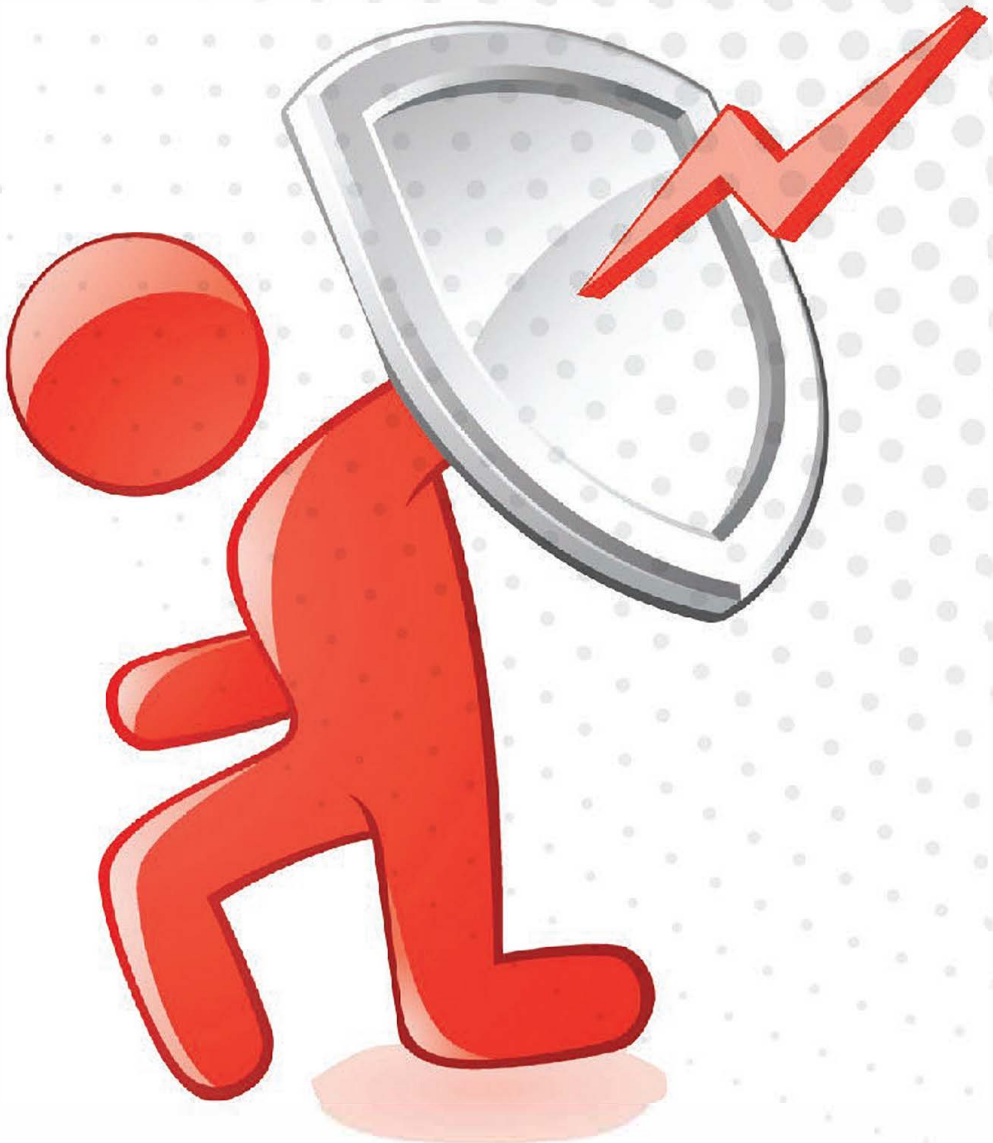
ISRI

Voice of the Recycling Industry™

Superfund Recycling Equity Act (SREA)

Guidance Manual Second Edition



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CAA	Clean Air Act
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act (also known as “Superfund”)
C.F.R.	Code of Federal Regulations
CRT	Cathode Ray Tube
CWA	Clean Water Act
DER	Department of Environmental Resources (Pennsylvania)
DOJ	U.S. Department of Justice
DSW	Definition of Solid Waste
DTSC	California Department of Toxic Substances Control
EAF	Electric Arc Furnace
EPA	Environmental Protection Agency
ISRI	Institute of Scrap Recycling Industries
NCP	National Contingency Plan
NPL	National Priorities List
PCB	Polychlorinated biphenyl
PRP	Potentially Responsible Party
RCRA	Resource Conservation and Recovery Act
SARA	Superfund Amendments and Reauthorization Act
SLAB	Spent Lead Acid Battery
SREA	Superfund Recycling Equity Act
SWDA	Solid Waste Disposal Act (commonly known as RCRA after 1976)
TSCA	Toxic Substances Control Act
U.S.C.	United States Code

THE INFORMATION CONTAINED IN THIS MANUAL IS PROVIDED FOR GUIDANCE PURPOSES ONLY AND SHOULD NOT BE DEEMED TO BE LEGAL ADVICE OF ANY KIND. DUE TO THE COMPLEXITY OF THE SUPERFUND LAWS, A RECYCLER POTENTIALLY FACING RESPONSIBILITY FOR A SUPERFUND SITE CLEANUP SHOULD ALWAYS OBTAIN LEGAL ADVICE FROM A QUALIFIED SUPERFUND LEGAL EXPERT.

Executive Summary

Many recyclers are surprised to learn that they can be held responsible for the cleanup of a Superfund site at a facility they sold recyclables to years earlier. The purpose of this Manual is to assist recyclers in understanding the Superfund law and the steps that need to be taken in order to take advantage of the recycling exemption provided for under the Superfund Recycling Equity Act (SREA).

A Superfund site consists of land so heavily-contaminated by industrial activity that the federal government has stepped in to require that the site be decontaminated or contained to prevent harm to people or the environment now or in the future. The primary law governing this activity is called the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund law), which was enacted in 1980.[1] The U.S. Environmental Protection Agency (EPA or the Agency) is tasked with enforcement of the law.[2]

A Superfund cleanup can cost many millions of dollars and take many years to complete. Unfortunately, because of the way the law was originally written and subsequently interpreted by the courts, recyclers that sold or shipped recyclable materials to a facility that was later determined by EPA to be a Superfund site, were for many years pulled into Superfund cases as responsible parties liable for the costs of cleanup.

The good news is that the Superfund Recycling Equity Act (SREA or the Act) was signed into law on November 29, 1999 following six years of intense lobbying and grassroots activity by ISRI and its members.[3] SREA corrects the unintended consequence of Superfund that had resulted in hundreds of millions of dollars of Superfund liability being imposed on the recycling industry. It clarified once and for all that recycling is not disposal and shipping for recycling is not arranging for disposal.

HOWEVER, protection from Superfund liability is not automatic. SREA provides that to obtain relief from Superfund liability, the recycler must demonstrate three (3) basic conditions:

- The material shipped to the consuming facility meets the definition of a "recyclable material."
- The transaction must meet the conditions for "Arranging for Recycling;" and,
- For transactions taking place after February 27, 2000, “reasonable care” must have been taken to determine the environmental compliance status, as it applies to the recyclable material, of the facility to which the recyclable material was sent or delivered.

[1] Pub. L. 96–510, 94 Stat. 2767 (Dec. 11, 1980) codified at 42 U.S.C. § 9601 et. seq.
[2] CERCLA was later amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA) which made several important changes and additions to the administration of the Superfund program.
[3] Pub. L. 106–113, 113 Stat. 1501, 1501A-598 (Nov. 29, 1999) codified at 42 U.S.C. § 9627.

Further, while Congress wanted to protect recyclers with the passage of SREA, it is important to understand what SREA does not do:

- It does not protect recyclers who cannot prove eligibility for the exemption.
- It also does not protect recyclers from liability for cleanup of property owned or operated by them that is deemed a Superfund site.
- It does not apply to state Superfund sites, only federal sites.

Forewarned is forearmed: to claim the SREA exemption, a recycler must show that the transaction in question met certain conditions at the time of the transaction. This manual will help recyclers become familiar with those conditions to help protect them from Superfund liability.

Before reading this Manual, recyclers should take note that, while some of the exemption criteria will be easy to demonstrate, other parts of the SREA criteria contains language that is open to interpretation. This uncertainty can make it challenging for recyclers to know what is required to comply with the law. Thus, this Manual will indicate some areas of uncertainty in the law and will offer guidance from sources ISRI has obtained. The Manual also includes supplemental information and supporting resources that may be of value to attorney(s) should a recycler choose to obtain legal counsel as part of the compliance process.

HOW TO USE THIS MANUAL

This Manual is divided into five sections and four appendices.

Section One provides an overview of the current Superfund law. Recyclers should use this section to learn how to recognize when EPA has – or might – be considering them liable for a Superfund site cleanup.

Section Two explains the SREA exemption from Superfund liability. Recyclers should use this section to learn the criteria they must prove in order to use the exemption. Where there are uncertainties in the law, users will be referred to Section Four which offers further discussion and guidance.

Section Three explains the ISRI SREA Reasonable Care Program Reports. These reports are important tools that may help recyclers meet some parts of the SREA exemption criteria. Recyclers should use this section to learn how to obtain, interpret and use these reports.

Section Four is intended as an additional resource for administrators and also for attorneys advising or preparing to defend a recycler from Superfund liability. This section serves as a companion to Section Two and can be used for greater insight into certain aspects of the SREA exemption.

Section Five provides a brief background on the Superfund law.

The Manual Appendices consist of:

- The relevant laws in their entirety: CERCLA (Appendix A) and SREA (Appendix B),
- Summaries of key case law (Appendix C), and

- EPA Memorandum issued in August 2002 on factors the Agency considers in a CERCLA enforcement case involving SREA (Appendix D).
- SREA's Legislative History (Appendix E)

The online version of the Manual contains hyperlinks connecting relevant Manual Sections and the Appendices.

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SECTION ONE:
OVERVIEW OF SUPERFUND LAW AND LIABILITY

In order to understand how recyclers can be found responsible for a Superfund cleanup, it is helpful to start with an overview of the law that provides the underlying framework for all cleanups, known as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).[4] This law is often referred to as "the Superfund law" or simply as "Superfund."

CERCLA was put into place to protect people and the environment from a specific kind of danger: active or abandoned contaminated sites that are releasing, or could release, hazardous substances. A core principle of the law is the requirement that those responsible for contaminating a site must bear the financial burden of cleaning it up.

Under CERCLA, the U.S. Environmental Protection Agency (EPA) is tasked with:

- identifying existing or potential hazardous sites,
- identifying the parties responsible for the contamination, and
- ensuring that the parties execute the cleanup at their own expense. If necessary, EPA can take over the cleanup and seek reimbursement of the expense from the responsible parties.

Identifying Potentially Responsible Parties

As soon as a Superfund site is identified, EPA will start searching for any and all parties that can be held responsible for the cleanup of the site. Anyone identified as part of this process is called a Potentially Responsible Party (PRP).

CERCLA identifies four categories of "potentially responsible parties" (PRPs) that can be held to strict joint and several liability for the costs of responding to the release (or threatened release) of hazardous substances. Strict liability is absolute: It is imposed without regard to intent or negligence. Joint and several liability means that each and every PRP can be held individually liable for the entire cost of the cleanup. Following are the four categories of PRPs:

1. The current owner or operator of the site;
2. Any person who owned or operated the site at the time of disposal or release of hazardous substances;

[4] 42 U.S.C. §§9601-9675. See Section 5 for more information on CERCLA.

3. *Any person (generator) who arranged for disposal, treatment, or transportation for disposal or treatment, of hazardous substances*; and
4. Any person who transported hazardous substances for disposal or treatment at a site selected by the transporter.

It is in the 3rd category of potentially responsible parties above that recyclers can inadvertently be pulled into a Superfund site. This happens when EPA and other parties equate the sale of a recyclable material to "arranging for disposal." PRPs are discussed in greater detail in Section Four.

A recycler will know that EPA may be preparing to designate it as a PRP if the recycler receives certain communications. These include a Section 104(e) letter, or a General or Special Notice letter. These are discussed in greater detail in Section Four.

Enforcement

Once EPA has identified parties responsible for a Superfund site, it will seek payment from those parties for the cleanup.

If you receive a communication from EPA that might be referring to Superfund, consult with a qualified Superfund legal expert before responding to the contact.

Under CERCLA, parties are encouraged to reach a voluntary settlement with EPA in which arrangements are made for the responsible party to pay for and execute cleanup of the site. These settlements are negotiated agreements. Once completed, they are contracts which can be enforced under the law. They are almost always considered better than litigation, which is time-consuming and expensive. If a polluter is willing to conduct and fund the cleanup voluntarily under a settlement, EPA will oversee the process.

Congress expected that some polluters would resist paying voluntarily or entering a settlement. For this reason, CERCLA also gives EPA strong enforcement powers. If a responsible party does not agree to pay for a cleanup, EPA can issue orders, assess penalties or take over the work and claim reimbursement. The Agency can also work with the U.S. Department of Justice (DOJ) to pursue the party through the federal court system.

The Recycling Exemption

The unintended consequence of Superfund (as originally written) created a market distortion preferring virgin feedstocks over recycled feedstocks. At a site contaminated by a third party through the use of both virgin and recyclable materials, the suppliers of the recyclable materials might be held liable for cleanup while the suppliers of the virgin materials were not. This was because the sale of a virgin material was not considered to be waste disposal and not subject to Superfund liability. Further, if a manufacturer used both virgin and recyclable materials and contaminated his site with substances that could only have come from the virgin material, the supplier of the recyclables could still be held liable while the supplier of the virgin materials remained exempt.

The good news is that Congress did not intend to make recyclers liable under the Superfund law for cleanups at their consumers' facilities, and in 1999 – following significant lobbying by ISRI and its

members – Congress remedied the situation by enacting the Superfund Recycling Equity Act (SREA or the Act).[5] SREA creates an exemption for recyclers in CERCLA, however, it is important to understand that the exemption is not automatic. A recyclers must take certain very specific pro-active steps to meet the exemption and be relieved of liability.[6]

SREA is a Federal Defense

Recyclers should be aware that the SREA exemption does not apply to actions brought under a state hazardous substance law *unless* the state law specifically incorporates SREA language.[7] There are currently only a few states with such provisions.[8] Recyclers facing a state action should consult with a qualified Superfund legal expert to determine if the SREA recycling exemption may apply.

[5] The full text of SREA is contained in Appendix B.

[6] To understand Congress' intention in passing the law, it is worth considering the preamble to SREA. This can be found in Section Four.

[7] *Del-Ray Battery Co. v. Douglas Battery Co.*, 635 F. 3d 725 (5th Cir. 2011).

[8] As of January 2020, only the following eight states have some kind of SREA protections contained in their state statutes: AR, FL, GA, MI, NC, PA, SC, and TN. In CO, IN, and KY, the state statutes refer to CERCLA , but do not specify SREA.

SECTION TWO
THE RECYCLING EXEMPTION: SREA

Sources of Information and Guidance

To understand the SREA exemption, it is important to remember that in the eyes of the law, recyclers are potentially liable under the Superfund laws unless and until they can prove they are exempt.[9]

This section is designed to go into more detail regarding when the recycling exemption may apply and what recyclers must do to claim it. As noted, some language in SREA remains open to interpretation. The following sources are used in this Section to provide information and guidance:

EPA Guidance

In 2002, EPA issued internal guidance to its regional offices and enforcement staff setting out the agency's understanding of SREA (2002 EPA Internal Guidance or Internal Guidance).[10] Although the 2002 EPA Internal Guidance is not considered official and cannot be relied upon as legal authority, it may be helpful to recyclers and of interest to attorneys advising or defending a recycler facing Superfund liability. This Section refers to the Internal Guidance where relevant and also links to further information contained in Section Four. The full text of the Internal Guidance can be found in Appendix D.

Case law

There have been several court cases addressing certain aspects of the SREA exemption law.[11] This Section notes relevant court cases and links to further information contained in Section Four.
Important cases have also been summarized in Appendix C. If a case cited in this Section is contained in the Appendix, it will be hyperlinked in the electronic version of the Manual.

Legislative History

References to the legislative history of SREA are noted where relevant. Although this information is of interest, it is not a conclusive indicator of congressional intent and cannot be treated as authoritative for the purposes of clarifying interpretations of the Act.[12]

Application of the Recycling Exemption Before and After SREA

When it enacted SREA, Congress intended to rectify a wrong that had been imposed on recyclers. As such, the law created a legal defense for recyclers going forward, but also for those who had been identified as potentially responsible parties ("PRP for transactions even before the law was enacted.

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[9] 42 U.S.C. § 9627 (a)(2).
[10] *Superfund Recycling Equity Act of 1999: Factors To Consider In A CERCLA Enforcement Case*, United States Environmental Protection Agency, Office of Enforcement and Compliance Assurance and Office of Site Remediation Enforcement (August 2002).
[11] An overview of court actions, including a case to watch is included in Section Four.
[12] *United States v. NL Industries* No. 91-cv-578-JFL, 2005 U.S. Dist. LEXIS 10713 (S.D. Ill. May 4, 2005).

Some cases filed after SREA was passed have required courts to examine whether the exemption applies to recycling transactions that took place before SREA's enactment.

In general, federal courts do not favor applying laws retroactively. In plain English, this means that courts are reluctant to allow new laws that impair rights or impose legal burdens on activities that happened before enactment of the law. However, courts will allow application of laws retrospectively[13] in certain limited circumstances.[14]

The courts that have considered SREA have decided that it is a so-called retrospective law and therefore its protections may apply to transactions occurring prior to enactment of the law.[15]

That said, courts have found that the SREA protections do have some limits. Specifically, courts have held there is no protection for recyclers that had previously settled or were otherwise involved in a judicial action that was already concluded prior to enactment of the law.[16]

As an amendment to CERCLA, SREA can be referenced in two ways:

- As a section within the main law: § 127 of CERCLA, and/or
- As a section of the United States Code: 42 U.S.C. § 9627

Pending and Past Actions – A Closer Look

The Act states that it will not affect any *concluded* judicial or administrative action or any *pending* "judicial action" initiated by the *United States* prior to SREA's adoption on November 29, 1999.[17] This means that:

- Concluded prior *private* actions cannot be reopened, and
- Judicial (but not administrative) actions filed by the United States before November 29, 1999, will not be affected by the Act.

The law is less certain when it comes to the effect of the statute on *pending*, but not completed, actions brought by *private parties and states*.[18]

Courts that have begun to address these retroactivity issues have, after applying a complex analysis of constitutional law, congressional intent, and statutory interpretation, held that the Act will apply to pending private and state litigation.[19]

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[13] If a statute applies to pending cases, it is termed retrospective, as opposed to retroactive. *United States v. $814,254.76*, 51 F.3d 207, 210 & n. 3 (9th Cir.1995); as explained by the dissent in *Jeffries v. Wood*, 114 F.3d 1484 (9th Cir.1997) (en banc).

[14] *Landgraf v. USI Film Prods.* (92-757), 511 U.S. 244 (1994).

[15] *Department of Toxic Substances Control v. Interstate Non-Ferrous Corporation*, 99 F. Supp. 2d 1123, 1154 (E.D. Ca. 2000); and *Gould Inc. v. A & M. Battery & Tire Serv.*, 232 F.3d 162 (3rd Cir. 2000).

[16] *Gould v. A & M Battery & Tire Service*, 232 F.3d 162 (3d Cir. 2000).

[17] 42 U.S.C. § 9627 (i).

[18] Although in SREA's legislative history, Senator Lott clearly states that the Act will apply to pending private actions, this cannot be relied upon as legally authoritative. LEGISLATIVE HISTORY FOR S. 1528 SECTION 127-RECYCLING TRANSACTIONS, Senator Trent Lott, Congressional Record., November 19, 1999, S15049 (Lott Legislative History).

[19] *Morton Int'l Inc. v. A.E. Stanley Mfg. Co.*, 106 F. Supp. 2d 737 (D.N.J. 2000). *Gould v. A & M Battery & Tire Service*, 232 F.3d 162 (3d Cir. 2000); *RSR Corp. v. Avanti Dev.*, 2000 WL 1449859, No. IP 95-1359-C-M/S (D.N.J. 6-13-00);

Several courts, however, have held that the Act will not apply to private contribution claims[20] that are asserted in a pending judicial action filed by the federal government.[21]

Further discussion and case law regarding retroactivity can be found in Section Four.

A Summary of the SREA Exemption Requirements

To be eligible for the SREA exemption, a recycler is required to prove the legitimacy of the recycling transaction in question. This is done by proving certain requirements and criteria set by SREA.[22]

It is important to note that these requirements and criteria differ depending on whether the recycling transaction occurred before or after enactment of SREA. Specifically, there is an additional requirement on the recycler if the transaction occurred after February 27, 2000.

Each of these conditions and criteria will be discussed in turn below.

Most will not be difficult for a recycler to prove. However, some language in the Act has created uncertainty. These aspects will be noted, with guidance. When more specific information is available, the subsection will link to Section Four.

In general terms, the requirements and criteria under SREA are as follows:

1. A recycler must be able to prove that, ***at the time of the transaction*** in question:
    - The material met the **definition** of a recyclable material[23], and
    - The recycler was **"a person who arranged for recycling of recyclable material"**[24]
2. To be an "arranger," a recycler must meet certain conditions:

United States v. Mountain Metal Co., 137 F. Supp. 2d 1267 (N.D. Ala. 2001). *Department of Toxic Substances Control v. Interstate Non-Ferrous Corp.,* 99 F. Supp. 2d 1123 (E.D. Cal. 2000).

[20] Private contribution claims refer to claims made by other PRPs to share the costs of a cleanup.

[21] See *United States v. NL Indus*., 2005 WL 1267419 (S.D. Ill. 2005) (SREA does not apply to third-party claims brought by a party who was subject to a pending suit by the United States at the time the Act was adopted); *United States v. Atlas Lederer Co*., 97 F. Supp. 2d 830 (S.D. Ohio 2000) (SREA does not apply to third-party claims brought against a party who was subject to a pending suit by the United States at the time the Act was adopted). In *United States v. Mountain Metal Co.,* 137 F. Supp. 2d 1267 (N.D. Ala. 2001), the court held that the Act applied retroactively to private, uncompleted judicial actions even if plaintiffs have consolidated their private party action with an action of the U.S. to which the Act does not apply. The court stated that the "statute does not allow recovery for a separate and independent private party action simply because that private action is consolidated with an action filed by the United States."

[22] There are two stages during which a recycler can assert the SREA exemption: (1) If a recycler is party to initial EPA administrative proceedings and the recycler can demonstrate that it meets the exemption criteria, EPA may remove them from the list of PRPs, or (2) If a recycler is subject to court action by EPA (or a private party seeking to share costs), the exemption can be used as a defense. If the recycler meets the criteria as part of a defense, the burden of proving that the recycler is liable shifts to EPA (or the private party). Recyclers who cannot meet the exemption criteria may still be able to use a defense called the "useful product" defense. This is discussed in greater detail in the subsection below and Section Four.

[23] 42 U.S.C. § 9627(b).

[24] 42 U.S.C. § 9627(c).

- It must be able to prove **four criteria** set out in the Act,[25] and
- For all transactions after Feb 27, 2000, it must meet **an additional criteria** proving that it **exercised reasonable care** in determining whether the consuming facility where the materials were shipped was compliant with environmental laws and regulations.[26] ISRI helps support this process through its SREA Reasonable Care Compliance Program. Information on this Program can be found in Section Three.
- This duty extends to the recycler's own site.[27] As such, a recycler is strongly encouraged to obtain annual SREA Reasonable Care Reports on its own facilities.

Definition of Recyclable Material

To be eligible for the SREA exemption, a recycler must be able to prove that the recyclable materials shipped in the transaction in question met the SREA definition.

For a typical recycling transaction, this should not be difficult since the definition under the Act includes almost all of the materials traditionally processed by a recycler.

SREA defines "recyclable material" as:

- *scrap paper*
- *scrap plastic*
- *scrap glass*
- *scrap textiles*
- *scrap rubber (other than whole tires)*
- *scrap metal*
- *spent lead-acid, spent nickel-cadmium, and other spent batteries, as well as*
- *minor amounts of material incident to or adhering to the scrap material as a result of its normal and customary use prior to becoming scrap.*[28]

Materials Excluded from the Definition

Although the definition of recyclables is broad, Congress did exclude certain materials from eligibility for the SREA exemption:

1.Polychlorinated biphenyls (PCB) – defined as any material that contains or is contaminated by PCBs at a concentration over 50 parts per million (ppm) at the time of the transaction,[29] unless it has been cleaned. As discussed in SREA's legislative history:

> *"[m]aterial, which previously held a concentration of PCBs in excess of 50 ppm, but has been cleaned to levels below 50 ppm, would still qualify for exempt treatment. Item, in*

[25] 42 U.S.C. § 9627(c)(1)-(4).
[26] 42 U.S.C. § 9627(c)(5).
[27] 42 U.S.C. § 9627(g).
[28] 42 U.S.C. § 9627(b).
[29] 42 U.S.C. § 9627(b)(2) states that, if at any time a new standard of PCB contamination level is promulgated pursuant to applicable federal laws, then that new standard will apply.

this context, is meant to apply only to a distinct unit of material, not an entire shipment."[30]

2.Contaminated shipping containers (e.g., drums, barrels or tanks) – defined as containers that are 30 to 3,000 liters (approximately 8 to 792 gallons) in size and which have contained a hazardous substance or have the residue of a hazardous substance.[31]

3.Whole Tires – defined as whole tires that have not been shredded or processed in some manner.[32]

Residue on Scrap

By referring to "*minor amounts of material incident to or adhering to the scrap material as a result of its normal and customary use prior to becoming scrap*" in the definition of recyclables,[33]Congress recognized that, by its nature, scrap materials might not be spotlessly clean and could include trace amounts of other materials such as paint, solder, glue, or dirt.[34]

However, in its 2002 Internal Guidance to enforcement officers, EPA appears to have made a slightly different interpretation of acceptable "residue." Awareness of this interpretation is important for recyclers (and their attorneys).

EPA notes that SREA does not define "minor amounts" and directs its officers:

> *"When evaluating the appropriate enforcement posture to take, Regions should determine on a case-by-case basis whether "minor amounts," or more than "minor amounts," of material were present by considering the volume and/or weight of the recyclable material composition as compared to the total volume or weight of metal."*[35]

Due to the uncertainty regarding the interpretation of this language in the Act, this issue is best addressed by a qualified Superfund legal expert.

Further information regarding residue on scrap can be found in Section Four.

[30] Lott Legislative History at S15049.
[31] 42 U.S.C. § 9627(b). In the legislative history, Sen. Lott clarified that in the example of a steel 55 gallon drum, "[t]he terms ''contained in'' or ''adhering to'' do not include any metal alloy, including hazardous substances such as chromium or nickel, that are metallurgically or chemically bonded in the steel to meet appropriate container specifications." Lott Legislative History at S15049.
[32] 42 U.S.C. § 9627(b) "…scrap rubber (other than whole tires)." As it relates to this section, ISRI sought to have whole tires included in the definition but its efforts were outweighed by environmental groups concerned with the health hazards associated with stockpiles of whole scrap tires and whole tires burned as fuel.
[33] 42 U.S.C. § 9627(b).
[34]One example of this might be an appliance being run through a shredder that comes into contact with oil from an automobile that had previously been in the shredder. Lott Legislative History at S15048, S15049.
[35] Internal Guidance. Section 2.1.

Arranging for Recycling: Distinguishing Recycling from Disposal

The "arranger" criteria in SREA was Congress' way of ensuring that the recyclable material was shipped *for the purposes of recycling, not disposal.*

This is an important distinction because a transaction deemed a disposal is subject to Superfund liability and is not eligible for the exemption.[36]

This provision of SREA is strictly interpreted: if materials were sent to a consuming facility *for any reason other than to be recycled*, the transaction will be deemed a disposal, *regardless* of whether the material was recyclable or not. Further, even if all SREA criteria are met, a transaction will be excluded from protection if the recycler knew the materials were not going to be recycled or would be burned for fuel or energy.[37]

To be a "person who arranged for recycling of recyclable material" under the Act, a recycler must prove the transaction met five criteria.[38] If it can do so, it will be "deemed" to be "a person who arranged for recycling of recyclable material." In plain English, this means it is considered proven.

Being deemed an "arranger" is an important step in proving that a recycling transaction is eligible for the SREA exemption.

It should be noted that SREA requires additional criteria for transactions involving scrap metal and batteries. These are discussed separately below.

Arranger Status Must be Proven by a Preponderance of the Evidence

As previously mentioned, SREA requires the recycler to prove it meets the criteria for exemption. When a law requires a party to prove something, the degree of certainty needed to prove that thing is called the "burden of proof."

Under SREA, the arranger criterion must be proven by a burden of proof known as the "preponderance of the evidence."[39]

The phrase is in quotes because it has a very specific meaning in the law. In plain English, it means there is a greater than 50 percent chance that something is true or that something happened. Another way to understand the standard is to ask: is the proposition more likely to be true or not?

This is not the hardest burden of proof to meet, but it can require some hard work when it comes to the SREA criteria. Cases addressing a recycler's burden of proof can be found in Section Four.

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[36] Being an "arranger" for the purposes of **recycling** under the SREA exemption should be distinguished from being an "arranger" for the purposes of **disposal** under CERCLA. 42 U.S.C. § 9607(a) (3). Under CERCLA, the government (or plaintiff, such a PRP) has the burden of proving that an entity was an "arranger" of a disposal before they can be held liable as a PRP. To be eligible for the SREA exemption, the recycler has the burden of proving that it was arranging for recycling.

[37] 42 U.S.C. § 9627(f)(1)(A)(i)-(ii)

[38] As noted, a fifth, additional, criteria is required if the transaction occurred after February 27, 2000.

[39] "The burden is on the person who arranged for a transaction, by selling recyclable material or by otherwise arranging for the recycling of recyclable material, to demonstrate by a preponderance of the evidence that the statutory criteria are met." *Department of Toxic Substances Control v. Interstate Non-Ferrous Corporation*, 99 F. Supp. 2d 1123, 1154 (E.D. Ca. 2000) citing § 127(c)-(e).

If the recycler can meet this burden of proof, then the burden shifts back to the government or plaintiff[40] to prove why the SREA exemption should not apply.[41]

The 2002 EPA Internal Guidance notes that some parties may choose to settle (and help pay for a cleanup) instead of attempting to meet the exemption criteria. A settlement will offer contribution protection as a result of claims by non-settling PRPs.

Further information from the EPA Guidance can be found in Section Four.

A recycler should consult with a qualified Superfund legal expert before making a settlement decision. This is especially important if a recycler has received a settlement offer from EPA.

Arranging for Recycling - The Five Criteria

Under SREA, a recycler will be deemed an arranger of recyclable goods (regardless of whether they were sold before or after SREA was enacted), if it can prove that the five criteria were met at the time of the transaction.[42]

The five criteria are as follows:

(1) **The recyclable material met a commercial specification grade**[43]
This means that the material had to conform to a published specification. Such specifications could be published by industry trade associations (such as an ISRI specification), or some other historically or widely used specifications (such as a widely disseminated mill specifications).

(2) **A market existed for the recyclable material**[44]
This market can be demonstrated in a number of different ways including a third-party published price (including a negative price), a market with more than one buyer or one seller for which there is a documentable price, or a history of trade in the recyclable material. A third-party publisher would include industry newspapers, newsletters, websites or magazines such as *Fast Markets/AMM*, *Plastics News* or *The Yellow Sheet*, or any similar publication that documents prices current at the time of the transaction.[45]

(3) **The material was used in place of virgin material**[46]
Specifically, a substantial portion, but not necessarily all of the recyclable material, **was made available** for use as a raw material feedstock, in place of a virgin material, for the manufacture of a new saleable product. With respect to this criterion, recyclers should note:

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[40] A "plaintiff" refers to a person or company that has filed a civil lawsuit or claim.
[41] *Gould, Inc. v. A&M Battery & Tire Serv.,*176 F. Supp. 2d 324 (M.D. Pa. 2001)
[42] 42 U.S.C. § 9627(c). See the discussion of *United States v. Mallinckrodt, Inc.*, 343 F. Supp. 2d 809, 819 (E.D. Mo. 2004) in Section Four.
[43] 42 U.S.C. § 9627(c)(1).
[44] 42 U.S.C. § 9627(c)(2).
[45] Lott Legislative History at S15049.
[46] 42 U.S.C. § 9627(c)(3).

- The Act does not enumerate a specific percentage of what constitutes a "substantial portion."[47]
- If, for some reason beyond the control of the arranged of the recycling, a substantial portion of the recyclable material was not used by the consuming facility to manufacture a new product, *that fact alone* should not be viewed as evidence that this requirement was not met.[48]
- So long as the recycler sold the material *with the intention* that a substantial portion would be used as a raw material feedstock, but the consuming facility did not use it, the seller's intent should be sufficient to satisfy this requirement.[49]
- Additionally, there is no requirement for a recycler to document that a substantial portion of the recyclable material was *actually* used to make a new product.[50] The recycler need only be able to demonstrate that it is common practice for the recyclable materials in question be made available for use in the manufacture of a new saleable product. For example, if recyclable stainless-steel is sold to a stainless-steel mill, there should be a presumption that recycling will occur.[51]

(4) The recyclable material could have been a replacement for virgin material[52]
Specifically, the recyclable material **could have been** a replacement or substitute for a virgin raw material, or a product to be made from the recyclable material could have been a replacement or substitute for a product made from a virgin raw material. This provision recognizes that as manufacturing technology develops there are many consuming facilities that use only recycled material as feedstocks.

Recyclers should be prepared to demonstrate that the recyclable materials in question will be made available for use in the manufacture of a new saleable product

(5) The recycler exercised reasonable care[53]
Specifically, for all transactions after February 27, 2000, the recycler must prove that it **exercised reasonable care in determining that the facility where the recyclable material was handled, processed, reclaimed, or otherwise managed by another person (the consuming facility) was in compliance with all applicable substantive environmental laws and regulations. This duty extends not just to consuming facilities but also to a recycler's own site.**[54]

[47] Lott Legislative History at S15049.
[48] Id. at S15049.
[49] Id. at S15049.
[50] "…[t]he fact that the recyclable material was not, for some reason beyond the control of the person who arranged for recycling, actually used in the manufacture of a new product should not be evidence that the requirement of § 127 were not met." Lott Legislative History at S15048-49.
[51] *United States v. Mallinckrodt, Inc.*, 343 F. Supp. 2d 809, 819 (E.D. Mo. 2004).
[52] 42 U.S.C. § 9627(c)(4).
[53] 42 U.S.C. § 9627(c)(5) and (g).
[54] The Act states that a recycler will be liable (and therefore not eligible for the SREA exemption) if they operate a Superfund site, as defined in CERCLA. 42 U.S.C. §9627(g).

Meeting the reasonable care inquiry criteria is so important and complex, it is discussed in greater detail below.

EPA's Internal Guidance on the SREA criteria, with discussion of its relationship to other federal programs can be found in Section Four.

The Fifth Criterion: Understanding the Proactive Reasonable Care Requirement

Before explaining the criterion in detail, it is helpful to understand the reason for its inclusion in SREA.

While drafting the law, Congress (and environmental groups) grew concerned that if recyclers knew they could claim the Superfund exemption, they might turn a blind eye to -- and continue to supply -- consuming facilities that were violating environmental protection laws.

To prevent this possibility, Congress created the fifth criterion as a way to give the recycler the responsibility to investigate whether a consuming facility it plans to supply is complying with pollution laws.[55]

The Reasonable Care Standard

As noted above, the fifth criterion requires that the recycler prove that it exercised "reasonable care" with respect to the management and handling of the recyclable material.[56]

The phrase is in quotes because it has a legal meaning. Courts are often called upon to decide whether something can be considered "reasonable" under the law. For the recycler under SREA, "reasonableness" refers to how extensively it is expected to investigate a consuming facility's operations. This will be discussed further below.

It is important to know that, in choosing "reasonable care" as the standard, Congress showed that it did not expect recyclers to go to extreme lengths in investigating a consuming facility.

In not opting for a tougher standard, Congress was likely acknowledging that recyclers may be small or large operations and that what might be reasonable for one recycler, might be onerous for another. In choosing this standard, Congress has also given courts more leeway in considering the facts in any given case.[57]

Reasonable Care and Due Diligence

[55] Lott Legislative History at S15052.
[56] As with the other criteria, this must be proven by a preponderance of the evidence.
[57] Lott Legislative History at S15050.

To prove a recycler has taken reasonable care, it must exercise a degree of proactive investigation in determining whether the consuming facility was in compliance with applicable substantive federal, state and local environmental laws.[58] This investigation is commonly referred to as due diligence.

In the context of SREA, exercising due diligence means the recycler made sure – before the transaction occurred – that the consuming facility was in compliance. This is discussed further below.

It is important to emphasize that if a recycler has failed to conduct the required investigation at the time of the transaction and prior to shipping the materials, the SREA exemption will not protect the recycler -- even if all the other SREA criteria pertaining to the materials themselves are met.[59]

Meeting the Reasonable Care Requirement – The Three Factors

A recycler's effort – or due diligence – in investigating the compliance status of the facility will show reasonable care if the recycler can prove that at the time of the transaction it met three factors outlined in SREA.[60] These are discussed below.

No one fact is determinative in assessing whether all three factors are met. This means that what is reasonable for one recycler, might not be so for another.[61] The law's language suggests that Congress may have intended some flexibility.

However, it is important to note that, as of this writing, no court has examined the question of what it takes for a recycler to meet the reasonable care requirement. This makes it harder to predict what any individual recycler needs to do in order to meet the reasonableness standard.

Further discussion of the proactive reasonable care standard can be found in Section Four.

Due to the complexity of meeting the reasonable care requirement, a recycler facing Superfund liability should always consult with a qualified Superfund legal expert.

The Three Reasonable Care Factors:

1. **The price paid in the recycling transaction**[62]
   If the price paid would be considered unrealistic by a "reasonable person," the recycler must be prepared to make the case that the price was reasonable under prevailing market conditions, or other factors, at the time of the transaction.

   As many recyclers know, there are times that, for various reasons, the sale of recyclables results in a net negative value. Supply and demand dictate prices, and market values may

[58] *RSR Corp. v. Avanti Dev., Inc.,* 2000 U.S. Dist. LEXIS 14209 (S.D. Ind. 2000). Cf. *United States v. Atlas Lederer Co.,* 282 F. Supp. 2d 687 (S.D. Ohio 2001).
[59] 42 U.S.C. § 9627(c); *United States v. Mallinckrodt, Inc.,* 343 F. Supp. 2d 809 (E.D. Mo. 2004).
[60] 42 U.S.C. § 9627(6). See also Lott Legislative History at S15050. EPA's Internal Guidance on the time of the transaction can be found in Section Four.
[61] 42 U.S.C. § 9627(6)(b).
[62] 42 U.S.C. § 9627(6)(A).

drop. Sometimes, the cost of transportation, handling and processing exceed the market value of the material. Congress recognized these factors and allowed for some flexibility in how the price and market conditions are used to determine reasonableness.[63]

This means that, even if the recycler pays the consuming facility to take the material (as opposed to being paid to ship the material), so long as the price paid is less than the cost of disposal, it can be considered a legitimate transaction.[64]

2. The ability of the recycler to detect the nature of the consuming facilities operations[65]
The wording of this factor indicates that Congress recognized that the recycling industry is comprised of entities of varying sizes and resources, and that this will impact their ability to assess the compliance of consuming facilities. For example, a smaller company might be unable to visit a distant consuming facility and/or have the technical expertise to assess its operations, while a bigger recycler would find both feasible.[66] The meeting of this factor will therefore be a fact-specific determination.

   This factor highlights Congress' choice to consider no one thing as determinative in deciding whether a recycler's due diligence can be deemed "reasonable."[67] In the same fashion, a court will not likely consider only one factor as determinative.

3. The results of inquiries made to appropriate federal, state or local environmental agencies[68]
The Act makes it clear that, as part of due diligence, recyclers must have made inquiries with the appropriate government agencies responsible for overseeing the environmental compliance of the consuming facility in question.

   The ISRI SREA Reasonable Care Compliance Program was developed specifically to help recyclers comply with this third factor. The program is outlined in Section Three and consists of a method by which recyclers can easily obtain compliance data from appropriate federal, state, and local government agencies. This program is also available for recyclers seeking to obtain public records regarding their own facilities to ensure their own compliance as required by the law.

   It is important to note that the language of SREA regarding these inquiries has created some uncertainty. According to the Act, the decision to ship or not to ship must be made as:

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[63] This is flexibility is implied in their use of the language, "*or otherwise arrange for the recycling of recyclable materials"* in their definition of an arranger. 42 U.S.C. § 9627(c). "[W]hen looking at ''the price paid in the recycling transaction''… one should look not only at whether the price bore a reasonable relationship to other transactions for similar materials at the time of the transaction in question but should also take into account the circumstances surrounding the individual transaction such as whether it was part of a long term deal involving significant quantities." Lott Legislative History at S15050.
[64] Lott Legislative History at S15049.
[65] 42 U.S.C. § 9627(c)(6)(B).
[66] Lott Legislative History at S15050.
[67] It should be noted that obtaining an ISRI SREA Reasonable Care Report may be a component in showing due diligence. However, the difference in business size may not be relevant when it comes to the cost of obtaining an ISRI Report because all ISRI members pay the same price for Reports, regardless of size. For more information on the ISRI SREA Reasonable Care Report program, see Section Three.
[68] 42 U.S.C. § 9627(c)(6)(C).

*"…the result of inquiries made to the appropriate Federal, State, or local environmental agency (or agencies) regarding the consuming facility's past and current compliance with substantive (not procedural or administrative) provisions of any Federal, State, or local environmental law or regulation, or compliance order or decree issued pursuant thereto, **applicable** to the handling, processing, reclamation, storage, or other management activities associated with the recyclable material. Add footnote with citation.*

Because the word "applicable" is open to interpretation in the recycling context, it can be hard for recyclers to understand where and when their duty to inquire ends. Further discussion of this ambiguity can be found in Section Four.

Avoiding Exclusion from SREA Protection

A recycler that meets the SREA exemption requirements may still not be in the clear. Once the requirements for the SREA exemption have been met by a recycler, the government or plaintiff is allowed the opportunity to prove to the court that the recycler should be excluded from SREA protection.

To prove this, it must be shown that one of several exclusions in the Act applies to the transaction in question.[69] Recyclers can take some solace from the fact that, if the government or plaintiff fails to prove an exclusion, the Act requires that it must pay the recycler's attorney fees in defending the suit.[70]

The burden to prove that an exclusion applies is challenging. The government or plaintiff must prove the recycler:

- Had an **objectively reasonable basis to believe** at the time of the transaction that the material would not be recycled or that it would be burned for fuel or energy, or
- Had **reason to believe** that hazardous substances had been added to the recyclable material for purposes other than processing for recycling, or
- Had **failed to exercise reasonable care** with respect to the management and handling of the recyclable material, including failure to comply with customary industry practices current at the time of the recycling transaction that were designed to minimize, through source control, contamination of the recyclable material by hazardous substances,[71] or
- The consuming facility receiving the materials -- **or the recycler** -- is an owner and/or operator of a Superfund site.[72]

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[69] 42 U.S.C. § 9627(f); It is important to note that Congress felt it necessary for battery recyclers to also prove they did not recover the valuable components of spent batteries. See Battery Recyclers.

[70] 42 U.S.C. § 9627(j). This fee-shifting provision should give pause to any government or private party considering action against a recycler who can likely demonstrate it meets the SREA exemption criteria. More information can be found in Section Four.

[71] With specific regard to exclusions, the Act state that, "*a requirement to obtain a permit applicable to the handling, processing, reclamation, or other management activities associated with recyclable material shall be deemed to be a substantive provision*." 42 U.S.C. § 9627(f)(3).

[72] The Act states that a recycler will be liable (and therefore not eligible for the SREA exemption) if they operate a Superfund site, as defined in CERCLA. 42 U.S.C. §9627(g). For this reason, recyclers are advised to obtain an annual

An Objectively Reasonable Basis to Believe- A Closer Look

The Act states that whether or not a recycler had an objectively reasonable basis for belief shall be determined using factors that include (but are not limited to):

- The size of the person's business,
- Customary industry practices (including customary industry practices current at the time of the recycling transaction designed to minimize, through source control, contamination of the recyclable material by hazardous substances),
- The price paid in the recycling transaction, and
- The ability of the person to detect the nature of the consuming facility's operations concerning its handling, processing, reclamation, or other management activities associated with the recyclable material.[73]

Proving an Objectionably Reasonable Basis to Believe

It is helpful to consider how courts have addressed proving if a recycler had an objectionably reasonable basis of belief for the purposes of this exclusion. For example, the U.S. District Court for the Northern District of Alabama held that the size of the business is relevant, finding that it was not reasonable to expect a smaller business to visit a consuming facility or make the same kind of technical assessments that a larger business might be capable of doing.[74]

A summary of this important ruling can be found in Section Four and Appendix C.

CAUTION: Although the exclusion provision of SREA refers to an "objectively reasonable basis" it is important to recognize that this is a different legal standard from the standard of "reasonable care" required for the due diligence needed to meet the fifth criterion when claiming the exemption. While a court analysis of the objectively reasonable basis requirement might be an *indicator* of how a court would view the reasonable care requirement, it cannot be relied upon. As of this writing, no court has directly ruled on what it considers "reasonable" for purposes of making proactive due diligence inquiries prior to shipping materials.[75]

Brokered Transactions

Many recyclers use brokers as part of the recycling transaction. In many cases, the broker will not take physical possession of the materials. It is important to recognize that SREA places its requirements on the owner of the materials, and owners cannot sell or broker away their liability under Superfund. As such,

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ISRI SREA Reasonable Care Report on its own facility. For more information on the ISRI SREA Reasonable Care Report program, see Section Three.

[73] *United States v. Mtn. Metal Co.,* 137 F. Supp. 2d at 1280 (N.D. Ala. 2001), citing 42 U.S.C. § 9627(2).

[74] *United States v. Mtn. Metal Co.,* 137 F. Supp. 2d 1267 (N.D. Ala. 2001); See also *Gould*, 176 F. Supp. 2d 324 (M.D. Pa. 2001).

[75] The Act sets forth an "objectively reasonable basis" standard for exclusion which, as the legislative history indicates, "is not equivalent to the reasonable care standard. The objectively reasonable basis for belief standard is meant to be a more rigorous standard than the reasonable care standard." See, 42 U.S.C. §9627(f). See also, Lott Legislative History at S15050.

the SREA requirements likely remain with the material owners even if a broker offers to take responsibility or liability.

At this writing, the EPA has issued no formal guidance on how brokers should be treated with respect to the SREA exemption. Although information from an informal, unpublished 2006 EPA draft guidance document (2006 draft guidance) offers some insights into EPA's view of brokered transactions, it is important to know that ISRI expressed significant concerns with this draft document and it was never put into final form or circulated to Regional Enforcement staff.

Brokers in Physical Possession of Materials

One of the challenging aspects of the 2006 draft guidance is that it seems to assume that all brokers take physical possession of materials during a recycling transaction, which is rarely the case.
This view is suggested by the guidance's instruction that regional offices consider whether the arranger or transporter investigated the broker's facility, and - if reasonable under the circumstances - any other facilities that handled, processed, reclaimed or otherwise managed its recyclable materials.

At the time, EPA was of the opinion that SREA makes no exception for recycling transactions where brokers are used. As such, EPA would seem to be extending the due diligence responsibility of owners for their brokers' locations and the final consuming facility.

Unfortunately, except for acknowledging that brokerage does occur, this does not address the implications for recyclers that sell through brokers *not* taking physical possession of the recyclable materials.

Intermediate Facilities

The EPA implied in the 2006 draft guidance that recyclers must make inquiry into the environmental compliance of every intermediate consuming facility as well as the final consuming facility in a brokerage transaction.[76]

ISRI takes issue with this opinion and believes that the "reasonable care" standard of SREA should be the authoritative factor in determining the extent of, and on which facilities, SREA due diligence is required.

Broker's Reasonable Care Inquiry May Not Suffice

A common question is whether a recycler can accept the due diligence of its broker and still be eligible for the SREA exemption. The courts have not specifically answered this question, but common law principles appear to suggest that it cannot.

SREA places responsibilities on the material owners, and Superfund liability may not be sold or otherwise brokered away. As such, proof of a brokers' own due diligence would not likely relieve an owner of its SREA responsibilities, unless the broker first takes ownership of the materials.

[76] In the unpublished draft guidance, EPA stated its belief that when brokers are used there is the potential that the recyclable materials may be handled, processed, reclaimed or otherwise managed in series at more than one consuming facility, including the broker's facility. For example, an arranger might send its scrap wire to a scrap processor and then the scrap processor sends the metal to a smelter for recycling. In this case, EPA seemed to suggest that recyclers should conduct due diligence on all locations at which the material was handled. This does not, however, address situations in which the broker does not take physical possession of or physically handle the material.

It is arguable that a broker's reasonable care should suffice to meet the SREA requirements. At one time, EPA revealed it might consider SREA satisfied if a broker has exercised reasonable care in investigating a consuming facility – but this does not appear in any published EPA guidance and has never been tested in court. In the 2006 draft guidance, EPA indicated it **may** exercise enforcement discretion in determining arranger liability if a broker provided evidence to the owner/arranger documenting the broker's "reasonable care" as outlined by the Agency.

It must be emphasized that this was a draft document and it was never formally adopted, published or circulated within EPA, however, it remains a useful indicator. A recycler preparing a defense to Superfund liability should share brokerage information with a qualified Superfund legal expert.

Further information on Congress' intent regarding brokers can be found in Section Four.

SREA Covers Litigation Costs

If, as a result of litigation, a recycler successfully claims the SREA exemption, the plaintiff who brought the contribution action can be held liable for the recycler's costs in defending the action, including legal and expert witness fees.[77] This fee-shifting provision of SREA is considered a deterrent to PRPs seeking to bring recyclers into litigation without good reason.

Further information on this topic can be found in Section Four.

Exemption from Liability is Limited to Superfund Actions

Congress limited the scope of SREA to the Superfund laws.[78] This means that SREA and its exemption do not apply to any other federal environmental laws, including the Solid Waste Disposal Act (SWDA), commonly referred to as the Resource Conservation and Recovery Act (RCRA).[79] The protection also does not apply to lawsuits brought under state environmental laws, unless the state legislature has specifically enacted similar recycling exemptions .[80]

SREA Does Not Limit Other Defenses

SREA affirmatively states that a person who cannot take advantage of the SREA exemption from liability can still use any other defenses it might have under the law.[81]

[77] 42 U.S.C. § 9627(j).
[78] 42 U.S.C. § 9627(k).
[79] RCRA was initially enacted in 1976, Pub. L. No. 94-580, 42 U.S.C. §6901 et seq., 90 Stat. 2826 (1976), and was amended in 1978, Pub. L. No. 95-609, 92 Stat. 3083 (1978), and 1980, Pub. L. No. 96-482, 94 Stat. 2348 (1980).
[80] While one or two cases have explored the question of whether "excluded scrap metal" under Subtitle C of RCRA should exempt a recycler from CERCLA liability, there has been no precedent-setting decision thus far.
[81] 42 U.S.C. § 9627(l). Importantly, the Act states that there shall be no presumption of Superfund liability because a PRP cannot or chooses not to utilize the SREA defense.

Other than the SREA exemption, defenses to Superfund liability are limited and include showing that the hazard was caused by an act of God; acts of war; or acts/omissions of a third party with whom a PRP has no contractual relationship.[82]

The Useful Product Defense

The other defense available to recyclers, especially those who cannot meet the SREA exemption criteria, is the so-called "useful product defense."

Under the Useful Product Doctrine, a recycler can escape liability if it can prove that it was selling a useful product rather than arranging for a disposal.

This defense might be an option for a recycler who cannot meet the SREA requirements for exemption. It may be of particular importance to a battery recycler who has recovered the useful components of batteries. There is mixed case law on the concept of a "useful product" but the arguments have proven helpful to recyclers over the past three decades.[83]

Proving this defense is a complex process and a full discussion of its application is beyond the scope of this Manual. Recyclers facing possible Superfund liability should consult with a qualified Superfund legal expert.

Further information on the Useful Product defense can be found in Section Four generally and for batteries, specifically.

Special Requirements Specific to Scrap Metal & Batteries

Recyclers handling scrap metal and batteries have certain additional requirements under SREA that do not apply to the other scrap material covered by the Act. As with the other criteria, the recycler must prove these additional requirements by a preponderance of the evidence.

Scrap Metals

A Problem Definition

The SREA statute clearly defines "scrap metal" as a recyclable material eligible for the exemption. Unfortunately, it does not account for the fact that there are varying perspectives on what constitutes scrap metal. As such, the first thing a recycler must determine is whether its material meets a covered definition.

According to EPA, the SREA definition of scrap metal is the same as the RCRA regulatory definition of scrap metal set forth in 40 C.F.R. Section 261.1(c)(6).[84] However, there are inconsistencies among these definitions. The impact of these inconsistencies on whether and when certain materials can qualify as "scrap metal" and "recyclable material" under SREA may eventually be a question decided by the courts.

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[82] 42 U.S.C. § 9607(b).

[83] *Pneumo Abex Corp. v. High Point, Thomasville and Denton R. Co.,* 142 F.3d 769 (4th Cir. 1998), *Douglas Cty. v. Gould, Inc.,* 871 F. Supp. 1242 (D. Neb. 1994), and *United States v. Mallinckrodt, Inc.*, 343 F. Supp. 2d 809, 819 (E.D. Mo. 2004).

[84] Internal Guidance. Section 3.0.

Further information on the definition can be found in Section Four.

Extra Requirements to be Deemed an Arranger

To be deemed "arranging for recycling," under SREA, scrap metal recyclers must prove two additional requirements above and beyond the five criteria required of all recyclers.

A recycler that arranges for the recycling of scrap metal must also show:

> *"(B) the [recycler] was in compliance with any applicable regulations or standards regarding the storage, transport, management, or other activities associated with the recycling of scrap metal that the [EPA] Administrator promulgates under the Solid Waste Disposal Act [42 U.S.C. 6901 et seq.] subsequent to November 29, 1999, and with regard to transactions occurring after the effective date of such regulations or standards; and*
>
> *(C) the person did not melt the scrap metal prior to the transaction."* [85]

The first requirement means that a recycler selling recyclable scrap metal to a consuming facility must have been in compliance, at the time of the transaction, with any applicable regulations or standards having to do with processing or storage activities at the recycler's facility, as well as regulations or standards applicable to the transport of the scrap metal.

The second requirement means that, when dealing with slag or dross, recyclers must be able to show whether the substance was the result of melting scrap metal at its facility or whether the slag or dross was purchased from another recycler.

Though not legally authoritative, the SREA legislative history clarifies the issue of melting scrap metal by stating that "sweating'' iron from aluminum, welding, cutting metals with a torch, and other similar activities are not deemed to be melting scrap metal under the Act.[86]

Battery Recycling

Congress felt it was important to include specific requirements on scrap battery recyclers because of their potential to release hazardous substances.

The Act distinguishes whole from recovered[87] batteries, providing exemption eligibility only to those recyclers that ship whole batteries. This means that recyclers shipping broken batteries or parts of batteries are not eligible for SREA exemption.

However, courts have held that transactions involving lead plates from within a battery may be eligible for another defense separate and apart from SREA, called the Useful Product defense.[88] Further information on the Useful Product defense generally and for batteries, can be found in Section Four.

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[85] 42 U.S.C. § 9627 (d)(1).
[86] Lott Legislative History at S15050.
[87] Recovery refers to a recycler that breaks or smelts a battery to recover the lead plates, nickel, cadmium, or other type of materials. See Lott Legislative history at S15050.
[88] See e.g., *Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal Co.,* 814 F. Supp. 1269, 1275 (E.D.Va.1992); *Douglas County,* 871 F. Supp. at 1246 (emphasis supplied) (citing *Catellus Dev. Corp. v. United States,* 34 F.3d 748 (9th

Extra Requirements to be Deemed an Arranger

To be deemed "arranging for recycling," battery recyclers must prove the transaction met two additional requirements above and beyond the five criteria required of all recyclers.

The additional requirements for batteries are:

> *"1) the person met the criteria set forth in subsection (c) of this section with respect to the spent lead-acid batteries, spent nickel-cadmium batteries, or other spent batteries, but the person **did not recover** the valuable components of such batteries; and*
>
> *(2) (A) with respect to transactions involving **lead-acid batteries**, the person was in compliance with applicable Federal environmental regulations or standards, and any amendments thereto, regarding the storage, transport, management, or other activities associated with the recycling of spent lead-acid batteries;*
>
> *(B) with respect to transactions involving **nickel-cadmium batteries**, Federal environmental regulations or standards are in effect regarding the storage, transport, management, or other activities associated with the recycling of spent nickel-cadmium batteries, and the person was in compliance with applicable regulations or standards or any amendments thereto; or*
>
> *(C) with respect to transactions involving **other spent batteries**, Federal environmental regulations or standards are in effect regarding the storage, transport, management, or other activities associated with the recycling of such batteries, and the person was in compliance with applicable regulations or stand standards or any amendments thereto."*[89]

Cir.1994) (footnotes omitted)); accord *RSR Corp. v. Avanti Dev., Inc.*, 68 F.Supp.2d 1037, 1048 (S.D.Ind.1999) (noting that the seller of the plates had already reclaimed the lead plates and that the seller's reclamation process was not the process alleged to have caused the pollution in the case).

[89] 42 U.S.C. § 9627(e).

SECTION THREE
THE SREA REASONABLE CARE COMPLIANCE PROGRAM

Introduction

As discussed in Section Two, to be eligible for the SREA exemption, among other criteria, a recycler must be able to prove that it exercised **reasonable care** in determining that the consuming facility where the recyclable material was handled, processed, reclaimed, or otherwise managed was **in compliance with all applicable substantive environmental laws and regulations.**[90]

To meet this criterion, SREA requires that the recycler proactively investigate the compliance status of the consuming facility to which it is shipping the eligible recyclable materials (i.e. conduct due diligence).

More specifically, a recycler must investigate and determine whether a consuming facility is in compliance with environmental laws and regulations by making inquiries with the appropriate agencies at the federal, state, and local levels of government and then reviewing those records to determine compliance status.[91]

The ISRI SREA Reasonable Care Compliance Program was created by ISRI to assist recyclers[92]in meeting the proactive requirement.[93] As the Voice of the Recycling Industry,® ISRI devised the Program as a way to pull together the industry's resources and use economies of scale to make due diligence more accessible and affordable to recyclers.[94]

Under this Program, a recycler interested in doing business with a particular consuming facility can request ISRI to have a report prepared (known as a SREA Report) summarizing the public compliance records of the facility.

Timing a Report Request

It is important to note that SREA requires that the reasonable care inquiry be made "*at the time of the transaction*"[95] which effectively means, **before** shipment.

This means that due diligence ***must*** be completed and reviewed at the time of the transaction. It is not a defense to have simply started the due diligence at the time of the transaction.

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[90] 42 U.S.C. § 9627(c)(5) and (g).
[91] 42 U.S.C. § 9627(c)(6)(C).
[92] And brokers.
[93] The compliance program was initially available only to ISRI members as a benefit of ISRI membership. In 2019, ISRI opened the program to non-members as a means to encourage and facilitate compliance with SREA.
[94] SREA Reports are prepared by ISRI contractors. The current contractor is Keramida Inc., an environmental consulting firm with 30 years of expertise in conducting environmental due diligence, with access to numerous federal, state and local regulatory databases, and experience interpreting environmental regulations and site-specific records.
[95] 42 U.S.C. § 9627(c).

As a practical matter, recyclers must therefore plan for the time it will take to use the ISRI Program to obtain a report. It should be noted that SREA Reports can take an average of 2-4 months to complete due to the complexity of compiling information on any given consuming facility.

Overview of the Reasonable Care Compliance Program

Recommended Frequency of SREA Reports

Recyclers often ask how often the due diligence inquiry must be made of new or routinely-used consuming facilities. The ISRI Program was developed in consultation with expert legal counsel and is based on a review of established due diligence statutes and standards, including frequency of inquiry.

SREA Reports should be ordered on an annual basis on all consuming facilities to which a recycler ships material

While no court has yet to rule on how often a recycler should make these compliance inquiries in order to be deemed "reasonable" under SREA, ISRI recommends inquiring at least once on an annual basis, and before any transaction with a new customer is completed. As such, SREA Reports have a shelf-life of 12 months from the date of completion.

Maintaining a Record of Inquiries

ISRI strongly recommends that recyclers maintain copies of all inquiries and documentation, with the date of the inquiry clearly noted on the documentation. Accordingly, SREA Reports include clearly-delineated notations of when and who has made inquiries.

Documentation can be electronic or in paper form, or both. However, recyclers should be sure that it is durable and physically produced to allow proof that the inquiries were actually made at the appropriate time.

The documentation should always be kept in a safe and secure location where all other vital business records are maintained.

Unlike tax liability, **Superfund liability is forever** and may not arise for years, perhaps decades, after a transaction. Record destruction – intentional or not – could eliminate eligibility for the SREA exemption. As such, all due diligence records should be stored in a location and manner that ensures that business associates now - and in the future - will be aware of their existence and can gain ready access.

The Content and Value of SREA Reports

As noted above, a SREA Report contains the public records available on the requested facility's environmental compliance status. Recyclers can use the SREA Report as a tool in their due diligence inquiries.

The information in a SREA Report will come from various sources:

- Searches of federal, state and local databases
- Searches of proprietary databases of public information
- FOIA requests; and

- Consuming facility correspondence[96]

Before discussing SREA Reports in further detail, it is extremely important to emphasize what a Report can – and cannot – do:

- A SREA Report is not guaranteed to satisfy the reasonable care standard or due diligence requirement under SREA. It is best viewed as a useful tool in meeting a recycler's duty under the Act.
- A SREA Report is informational only; it cannot be viewed as a conclusive statement that a consuming facility is – or is not - compliant. Each recycler must make its own determination of compliance based on its individual assessment of the information in the Report and other inquiries it may deem necessary.
- A SREA Report may contain compliance information that is challenging to assess. This is because certain language in SREA is open to interpretation. Some examples of such issues are discussed below.

Finally, as a practical matter, recyclers should recognize that not all relevant information can be guaranteed to be included in an SREA Report. For example, an event may occur at a consuming facility shortly after the Report has been complied. A recyclers should therefore remain vigilant for information that comes its way regarding a consuming facility with whom it is – or will in the future be – doing business. Again, if a recycler learns of troubling information, it should consult with a qualified Superfund legal expert.

Interpreting a SREA Report[97]

All SREA Reports will have the following Sections: [98]

A. REASONABLE CARE EVALUATION PROGRAM
B. REASONABLE CARE EVALUATION REPORT COMPONENTS
C. REPORT FORMAT AND CATEGORIES
D. SREA EVALUATION SUMMARY
E. SREA EVALUATION FINDINGS
F. CONSUMING FACILITY CORRESPONDENCE
G. ENVIRONMENTAL COMPLIANCE AGENCY CORRESPONDENCE

[96] The sources used will be listed in the SREA Report's Section C.
[97] SREA Reports are usually between 300-500 pages in length. The key summary sections are placed at the beginning of each report and typically are between 10-20 pages. While the reports are delivered entirely in electronic form, recyclers may want to consider printing out the cover page (which provides the necessary documentation of when and who made the inquiries), along with the SREA Report Sections D, E, and F. The recycler should then attach those section to the transaction contract documents. Recyclers should retain all Report sections, including the backup material contained in the Appendices. Reviewing the comprehensive backup data in the electronic format may be more manageable.
[98] Sections A and B are introductory sections which provide an overview of the SREA Reasonable Care Compliance Program and the sources of the Report's information. Section C describes the report's format and the categories of information.

H. REGULATORY DATABASE SEARCH SUMMARY REPORT
I. DISCLAIMER AND LIMITATIONS
J. LIST OF COMMON ACRONYMS
APPENDICES

Each of the key Sections will be discussed in detail below. However, the contents of a Report can be summarized as follows:

The Key findings in a SREA Report will be contained in[99]:

- Section D - A single Table which summarizes the Report's findings in a quick, easy-to-read format. Noncompliance issues will be identified by a red banner.
- Section E – Three additional Tables which breaks the information contained in the first Table into greater detail, allowing fuller assessment.

The information used to prepare the Tables are contained in:

- Sections F-H – Summaries of the sources of information on which the Tables are based.
- The Appendices – Containing the raw data received from the sources. This is sometimes referred to as the "backup data." A recycler should review this data when analyzing any areas of concern found in any of the four Tables.

Section D – The SREA Evaluation Summary

Recyclers should carefully review Table 1 in Section D, which offers an overview of the consuming facility's current compliance status, including whether the facility has failed to comply with permits or operating requirements, has been subject to any kind of regulatory orders, or has had onsite contamination issues.

When the results of a SREA Report touch on areas of uncertainty under SREA, recyclers should consult a qualified Superfund legal expert.

[99] Sections A and B are introductory sections which provide an overview of the SREA Reasonable Care Compliance Program and the sources of the Report's information. Section C describes the report's format and the categories of information.

D. SREA EVALUATION SUMMARY

TABLE 1

AREA OF COMPLIANCE	FINDINGS POTENTIALLY APPLICABLE TO SREA	CURRENT RATING*	FINDINGS NOT APPLICABLE TO SREA	
			Potentially Relevant To Your Business	Not Likely Relevant To Your Business
Lacking Regulatory Operating Authorization (Permit)	-	🟢	-	-
Permit Noncompliance	2	🔴	-	-
Operating Regulatory Noncompliance	-	🟢	-	-
Please say that again nce Schedule Requirements	-	🟢	-	-
Agreed / Consent / Administrative Order Requirements	-	🟢	-	-
Onsite Contamination Issues	4	🟢	-	-
Pre-existing Issues (prior to 2/27/2000)	-	🟢	-	-
Other, Including Issues Without Clear Information	7	🔴	1	-

* The compliance status of the Consuming Facility was assigned using the following protocol:

🔴 indicates at least one finding that is potentially applicable to SREA

🟡 indicates zero findings that are potentially applicable to SREA but at least one finding that may be relevant to your business

🟢 indicates zero findings that are potentially applicable to SREA or relevant to your business

Additional explanation for Table 1 is Provided in Section C.

Table 1 divides the inquiry results into three columns for easy reference:

- The first column contains the number and type of Findings Potentially Applicable to SREA
  - In the sample Table, this column shows that the facility has had a total of 13 findings in three categories: "Permit Noncompliance," "Onsite Contamination Issues" and "Other, Including Issues Without Clear Information."
- The second column color-codes the findings for easy reference. A red circle indicates findings that may be applicable to SREA eligibility, yellow are informational, and green indicates no issues.
  - In the sample Table, the facility has two red circles indicating findings potentially applicable to SREA eligibility.
- The final columns indicate whether or not any of the findings are relevant to the recycler's business.
  - In the sample Table, there is one finding potentially relevant to the recycler's business.

Although this initial overview may show potential issues, a recycler must examine the remainder of the Report in order to get a fuller, and therefore more useful, picture of the facility's compliance over time.[100]

[100] It is worth noting that many companies own several consuming facilities. When reviewing SREA Reports, recyclers should keep in mind that, just because one consuming facility is having issues with environmental compliance, it does not necessarily mean all of the company's consuming facilities are having difficulties. That said, if several of a

Section E – SREA Evaluation Findings

Section E contains three additional tables which go into further detail on the information summarized in Table 1:

Section E - Table 2 - Findings Potentially Applicable to SREA

Table 2 contains some of the most important information in the SREA Report because it provides details of the noncompliance items noted in Table 1.

When reviewing Table 2, recyclers should look for the following events and patterns.

- Extended periods of non-compliance. These may indicate systemic issues within a facility.
- Extended periods of non-compliance for multiple permits. These may indicate systemic issues within a facility.
- Clusters of noncompliance during a specific time-frame. These may indicate that a facility has dealt with a period of inadequate funds, poor management or lack of technical expertise. Whether such clusters are in the past or present will be useful information for a recycler as part of the decision of whether to ship to the facility.

If any of these events or patterns are evident, the recycler should assess the additional information in the Appendices and, as possible, through the recycler's own inquiries, which should be documented and filed with the SREA Report.

If all or most of the concerns referenced in the table are more than a few years old and appear to have been rectified, it may be an indication that the facility is back into compliance. In such instances, recyclers are encouraged to contact the facility directly to make further inquiries.

company's consuming facilities are having difficulties, it could be an indicator that many or most of that company's consuming facilities are failing to comply. Recyclers should carefully review this information and make direct inquiries to the consuming facility to clarify any questions.

E. SREA EVALUATION FINDINGS

Table 2. Findings Potentially Applicable To SREA

Category	Findings
Lacking Regulatory Operating Authorization (Permit)	No Findings
Permit Noncompliance	• Facility is registered with CAA Permit No. OH0000000210000107. Facility has had 1 informal enforcement actions under the CAA program in the last 5 years. Facility has been in noncompliance with this permit for 4 of the last 12 quarters and has been in significant noncompliance for 4 of the last 12 quarters. Facility is currently listed with the following compliance status: No Violation Identified. (EPA ECHO data last updated on 04/13/2019) • Facility is registered with CWA Permit No. OH0139408. Facility has been in noncompliance with this permit for 3 of the last 12 quarters Facility is currently listed with the following compliance status: No Violation Identified. (EPA ECHO data last updated on 12/31/2018)
Operating Regulatory Noncompliance	No Findings
Compliance Schedule Requirements	No Findings
Agreed / Consent / Administrative Order Requirements	No Findings
Onsite Contamination Issues	• Facility is listed in the Ohio Spills database for the following spill event: Product: WASTE WATER Month/Year: 8/2005 Amount Spilled (gal): Not Reported • Facility is listed in the Ohio Spills database for the following spill event: Product: SOLUBLE OIL - MILKY WHITE Month/Year: 10/2006 Amount Spilled (gal): Not Reported • Facility is listed in the Ohio Spills database for the following spill event: Product: WASTE WATER Month/Year: 12/2008 Amount Spilled (gal): Not Reported • Facility is listed in the Ohio Spills database for the following spill event: Product: SHEEN AND PETROLEUM ODORS Month/Year: 5/2005 Amount Spilled (gal): Not Reported
Pre-existing Issues (prior to 2/27/2000)	No Findings

Other, Including Issues Without Clear Information	• Facility is listed on the EPA Watch List. Being on the Watch List does not mean that the facility has actually violated the law. Being on the Watch List does not represent a higher level of concern regarding the alleged violations that were detected, but instead indicates cases requiring additional dialogue between EPA, state and local agencies. Watch List Program: CAA Facilities List Date: April 2012 Watch List • Facility is listed on the EPA Watch List. Being on the Watch List does not mean that the facility has actually violated the law. Being on the Watch List does not represent a higher level of concern regarding the alleged violations that were detected, but instead indicates cases requiring additional dialogue between EPA, state and local agencies. Watch List Program: CAA Facilities List Date: July 2012 Watch List • Facility is listed on the EPA Watch List. Being on the Watch List does not mean that the facility has actually violated the law. Being on the Watch List does not represent a higher level of concern regarding the alleged violations that were detected, but instead indicates cases requiring additional dialogue between EPA, state and local agencies. Watch List Program: CAA Facilities List Date: June 2012 Watch List • Facility is listed on the EPA Watch List. Being on the Watch List does not mean that the facility has actually violated the law. Being on the Watch List does not represent a higher level of concern regarding the alleged violations that were detected, but instead indicates cases requiring additional dialogue between EPA, state and local agencies. Watch List Program: CAA Facilities List Date: November 2012 Watch List • Facility is listed on the EPA Watch List. Being on the Watch List does not mean that the facility has actually violated the law. Being on the Watch List does not represent a higher level of concern regarding the alleged violations that were detected, but instead indicates cases requiring additional dialogue between EPA, state and local agencies. Watch List Program: CAA Facilities List Date: September 2012 Watch List • Facility is listed on the EPA Watch List. Being on the Watch List does not mean that the facility has actually violated the law. Being on the Watch List does not represent a higher level of concern regarding the alleged violations that were detected, but instead indicates cases requiring additional dialogue between EPA, state and local agencies. Watch List Program: CAA Facilities List Date: August 2012 Watch List • Facility is listed on the EPA Watch List. Being on the Watch List does not mean that the facility has actually violated the law. Being on the Watch List does not represent a higher level of concern regarding the alleged violations that were detected, but instead indicates cases requiring additional dialogue between EPA, state and local agencies. Watch List Program: CAA Facilities List Date: October 2012 Watch List

Assessing Non-Compliance Items

When interpreting a SREA Report, extended periods of noncompliance for multiple permits should be examined carefully.

If a SREA Report shows items of non-compliance, It is important to go to the backup data contained in the SREA Report Appendices to determine whether the violations are applicable to SREA. Studying this information will help a recycler determine whether or not the non-compliance rises to the level of concern worthy of ending a business relationship.[101]

Not all hazardous contamination will result in the location being identified as a federal Superfund site. Recyclers should carefully weigh such factors as the company's financial situation and ability to pay for clean-up and any prior business experience with the facility. All such factors should be discussed with legal counsel.

If the data raises concerns, the recycler should consult with expert legal counsel and consider the degree of risk it is willing to accept if it is to continue with the transaction.

SREA Reports and SREA's Uncertainties

Items in Table 2 can sometimes touch on unresolved issues regarding the SREA exemption criteria.

For example, a Clean Air Act ("CCA") Noncompliance item raises one of the most important areas of uncertainty under SREA: what is considered "*applicable to the handling, processing, reclamation, storage, or other management activities associated with the recyclable material.*"[102]

The question of when/where handling, processing, reclamation, storage, or other management activities begins and ends has not been definitively answered.[103] This is further discussed in Section Four.

There could also be CAA issues arising from the inbound recyclable materials staging areas.

A recycler finding CCA violations and enforcement actions in Table 2, should closely examine the backup materials contained in the SREA Report in Appendix C to see exactly what the basis for the violations were **and seek outside assistance if necessary**.

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[101] Using a steel mill as an example, if the issue relates to stormwater emanating from the inbound staging area then EPA would likely argue that it is something to be concerned about. However, if the problem relates to water from a quenching process then it would be very hard to see how that would be a compliance violation applicable to the handling, processing, reclamation, storage, or other management activities associated with the recyclable material.

[102] 42 U.S.C. § 9627(c)(6)(C).

[103] ISRI has attempted to negotiate the question of applicability with EPA, taking the position that virgin and recycled materials should be treated the same and, as such, applicability ends the moment the recyclable material crosses the delivery gate at the consuming facility. However, EPA has maintained that the delineation should occur far further into the consuming facility's manufacturing process. In the example of scrap steel, ISRI believes that once scrap steel is charged into a furnace applicability ends, but EPA has insisted that it must continue at least through the air system.

Section E - Table 3 - Findings Not Applicable to SREA but Potentially Relevant to Your Business

There may, at times, be business circumstances which are reflected in public compliance records but which do not directly relate to Superfund liability. These might reveal indicators, for example, that a facility is at risk of bankruptcy, faces zoning issues, or has substantive operational or other management concerns. While not necessarily relevant to evaluating potential for Superfund liability, there is clearly some value in having this information available prior to deciding whether to do business with a facility. Recyclers should carefully review this data and use it to make informed business decisions.

When reviewing this Section, a recycler should look for issues that might be relevant to its business. For instance:

- Do the issues have a relationship to the materials to be shipped by the recycler?
- Does a review of the date of the issue suggest it is a closed case?

Table 3. Findings Not Applicable to SREA but Potentially Relevant to Your Business

Category	Findings
Lacking Regulatory Operating Authorization (Permit)	No Findings
Permit Noncompliance	No Findings
Operating Regulatory Noncompliance	No Findings
Compliance Schedule Requirements	No Findings
Agreed / Consent / Administrative Order Requirements	No Findings
Onsite Contamination Issues	No Findings
Pre-existing Issues (prior to 2/27/2000)	No Findings
Other, Including Issues Without Clear Information	• Facility is listed in the Ohio NPDES database under the following discharge permit: Permit #: 3GC01673*AG Issue Date: 06/06/2005

In the sample Table 3, one item indicates “Other, Including Issues Without Clear Information” and notes that the consuming facility was subject to a “discharge permit.” This is an item that should be further researched in Appendix B and C of the Report and/or through direct communication with the facility.

Section E - Table 4 - Findings Not Applicable to SREA and Not Likely Relevant to Your Business

Table 4 includes information not typically relevant to concerns regarding Superfund liability. However, if there is a finding listed, particularly if it appears in red or yellow, it is imperative that the recycler review the public compliance data in the SREA Report’s Appendices to ensure that these items are truly “not applicable to” SREA eligibility. If there is any question, the recycler should seek counsel from a qualified Superfund legal expert.

Table 4. Findings Not Applicable to SREA and Not Likely Relevant to Your Business

Category	Findings
Lacking Regulatory Operating Authorization (Permit)	No Findings
Permit Noncompliance	No Findings
Operating Regulatory Noncompliance	No Findings
Compliance Schedule Requirements	No Findings
Agreed / Consent / Administrative Order Requirements	No Findings
Onsite Contamination Issues	No Findings
Pre-existing Issues (prior to 2/27/2000)	No Findings
Other, Including Issues Without Clear Information	No Findings

In the sample Table 4, no items indicate issues that might raise SREA concerns and/or reasons indicating that the recycler should hesitate to do business with the consuming facility.

Section F – Consuming Facility Correspondence

This Section contains any correspondence between the contractor preparing the SREA Report (on behalf of ISRI) and the consuming facility.

This correspondence will consist of a form questionnaire sent by the contractor to the facility. The form asks for specific information on the facility's compliance history. This correspondence is included in the SREA Report in an effort to provide a full picture of the facility's compliance along with the facility's explanation of any situations that it believes a recycler should consider in its risk assessment.

The questionnaire is presented to the facility in order to give it an opportunity to give its side of the story, particularly if the facility disagrees with the data found in the public record. Errors in the public record can be frequent and may reflect poorly on a facility. While only the facility can take steps to correct the public record directly with the reporting agency, the SREA Report questionnaire is a way the facility can challenge a record, as well as provide a recycler with additional insight to aid in its decision as to whether to ship materials to that facility.

Unfortunately, some consuming facilities will not respond fully or at all to the SREA Report questionnaire.

Section G – Environmental Compliance Agency Correspondence

As part of its investigation, the contractor will submit actual inquiries (on behalf of the recycler requesting the SREA Report) to the applicable federal, state, and local environmental compliance oversight agencies, as required by SREA . This section describes the process the contractor used for these inquiries. The data compiled from these inquiries is contained in Appendix B of the Report.

Section H – Regulatory Database Summary Report

The contractor uses a proprietary database to obtain electronically available public compliance information. This section identifies the database as well as its credentials as a valid source of data from the public records. The actual data pulled from this database will be contained in Appendix C of the Report.

Sections I and J

Section I reminds recyclers of the limitations of the information provided in the report, specifically that ISRI cannot guarantee the accuracy of the information. Section J contains a list of common acronyms and what they represent in order to assist recyclers in reading the Report.

SECTION FOUR

SUPPLEMENTAL INFORMATION AND CASE LAW

Purpose of Section Four

This Section is intended for use by administrators seeking additional information on the SREA exemption and attorneys advising recyclers on SREA compliance and/or litigation. It does not serve as a substitute for primary legal research on relevant statues, regulations and case law.

This Section should be seen as a companion to Section Two. Users will be best served by initially reading Section Two and then looking here for any additional material. To ease this process, the subsections in Sections Two and Four have been hyperlinked to additional information, when available.

Introduction

This Section refers to the following three sources:

- Case law since the passage of SREA. Where cases are cited, they are hyperlinked to the Case Summaries contained in Appendix C..
- A 2002 EPA guidance document for EPA regional offices (2002 EPA Internal Guidance or Internal Guidance).[104]The text of the Internal Guidance is contained in Appendix D. When this document is referenced below, it will be hyperlinked to the Appendix.

PRP Liability under CERCLA[105]

As soon as a Superfund site is identified, EPA will begin searching for any and all parties responsible for creating the hazard. Any person or company identified during this process is called a Potentially Responsible Party (PRP). If a party is liable under Superfund, it may have to pay some or all of the costs to clean up the hazardous site.

Ignorance is no defense

Liability under Superfund is strict. Strict liability is a legal concept indicating that a PRP will be liable regardless of whether it was actually negligent or at fault.

Put simply, a party can be held responsible under Superfund even if they did not know they were creating a hazardous site.

This can be a problem for a recycler who has supplied scrap to a consuming facility that has created a Superfund site.

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[104] *Superfund Recycling Equity Act of 1999: Factors To Consider In A CERCLA Enforcement Case* United States Environmental Protection Agency, Office of Enforcement and Compliance Assurance and Office of Site Remediation Enforcement (August 2002).

[105] This information has been summarized from the overview of CERCLA and its enforcement available on EPA's website: https://www.epa.gov/enforcement/superfund-enforcement.

Multiple responsible parties

If there is more than one PRP, it may be difficult for the EPA to figure out how much each PRP contributed to the hazard.

This question has been litigated and the courts have made an important ruling:

> An owner, operator, waste generator or transporter *may each be held liable for the entire cost of a site cleanup,* unless it can be shown that the harm is "divisible." A divisible harm would likely refer to two or more physically separate areas of contamination.[106]

This means that any single PRP can be held responsible for the entire cleanup.

In the law, this is called "joint and several liability" and it can be very onerous if you are the only party located or able to pay.

It is worth noting that, in practice, EPA attempts to identify and notify as many PRPs as possible, issuing orders and litigating against the largest manageable number of parties to maximize the chances of getting parties to pay. This increases the chance that a recycler will be named a PRP.

Parties named as PRPs may initiate a contribution action. This is a lawsuit in which the PRP seeks financial contribution (towards Superfund cleanup costs) from other PRPS.

EPA Notification to PRPs

As soon as a Superfund site is identified, EPA can immediately begin looking for PRPs to help pay for removal or remedial actions.

This identification process is known as a PRP search.

This search can include such activities as title searches, employee interviews, documentation reviews, interviews with site operators and transporters, interviews with neighboring industries, and site visits to look for obvious identifiers (e.g., labels on the barrels on site).

A recycler's name may come up during such a search and EPA may add the recycler's name to the PRP list.

[106] On May 4, 2009, the U. S. Supreme Court issued its first "apportionment" opinion under CERCLA. In reversing the Ninth Circuit, the Supreme Court held in *Burlington Northern & Santa Fe Railway Co. v. United States* that a PRP will not be jointly and severally liable under CERCLA if there is a reasonable basis upon which a court can apportion its share of liability. This is so even if apportionment results in the creation of a significant "orphan share." The court further added an element of intent to arranger liability, holding that a party cannot be an "arranger" for the disposal of waste under CERCLA unless it intends that its waste be disposed. *Burlington Northern & Santa Fe Railway Co. v. United States et al*, 129 S. Ct. 1870 (U.S. 2009).

Section 104(e) letters

Section 104(e) of CERCLA gives EPA the authority to issue information requests. If EPA believes a party may have knowledge of operations at a Superfund site, it may send out a section 104(e) information request letter.

The purposes of these letters include:

- Gathering information and evidence of PRP liability.
- Gathering information on financial viability of PRPs.
- Identifying resistant PRPs early in the enforcement process.

EPA also can use its authority under section 104(e) to obtain site access.

A recycler linked to a Superfund site might get such a letter. This is likely the first time a recycler will become aware of its potential for liability. If a letter is received, the recycler should immediately contact a qualified Superfund legal expert.

How is a PRP notified?

Once EPA has identified a PRP, the agency can send out two other types of letters: General Notice Letters and Special Notice Letters.

Recyclers identified as PRPs could receive either or both such letters.

General Notice Letters. The General Notice letter will state that the recipient has been:

- identified as a PRP at a Superfund site, and
- that it may be held liable for cleanup costs at the site.

The letter will also explain the process for negotiating the cleanup with EPA. It will include information on the Superfund law, the site in question, and may include a request for additional information.

Special Notice Letters. A Special Notice Letter is sent when EPA is ready to negotiate with a PRP to create a financial settlement for the cleanup of a site. This letter will give the PRP information on why EPA thinks it is liable and EPA's plans for the cleanup of the site.

The letter will also invite the PRP to participate in negotiations with EPA for the payment and execution of the site cleanup and to make arrangements to pay EPA for any site-related costs already incurred.

A Special Notice Letter triggers the start of a "negotiation moratorium," which means that EPA will agree, for a certain period of time, not to officially order the PRP to conduct the cleanup. This moratorium period is intended to encourage the PRP to act voluntarily in promptly negotiating a settlement agreement.

EPA's general policy is to always issue Special Notice Letters unless: past experience with a PRP indicates a settlement is unlikely; no PRPs have been identified; or PRPs lack the resources to do what is needed.

Due to the complexity of the law, recyclers should be cautious in replying to any EPA letter or communication that refers directly – or indirectly – to Superfund and should contact a qualified Superfund legal expert.

The SREA Preamble - What Congress Intended

Although a preamble is not part of a law, it shows what Congress wishes to accomplish in passing the law. Courts examining an issue raised by a law may look to the law's preamble to understand what Congress hoped to achieve. This can help courts interpret questions relating to the law.

It is clear from the SREA preamble that Congress created the Superfund exemption because it wanted to protect and promote recycling.

The SREA preamble states that the purpose of the law is:

> *"(1) to promote the reuse and recycling of scrap material in furtherance of the goals of waste minimization and natural resource conservation while protecting human health and the environment;*
>
> *(2) to create greater equity in the statutory treatment of recycled versus virgin materials; and*
>
> *(3) to remove the disincentives and impediments to recycling created as an unintended consequence of the 1980 Superfund liability provisions*."[107]

SREA Case Law

Since the passage of SREA:

- There have been a handful of court actions involving SREA, but all relate to instances of hazardous contamination occurring prior to enactment of the law.
- There are no court cases yet addressing the proactive reasonable care standard of SREA requiring due diligence on the compliance of a consuming facility.
- There have been no SREA-specific cases heard by the U.S. Supreme Court.

The questions of law that have been addressed by the courts (and/or EPA) shed some light on SREA, but all of the guidance relates to actions prior to enactment of the law and does not resolve some of the most pressing questions regarding SREA's interpretation.

Appendix C contains case summaries of court cases touching on relevant aspects of the SREA exemption which administrators and attorneys may find useful and informative. Although these case summaries provide an overview, they should not be considered a substitute for an attorney's own primary research of the case law relevant to their client's individual circumstances.

[107] S.1948, §6001(a), 113 Stat. 1536, 1537 (Nov. 29, 1999).

Pre-SREA CERCLA Case Law

It is worth noting the way in which courts viewed recyclers before SREA created the exemption.

In pre-SREA cases involving CERCLA liability, many federal courts ruled that persons who sold recyclable materials for recycling were liable under the Superfund law. These rulings involved both a misunderstanding of the nature of the recycling industry and an overly broad interpretation of CERCLA's provisions.

In these cases, the courts held that arranging for recycling was a waste disposal transaction as opposed to a transaction resulting in the processing of material into a raw material feedstock for the manufacture of a new product.

As a result of this inaccurate premise, courts found that, at a site contaminated by a third party using both virgin and recycled materials, the suppliers of the recycled material were liable for the clean-up, but the suppliers of the virgin materials were not. The courts did not include the suppliers of virgin material liable because their transactions were not regarded as a waste disposal.

The courts also found that if a manufacturer used both virgin and recycled materials and contaminated its site with substances that could *only* have come from the virgin material, the supplier of the recycled materials could *still* be held liable for cleaning up the site, while the supplier of virgin materials remained exempt.

After CERCLA, it was nearly twenty years before SREA was enacted.[108] Notably, during the first six months after SREA's passage, a significant number of recyclers received 104(e) letters associated with three Superfund sites. Using the provisions contained in SREA, these recyclers were able to respond to the letters showing they were likely exempt from CERCLA cleanup liability.

The Chemetco CERCLA Case – A Potentially Important SREA Case

The Chemetco case[109] was the first significant CERCLA lawsuit initiated subsequent to the enactment of SREA. The suit involved a PRP group suing other PRPs on the basis of strict, joint and several liability for the cleanup of an Illinois Superfund site. It was the first case to include PRPs who had recyclable transactions both before and after the date of SREA's enactment. Among others, the case raised the issue of whether a plaintiff can be held responsible for a defendant PRPs' costs in defending the lawsuit if the defendant successfully raises the SREA defense (the so-called fee-shifting provision in SREA).

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[108] The language contained in SREA when it was originally introduced in Congress was the result of complex negotiation between ISRI, the environmental community, and the Clinton Administration, which was primarily represented by career staff from EPA's Office of Land and Emergency Management (formerly the Office of Solid Waste and Emergency Response) and the Justice Department's Environmental and Natural Resources Division (formerly known as the Public Lands Division). Once a consensus on the language of the bill was reached, there was an understanding among the three groups to stand firm on the agreed upon language, allowing no amendments unless and until all three groups agreed. As of this writing, no new amendments have been negotiated or agreed.

[109] *Chemetco Site PRP Group v. A Square Systems, Inc., et al.*, Case 3:18-cv-00179-SMY-GCS, U.S. District Court for the Southern District of Illinois. See PACER Case Locator at https://pacer.login.uscourts.gov/csologin/login.jsf https://www.justislawfirm.com/wp-content/uploads/2018/02/Chemetco_Complaint.pdf and the ISRI website.

Although the case was dismissed without prejudice in 2018, Chemetco remains on the radar because there is a chance that the plaintiffs will file a new suit. Any resulting court case could result in important rulings on the SREA exemption.

Background

Chemetco operated a secondary copper smelting facility on a site south of Madison County, Illinois, from 1970 until 2001, when the company filed for bankruptcy. The facility produced copper cathodes and anodes and released contaminants resulting in elevated levels of cadmium, copper, lead and zinc oxide in the surrounding environment. The Chemetco Site was listed on the EPA's National Priorities list in March 2010 and cleanup of the 41-acre site is still ongoing.

Enforcement Summary

On September 13, 2013, a Consent Decree between EPA, DOJ , the State of Illinois, the bankruptcy trustee for the estate of defendant Chemetco, Inc., and Paradigm Minerals and Environmental Services LLC (Paradigm) (the trustee and potential purchaser of the site) was approved by the U.S. District Court for the Southern District of Illinois.

Under the settlement, Paradigm will implement a Superfund removal action to address existing contamination at the site at an estimated cost of $20 million. The settlement also resolved EPA and Illinois' consolidated complaint against Chemetco under the Resource Conservation and Recovery Action (RCRA) and the Clean Water Act (CWA), as well as their bankruptcy proofs of claim.

On February 13, 2015, an Administrative Settlement Agreement and Order on Consent for a Remedial Investigation/Feasibility Study (RI/FS) was issued between EPA and several PRPs including the Chemetco Site PRP Group (The Chemetco Group), which is comprised of small, medium and large recyclers as well as a number of Fortune 500 companies.

As part of the Chemetco Group's agreement with EPA to conduct the RI/FS, they were given the opportunity to identify additional PRPs using old data files from a Wang computer system found by EPA at the Chemetco site.

The CERCLA Lawsuit

On February 12, 2018, The Chemetco Group filed a civil action in the U.S. District Court for the Southern District of Illinois pursuant to CERCLA,[110]seeking judgment against approximately 3,500 defendants holding that each was a PRP strictly, jointly and severally liable for the voluntary response costs already incurred – and to be incurred – by the Chemetco Group.[111]

Three days after filing the complaint, the Chemetco Group asked for a stay to allow them time to continue researching PRPs and negotiate settlements with already named defendants.[112] The Court granted the Group a one-year stay.

The Chemetco Group proceeded to send letters to all defendants offering settlements representing each defendant's share of past and future response costs. If a defendant agreed to

[110] Sections 107 and 113, 42 U.S.C. §§ 9607 and 9613.
[111] *Chemetco Site PRP Group v. A Square Systems, Inc., et al*., Case 3:18-cv-00179-SMY-GCS, U.S. District Court for the Southern District of Illinois.
[112] Id., at Docket Number 7.

the settlement amount, the plaintiffs dismissed the defendant with prejudice from the lawsuit. The settlement letters also intimated that a settling defendant would be protected from contribution claims by other PRPs who did not settle with the Chemetco Group or EPA.

Nearly a year after filing its complaint, the Chemetco Group filed a motion seeking to extend the stay for an additional year. After a hearing on the motion, the Court denied the motion and gave the Chemetco Group 90 days to serve the defendants.

The Court's denial was based upon the unfairness of leaving defendant PRPs unable to respond to the complaint and also unable to conduct discovery to determine what information the plaintiffs were using as a basis for their settlement offers. Subsequently, the Chemetco Group decided to dismiss all remaining defendant PRPs without prejudice.[113] Shortly thereafter, the Court ordered the case dismissed.[114]

Future Chemetco Litigation

According to a March 14, 2019, article in *The Madison County Record*:

> "*On Feb. 28, [attorney for the Chemetco Group] Justis filed notice of voluntary dismissal of all remaining defendants without prejudice. He wrote that the group would continue retrieving Wang information and would try to settle with parties in a non-litigation setting. He also wrote that the group anticipated filing suit in the future against potentially responsible parties that refuse to cooperate*."[115]

If the Chemetco Group decides to file a new lawsuit against non-settling PRPs, any resulting court case could potentially address SREA exemption issues in need of clarification.

Retroactivity – Transactions Before and After SREA

The Act's protections have been held to apply to transactions conducted prior to enactment of SREA, subject to some limitations:

SREA states,

> *(i) Effect on pending or concluded actions*
> *The exemptions provided in this section shall not affect any concluded judicial or administrative action or any pending judicial action initiated by the United States prior to* [November 29, 1999].*[116]*

[113] The legal term "without prejudice" means that, although a case is being dismissed, a suit concerning the same facts and parties can be re-filed in the future.
[114] See, Fn. 150 at Docket Number 1584.
[115] https://madisonrecord.com/stories/512290121-chemetco-site-group-dismisses-483-defendants-from-pollution-suit.
[116] 42 U.S.C. § 9627(i). The statute does not include a date certain. The date November 29, 1999, substitutes for the statutory phrase, "enactment of this section."

While the federal government insisted (during pre-enactment hearings) that SREA should have no effect on pending actions brought by the United States, it relented on **pending actions brought by parties other than the United States**. Specifically, this means that:

- Defendants in any pending lawsuits initiated independently by private parties but not concluded by the time SREA was enacted have the opportunity to claim the SREA exemption.
- SREA exemptions are limited to actions originally initiated by private parties, and do not extend to those third-party cross-claims (or counter-claims, joinder or other means of bringing a PRP into a government lawsuit) for contribution connected with actions filed by the federal government before November 29, 1999.

The retroactivity provision of the Act was the basis for several legal challenges in the first few years after SREA was enacted. Before reviewing these cases, it may be helpful to note some legal concepts.

A statute that comes into effect while a case is pending in court may be termed "retrospective" if its provisions relate to the matter before the court. In these circumstances, the plaintiff or defendant in the case may ask the court to determine whether and how the new law applies to the pending case. The primary question for the court will be whether the law is "retroactive" or has "retroactive effect."

New laws that attach new legal consequences to events completed before its enactment are called retroactive or as having retroactive effect. Courts have a presumption against applying laws retroactively because they can be inherently unfair. The determination of whether a law is retroactive is a complex question that depends on a court's analysis of the statute in question, including its language, legislative history and other factors.[117]

Because of the strong presumption that new legislation is prospective, it will not have a retroactive effect unless Congress by its language clearly requires a certain result either by express command or by necessary implication.

Nearly every action decided after the enactment of SREA addresses, in some way, whether SREA is a retrospective amendment that applies retroactively. The court rulings distinguish between retrospective laws that apply to transactions prior to the date of enactment and retroactive laws that create a manifest injustice for those who do not benefit from the application of the retrospective law

Notable Case Law on SREA Retroactivity

There are two cases containing important language regarding retroactivity:[118]

1. *Cal. Dep't of Toxic Substances Control v. Interstate Non-Ferrous Corp.*, 298 F. Supp. 2d 930 (E.D. Cal. 2003); *Dep't of Toxic Substances Control v. Interstate Non-Ferrous Corp.*, 99 F. Supp. 2d 1123 (E.D. Cal. 2000)

[117] *United States. v.$814,254.76*, 51 F.3d 207, 210 & n. 3 (9th Cir.1995); as explained by the dissent in *Jeffries v. Wood*, 114 F.3d 1484 (9th Cir.1997) (en banc). *Morton Int'l., Inc. v. A.E. Staley Mfg. Co.*, 106 F. Supp.2d 737, 749-760 (D. N.J. 2000).

[118] Other cases on retroactivity include: *RSR Corp. v. Avanti Dev., Inc.*, No. IP 95-1359-CM/S, 2000 WL 1449859 (S.D. Ind. 2000); *Morton Int'l., Inc. v. A.E. Staley Mfg. Co.,* 106 F. Supp.2d 737, 749-760 (D. N.J. 2000).

Summary

On January 13, 1997, the California Department of Toxic Substances Control (DTSC) filed suit for cost recovery and declaratory relief under CERCLA and RCRA for response, removal, and remediation costs resulting from a release of hazardous substances at a Mojave, California, site known as the Mobile Smelting Property.[119]

Following enactment of SREA, DTSC submitted a Motion for Summary Judgment, arguing that the recycling exemption did not apply to this pending action. DTSC assumed the language "*any pending judicial action initiated by the United States prior to* [November 29, 1999]" was meant to include state governments and their departments.

On May 25, 2000, the court held that SREA was retrospectively applicable to non-federal CERCLA enforcement actions pending at the time of its enactment. Therefore, the SREA exemption applies to CERCLA Sections 107(a) and 113(g) actions brought by state environmental agencies against several scrap metal recyclers.[120]

Ruling and Analysis

The Court clarified that congressional intent clearly expressed that recycling serves the environment and the public interest. The statute has for its purpose more than limiting the liability of recyclers; it seeks to advance recycling and to protect the recycling industry.

The Court then held that SREA applies to non-federal CERCLA enforcement actions pending at the time of its enactment. Therefore, the SREA exemption applies to any pending state environmental agency's CERCLA Sections 107(a) and 113(g) actions.

The Court also found that applying SREA to currently pending cases that were not filed by the United States only alters the rights of parties in cases which came about as a result of misinterpretation or misapplication of pre-November 29, 1999, CERCLA liability principles, with resulting unintended consequences.

Finally, the Court held that in enacting SREA, Congress did not explicitly mention every class of pending case to which the SREA exemption applies. Nevertheless, SREA's structure, express language, purpose, and legislative history militate in favor of retrospectivity as to all pending actions brought by any party except the United States.

The Court held that Congressional intent that SREA apply retrospectively to pending cases initiated by parties other than the United States could be gleaned from:

- The headings used in SREA indicating that Congress intended to clarify, not change, the law;
- SREA's stated purpose, which was to exempt eligible recyclers from liability;

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[119] The Mobile Smelting Property is part of the U.S. EPA Superfund Program according to "SCAP-12 FOIA NPL/Non-NPL Site Summary, Version 24.01" (October 28, 2013). Viewed at https://www.epa.gov/sites/production/files/2015-09/documents/scap-12-non-npl.pdf on January 15, 2020.

[120] It is important to note that this case dealt with a federal action under CERCLA invoking the SREA defense. While California DTSC was plaintiff in the case, it was acting as the designated manager of the federal law and did not bring this case under a state equivalent statute. See, *Department of Toxic Substances Control v. Interstate Non-Ferrous Corporation*, 99 F. Supp. 2d 1123, 1154 (E.D. Ca. 2000).

- Language throughout SREA, which fixes different requirements based on when the transaction occurred; and, *inter alia;*
- The statement of Senator Lott, a chief co-sponsor of SREA, which was not "legislative history," but was to be accorded substantial weight.[121]

The Court did not find SREA to be retroactive, meaning that it did not find that SREA attaches new legal consequences to prior acts, because:

- No new liability was created, and the State of California's "rights" were not impaired (it would have cleaned up the site whether or not it thought it could recover costs from the parties it sued); and because
- SREA clarified existing law, it did not change it.

Nevertheless, the Court noted that the retrospective application of the exemption to pending actions does not result in an automatic exemption because any party seeking to avoid liability under SREA must prove by a preponderance of the evidence all of the exemption requirements. In addition, the exemption does not apply retroactively to actions resolved before the passage of SREA.

2. *Gould Inc. v. A&M Battery & Tire Serv.*, 232 F. 3D 162 (3D Cir. 2000); *Gould Inc. v. A&M Battery & Tire Serv.*, 176 F. Supp. 2d 324 (M.D. Pa. 2001)

Summary

In 1980, Gould Inc. acquired Majol Battery and Equipment Company, aware that the company had been extensively contaminating its Pennsylvania site with battery chemicals and components since 1961 and had received a cease operations request issued by the Pennsylvania Department of Environmental Resources (Pennsylvania DER).

In April 1988, Gould entered into a Consent Agreement and Order with EPA under § 106(a) of CERCLA, requiring Gould to conduct site stabilization activities relating to lead and other hazardous substances at the Marjol site. In May 1990, Gould entered into a second Consent Order under RCRA, this time with both EPA and the Pennsylvania DER, which required Gould to perform a Facility Investigation and Corrective Measure Study at the Marjol site.

In December 1991, Gould initiated a civil action seeking cost recovery from approximately 240 PRPs pursuant to § 107(a)(4)(B) of CERCLA, or, alternatively, contribution pursuant to § 113.

The defendants moved for partial summary judgment, arguing that because Gould was a responsible party who had entered into a consent agreement resolving its liability to the government, it was limited to asserting a contribution claim only. The District Court agreed and granted partial summary judgment in favor of the defendants.

With the exception of four appellants, Gould eventually settled with all defendants. **After appellants filed their Notice of Appeal, Congress passed, and the President signed, SREA.**

[121] There is conflicting court precedent on whether Senator Lott's statements should be accorded judicial weight and consideration. This court determined they should be so considered, though it recognized it was not "legislative history" in the traditional sense of the words.

The appellants pursued only their claim that SREA shielded them from contribution liability to Gould. Gould countered that the Act did not apply retroactively to the case, and that if it did apply retroactively, it violated the Fifth Amendment's due process guarantee.

The Third Circuit held that Congress intended for SREA to apply retroactively to pending judicial actions brought by private parties prior to the enactment of SREA. Further, SREA can, and does, apply retroactively without violating an individual's rights under the Fifth Amendment.[122]

Ruling and Analysis

Gould first tried to argue that its action was "initiated by the United States," claiming that it brought the action as a result of entering into the consent agreements with EPA.

The Court, however, found that the case was a judicial action initiated by a private party that was pending on appeal:

> *"By its express language, the Act has no effect on "any concluded judicial or administrative action or any pending judicial action initiated by the United States prior" to its enactment. 42 U.S.C. § 9627(i). This section exempts two categories of action from retroactive application of the Act. One category exempts all actions concluded as of November 29, 1999, whether administrative or judicial in nature. The second category exempts pending actions initiated by the United States prior to November 29, 1999, but only if they are judicial in nature. By implication or negative inference, then, Congress intended the Act to apply retroactively to all other types of actions. One District Court case, Morton Int'l Inc. v. A.E. Staley Mfg. Co., 106 F.Supp.2d 737, 752 (D.N.J.2000) has held that the language of the Act reflects Congress' intent that the recycling exemption apply to pending private party actions, thus applying retroactively to, inter alia, judicial and administrative actions that were: (1) initiated prior to November 29, 1999; (2) initiated by a party other than the United States; and (3) still pending as of November 29, 1999. We agree. This case is a judicial action, initiated by a private party, and was pending on appeal as of November 29, 1999."*

Gould then argued that whenever a private party initiates a judicial action following a related federal administrative action, the causal link between the two requires the court to deem the judicial action to have been initiated by the United States. The Court concluded that Congress intended for SREA to apply retroactively to pending judicial actions brought by private parties prior to the enactment of SREA.

Specifically, the Court held that,

> *Gould's proffered construction of § 9627(i) is belied not only by the Act's plain language, but also by its legislative history….*
>
> *….According to that history, the Act "provides for relief from liability for both retroactive and prospective transactions," id. at S15049, and "[a]ny pending judicial action, whether it was brought in a trial or appellate court, by a private party shall be subject to the grant of relief from liability." Id. at S15050. The same history further explains that "Congress intends that any third*

[122] For the sake of brevity, the other issues in the case are not summarized here.

party action or joinder of defendants brought by a private party shall be considered a private party action, regardless of whether or not the original lawsuit was brought by the United States." Id.

If the Act applies retroactively even to private-party actions prompted by exempted federal judicial actions, it makes no sense to conclude that it does not apply retroactively to private actions prompted by non-exempt administrative actions. Thus, these expressions of congressional intent and others found throughout the Act's legislative history, even if not controlling, clearly support a common-sense construction of the Act that applies it retroactively to private judicial actions such as this."

Residue on Scrap and Ancillary Materials

A common question that arises with SREA is whether small amounts of residue or other material attached to the scrap can preclude reliance on the exemption. There is some guidance from EPA to its enforcement officers and some case law that addresses the question of what is considered to be "*minor amounts of material incident to or adhering to the scrap material.*" If litigated, the question of what constitutes "minor amounts" could become a question of fact to be determined by a judge or jury.

EPA Internal Guidance

In its 2002 EPA Internal Guidance issued to its enforcement officers, EPA states:

> *"Regions should determine on a case-by-case basis whether "minor amounts," or more than "minor amounts," of material were present by considering the volume and/or weight of the recyclable material composition as compared to the total volume or weight of metal. For example, when the purported recyclable material is metal, such as wire, it is relevant whether the wire is:*
>
> - *bare metal; or*
> - *metal with only residual (post-stripping) amounts of insulation or coating remaining on the metal; or*
> - *metal with a minor amount of insulation or coating fully intact*."[123]

The Internal Guidance then gives the following examples:

- For **bare metal**, the example of "*metal that did not meet the manufacturer's specifications*."[124]
- For **metal with insulation/coating**, the example of "*an arranger or transporter sends metal with insulating material to a stripping/chopping company to separate the insulating or coating material from the metal and the metal with residual amounts of insulation or coating remaining was sent to a recycling facility to be recycled. The residual material was once an essential part of the scrap during its normal and customary use prior to becoming scrap and therefore may be considered "minor amounts.""*[125]

[123] Internal Guidance. Section 2.1
[124] Id.
[125] Id.

- For **metal with insulation/coating intact**, the example of "*an arranger or transporter sends metal with insulation or coating which cannot be mechanically removed because of the relative weight of the insulation or coating as compared to the metal itself. The insulation or coating was once an essential part of the scrap during its normal and customary use prior to becoming scrap and therefore may be considered "minor amounts.""*[126]

Case Law

In *Gould v. A & M Battery & Tire Service*, the Court held that a recycling transaction involving spent batteries was subject to the Act even if the spent batteries contained some non-recyclable materials.

In *California Department of Toxic Substances Control v. Interstate Non-Ferrous Corp.*, the Court addressed the issue of whether SREA exempted a party from liability for an ash produced from burning off the insulation on metal wire sent for recycling. The Court held that it was a question of fact as to whether the defendant had arranged for disposal of the non-recyclable insulation. It then appeared to rely on factors such as intent and knowledge, which governed analysis prior to the adoption of SREA.

Burden of Proof under SREA

SREA places the initial burden of proving that the exemption applies on the recycler seeking to assert the defense. There is significant legal precedent upholding this standard. Cases commonly referenced by EPA in enforcement actions relating to burden of proof include:

- *United States v. First City Nat. Bank of Houston*, 386 U.S. 361 (1967), cited in *Ekotek Site PRP Committee v. Self,* 881 F.Supp.1516, 1524 (D. Utah 1995)(finding burden of proving applicability of CERCLA's petroleum exclusion to be on defendants to establish their right to the exemption);
- *SEC v. Ralston Purina Co.,* 346 U.S. 119, 126 (1953) (party claiming the benefits of an exception to a broadly remedial statutory or regulatory scheme has the burden of proof to show that it meets the terms of the exception).
- *E.E.O.C. v. Chicago Club*, 86 F.3d 1423, 1430 (7th Cir. 1996) (separate provisos or exceptions curtail or restrict the operation of a statute in a case to which it would otherwise apply).

Considering a CERCLA Settlement

As previously mentioned, the SREA exemption is not automatic and in demonstrating eligibility, the burden of proof is initially on the recycler. While this should not be difficult with respect to the typical scrap transaction, the time, effort, and costs of legal counsel to oversee the process may prove impracticable for some recyclers. In light of this burden, EPA advises that some recyclers may prefer settlement as opposed to asserting the exemption:

> "*In some instances, parties may prefer the protection afforded by a CERCLA settlement. For instance, they may conclude that the risk of failing to prove the applicability of the exemption is*

[126] Id.

high enough to make a settlement more preferable than defending a CERCLA action using SREA. In such cases, the Regions are encouraged to explore settlement with such parties and may use this guidance as a tool for determining factors to consider in crafting an appropriate settlement."[127]

As with all such decisions relating to SREA, a recycler considering a settlement should consult with a qualified Superfund legal expert.

The Transaction Must Meet All Criteria of SREA

The courts and EPA have issued rulings and guidance which make it absolutely clear that the exemption will only apply if a recycler proves it met ALL the requirements specified in the Act at the time of the transaction in question. This SREA requirement was addressed in the following case:

United States v. Mallinckrodt, Inc., 343 F. Supp. 2D 809 (E.D. Mo. 2004)

In this case, the Court rejected a request for summary judgment finding that the defendant had failed to meet its burden of proving that SREA should protect its transactions from liability.

Summary

The Great Lakes Container Corporation Superfund Site (the Site) was a drum reconditioning and reclamation facility in St. Louis, Missouri, that operated between 1952 and 1986. Shell Oil sent 1000-1,500 drums per day to the drum re-conditioner while it was operative.

The United States claimed that Shell Oil was a PRP liable for the cleanup of lead contaminated soil at the Site because part of the drum reconditioning process involved the removal of lead paint from the drum (which was deposited at the Site) and the repainting of the drum. Shell Oil claimed that the drums sent to the re-conditioner should be deemed recyclable materials under SREA.[128]

Ruling and Analysis

The Court found that the defendant had not shown, based on the undisputed facts that its arrangement with the drum re-conditioner qualified for the recycling exemption:

- First, the Court noted that the defendant had not presented any evidence from the record to support its claim that its drums "*were specifically chosen for and capable of being recycled*."
- Second, the Court found that the defendant had not shown that *"[a] substantial portion of the recyclable material was made available for use as feedstock for the manufacture of a new saleable product*," because there was no evidence that new drums were being made from the defendant's old drums.
- Third, the Court found that the defendant had failed to present any evidence to support its claim that the paint on the outside of its drums was an integral part of the drums, rather than merely adhering to the drums, such that they do not fall into the exception in § 9627(b)(1).

[127] Id. Section 1.0.

[128] For the sake of brevity, the other issue in the case are not summarized here.

The Court therefore concluded that the defendant had failed to meet its burden of proof, and summary judgment was not appropriate on SREA grounds.

EPA Guidance on SREA Criteria

The 2002 EPA Internal Guidance is not considered official and cannot be relied upon as legal authority. However, for attorneys making a case for the SREA exemption, its recommendations to enforcement officers may be helpful in understanding the EPA perspective.

The Internal Guidance describes its purpose as follows:

> *"Since the passage of SREA, some site-specific transactions have raised questions and issues regarding what enforcement posture (e.g., whether to issue an information request letter or general or special notice letters, or how to develop settlement offers) the Agency may determine, in light of SREA, to be appropriate in evaluating a party's activities. This guidance addresses some of the key factors the Agency may consider and has been developed in the exercise of the Agency's enforcement discretion."*[129]

The Internal Guidance offers the following information to regional offices on assessing eligibility for the exemption:

> ***1.0 GENERAL FACTORS TO CONSIDER REGARDING SREA***
>
> *When evaluating the appropriate enforcement posture to take with respect to a party that may be eligible for the SREA exemption, Regions should consider relevant information provided by that private party and others, including but not limited to:*
>
> - *the specific facts at a given site, including how the material at the site was actually recycled;*
> - *how and when any hazardous substances that are included in the recycled material came to be associated with it;*
> - *if applicable, the size of the shipping containers and the nature of any hazardous substances in the containers that hold or constitute the recycled material;*
> - *the nature of the transaction, including prices paid;*
> - *the extent of contamination at the site and impact of the recycled materials at the site based on their relative toxicity, mobility and persistence;*
> - *compliance by the party and the consuming facility with applicable standards regarding the storage, transport, and management, or other activities associated with the recyclable material; and,*
> - *satisfaction of all other requirements in CERCLA Section 127.*
>
> *Effective consideration of the above factors will be facilitated significantly if the parties produce adequate, credible information to support their eligibility for a recycling exemption (including information establishing that a transaction involves recyclable material). The level of information will be determined on a site-by-site basis. **In evaluating the factors, it may be useful to consider interpretations the Agency has taken in its administration of other federal***

[129] Internal Guidance. Introduction.

environmental programs, such as the Resource Conservation and Recovery Act (RCRA) and the Toxic Substance Control Act (TSCA)."[130] *(emphasis added)*

Interpretations from Other EPA Programs

EPA's advice that regions take into account interpretations or regulations relating to other relevant federal environmental programs is importance in relation to certain regulatory actions and interpretations the Agency has issued over the past two decades.

Specifically, EPA has conducted many rulemakings relating to the Definition of Solid Waste (DSW) and, by implication, its definition of recycling and recyclable materials. However, these have related primarily, if not exclusively, to recyclable materials potentially subject to RCRA Subtitle C, especially scrap metal and spent lead-acid batteries. The DSW under RCRA Subtitle C specifically "*does not apply to materials (such as non-hazardous scrap, paper, textiles, or rubber) that are not otherwise hazardous wastes and that are recycled*"[131].

The most recent RCRA DSW rulemaking directly affecting the recycling industry was made final on January 13, 2015, and became effective on July 13, 2015. This rule creates four factors to be used in determining whether a recycler is a legitimate recycler.[132]Note the similarity between these four factors (summarized below) and those set out in SREA:

Factors Applying to Incoming Materials

1. *What you are bringing in for recycling is actually recycled into valuable products*
2. *You actually did sell the output (your finished product).*

Factors Applying to Output

3. *You are handling what is coming in as a valuable material*
4. *The output product meets objective commodity quality standards (like the ISRI Specs).* [133]

Defining Activities "Applicable" to Recycling

The question of what is "applicable" to the handling, processing, reclamation, storage, or other management activities associated with the recyclable material in SREA is an important question that has yet to be clarified by Congress, the courts or through EPA guidance.

The only guidance to date comes from Senator Lott in SREA's legislative history, which states that:

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[130] Id. Section 1.0.
[131] 40 CFR §261.1(b)(1).
[132] It is important to note that this DSW rulemaking is in regards to RCRA Subtitle C and applies only to scrap metal, spent lead-acid batteries, and other scrap materials that have a DSW recycling exclusion (e.g., processed scrap metal and CRTs) or a recycling exemption from hazardous waste regulation (e.g., unprocessed scrap metal, spent lead-acid batteries). The RCRA concept of legitimacy exists only in RCRA Subtitle C. It remains questionable whether for SREA purposes these concepts may be applied to materials not subject to RCRA Subtitle C (e.g., paper and plastics).
[133] ISRI. 2017. *Compliance Guidance: U.S. Environmental Protection Agency's Definition of Solid Waste Rule—Documenting that you are a Legitimate Recycler of Scrap Metal*: p 2.

> "*the person must only determine the status of the consuming facility's compliance with laws, regulations, or orders, which* ***directly*** *apply to the handling, processing, reclamation, storage, or other management activity associated with the recyclable materials sent by the person. Thus, for example, a person who arranges for the recycling of scrap metal to a consuming facility would not be responsible for determining the consuming facility's compliance with regulations governing the consuming facilities production of its product, just the consuming facility's compliance with management of the scrap metal as an in-feed material*."[134] (emphasis added)

Unfortunately, this language is open to interpretation.

By way of example, assume the scrap metal referred to in the legislative history is scrap steel. As such, it might be reasonable to say that the receiving of the scrap steel, placing it in a storage pile, transporting it from the storage pile and charging it into the furnace would be applicable activities. A strong argument could be made, especially at an integrated steel mill where scrap steel and virgin materials are charged into the same heat in a furnace, that applicability should end there since any subsequent air emissions would be coming from both the virgin and recyclable materials. Since virgin materials cannot be the basis for Superfund liability, any air emissions resulting from use of the recyclable materials should not be the basis for Superfund liability. Any activities past charging the material into the furnace should be solely applicable to the consuming facility's manufacture of its products.

It is also arguable that the intent of Congress was to put recyclable materials on a par with virgin materials and so recyclables should be treated identically for the purposes of liability. Under this theory, once the scrap steel crosses the main gate of any steel mill (EAF, integrated, etc.) it should be treated the same as a virgin material, which is not viewed as a basis for Superfund liability.

This argument could be extended to paper recycling. If Old Corrugated Containers are going to a paper mill that uses both virgin and recycled fiber as raw material feedstocks, it would follow that once these materials go into the pulper, or at the latest when they come out of the pulper, the recycled fiber and the virgin fiber are virtually indistinguishable and the very point at which "directly applicable" ends.

Unfortunately, neither the courts nor EPA have resolved these questions.[135].

The Time of the Recycling Transaction

Under SREA, all exemption criteria must be met at the time of the recycling transaction. However, according to the 2002 EPA Internal Guidance, the time of the recycling transaction may not be limited to the time when the parties entered into a contract:

[134] Lott Legislative History at S15049.

[135] It is worth noting that ISRI engaged in discussions with EPA over a period of several years in an effort to obtain guidance on the congressional intent behind SREA. During negotiations between ISRI and EPA on whether and what guidance should be issued, ISRI insisted that the activities applicable to the handling of the recyclable material should go no further than when the material was charged into a steel mill furnace or a paper pulping machine, whereas EPA contended that the applicable activities should go at least as far as the collection and disposal of air emissions. There was never final agreement on this point and the question has not been addressed in any judicial actions thus far. As such, the question remains an open one nearly 20 years after the enactment of SREA.

"It may include the time when the recyclable material is delivered to the recycling process. There may be situations where the parties enter into a relationship in which one party supplies the other with recyclable materials over a period of time, in which case, "time of transaction" may mean several points in time when the person arranges for recycling of recyclable material."[136]

The Proactive Reasonable Care Inquiry

The proactive reasonable care fifth criterion of the SREA exemption applies only to transactions occurring after enactment of the law. This is in keeping with settled legal principles since a law cannot require proactive due diligence on past transactions.

It is clear that recyclers, brokers and processors must make sure all of the consuming facilities they ship to are in compliance with applicable federal, state, and local environmental laws and regulations.[137] It is also clear that the legal standard of review for SREA due diligence extends only to what a reasonable person would be expected to do in his or her particular situation (which means what may be reasonable for one recycler, may not be reasonable for another recycler). (See Section Two)

However, this still leaves a great deal of statutory language in the provision open to interpretation. EPA has provided no guidance on meeting the reasonable care inquiry. And, although there has been a case upholding the basic premise of the SREA requirement for a degree of investigation into the compliance status of the facility, the court in that case provided no further analysis of the duty.[138]

As a result, as of this writing, there has yet to be a court case producing a ruling which fully interprets what a recycler needs to do to meet the this proactive reasonable care criterion.

The ISRI SREA Reasonable Care Program has been designed to help recyclers manage the ongoing uncertainty in meeting the Act's obligations. In particular, SREA Reports on consuming facilities were designed on the basis of general principles of due diligence already established in law (unrelated to SREA). ISRI made this choice on the assumption that these principles will likely be relevant in any future SREA case in which the court examines what may be deemed "reasonable care" for the purposes of SREA. (See Section Three).

Although there is no definitive court or EPA guidance on the proactive reasonable care criterion, there is a court case and some legislative history that may nevertheless be considered informative:

1. Reasonable Care and the *Mountain Metal* Analysis

Although it must be emphasized that a court has yet to rule directly on what it takes to meet the reasonable care criterion of the SREA exemption, it may be helpful to consider *U.S. vs. Mountain Metal*

[136] Internal Guidance. Section 1.1 (footnote 4).
[137] 42 U.S.C. §9627(c)(6)(A)-(C).
[138] See, *RSR Corp. v. Avanti Dev., Inc.*, 2000 U.S. Dist. LEXIS 14209 (S.D. Ind. 2000). Cf. *United States v. Atlas Lederer Co.*, 282 F. Supp. 2d 687 (S.D. Ohio 2001).

Co.,[139] in which the court analyzed and applied the SREA "objectively reasonable basis" standard to determine whether several recyclers should be excluded from using the exemption.

To be clear, this ruling did not address the proactive reasonable care standard. Rather, it addressed whether **for the purposes of exclusion**, the SREA exemption did not apply because the recycler had an "objectively reasonable basis" to believe that the material had been mishandled (for more information on exclusion, see Section Two).

Of interest is that, in its ruling, the court made a lengthy analysis of whether it was a reasonable expectation that three differently-sized recyclers should have known that a particular facility was not in compliance with applicable law.[140] In the court's exploration of the facts, it clearly put an emphasis on the size and expected capability of each recycling operation as a factor in determining if it had a reasonable basis of belief.

Although the *Mountain Metal* analysis related only to the exclusion provision of SREA, it may be indicative of how a future court analyzing the proactive reasonable care standard may approach the analysis. For example, a small recycler sending copper to a wire mill 1,500 miles away would likely never have an opportunity to visit that mill, and -- even if that recycler did visit -- it is very unlikely that the recycler would have the technical expertise to make any determination regarding the environmental compliance of the consuming facility.

Again, is important to note that the ruling and analysis in *Mountain Metal* does not directly apply to the proactive reasonable care criterion.

2. Legislative History Addressing Proactive Reasonableness

Congress recognized that small businesses often have less financial and manpower resources available to them. While not authoritative in nature for interpreting conflicts within the Act, the legislative history of SREA clearly suggests this understanding.

In discussing the recycler's proactive reasonable care inquiry, Senator Lott stated, as documented in the Congressional Record:

> *"Congress recognizes that small businesses often have less resources available to them than large businesses. Thus, [SREA] § 127 (c)(6)(B) acknowledges the fact that a small company may be able to determine less information about the consuming facility's operations than a large company. The size of an individual facility may be an important factor in the facility's ability to detect the nature of the consuming facility's operations."*

The Record goes on to further state:

> *"[While SREA] requires a responsible person who arranges for the recycling of a recyclable material to inquire of the appropriate environmental agencies as to the compliance status of the consuming facility[,] Federal, State, and local agencies may not respond quickly (or respond at all) to inquiries made regarding a specific facility's compliance record. [SREA] only requires a person to*

[139] *United States v. Mtn. Metal Co.*, 137 F. Supp. 2d 1267(N.D. Ala. 2001).

[140] This was a crucial point in *United States v. Mountain Metal Co* where the court took into account the fact that a PRP was a small business and could not have been expected to visit the consuming facility or make any kind of technical assessment of the facility's operations.

make reasonable inquiries; inquiries need not be made before every transaction. Inquiries need only be made to those agencies having primary responsibilities over environmental matters related to the handling, processing, etc. of the secondary material used in the recycling transaction."[141]

SREA Covers Litigation Costs

This is an important provision in SREA which was intended to prevent the government or other plaintiffs from bringing Superfund lawsuits against legitimate recyclers (as they had done during the first twenty years after passage of CERCLA). It is often referred to by the courts as SREA's "fee-shifting" provision.

Plaintiff Pays Litigation Fees

This provision of SREA has withstood judicial scrutiny. In the 2011 case of *Evansville Greenway Evansville Greenway and Remediation Trust v. Southern Indiana Gas and Electric Co.,*[142] a PRP group failed in a bid to seek contribution under CERCLA. After ruling that the defendant had met the SREA exemption, the federal district court awarded attorney and experts fees under the statute's fee-shifting provision.

Accordingly, plaintiffs, including PRP groups, must carefully consider the risk of liability for defense fees and expenses prior to filing contribution actions against generators of material that potentially falls within the scope of SREA's exemption.

It should be noted that the fee-shifting provision in SREA does not distinguish between governmental or private party lawsuits seeking contribution.

Litigation Costs Do Not Amount to Manifest Injustice

Before *Evansville*, district courts had refrained from awarding defense fees under SREA on the basis that a retrospective application of SREA's fee-shifting provision would amount to "manifest injustice" because it did not exist when the contribution actions were initiated.[143]

However, the court in *Evansville* matter-of-factly awarded the attorney and expert fees under the statute's fee-shifting provision, without referring to the prior case law interpreting this section.[144]

Objectively Reasonable Basis to Believe Standard

[141] LEGISLATIVE HISTORY FOR S. 1528 SECTION 127-RECYCLING TRANSACTIONS, Senator Trent Lott, Congressional Record., November 19, 1999, S15050 (Lott Legislative History)

[142] *Evansville Greenway and Remediation Trust v. Southern Indiana Gas and Electric Co., Inc.,* No. 07-00066 (S.D. Ind. Feb. 25, 2011), Dkt. 917

[143] See, e.g., *RSR Corp. v. Avanti Dev., Inc*., CAUSE NO. IP 95-1359-C-M/S, 2000 U.S. Dist. LEXIS 14203 (S.D. Ind. June 13, 2000), 2000 WL 1449859 at *4 (S.D. Ind. 2000) ("The plaintiffs made their decisions about whom to sue at a time when CERCLA did not allow a prevailing party in a contribution action to obtain costs and fees from its burden. To burden that decision now with the imposition of the attorney and expert fees of any defendant that prevails under the SREA seems inconsistent with the 'familiar considerations of fair notice, reasonable reliance, and settled expectations' mentioned by the Supreme Court.")

[144] Ibid. 133. Without referring to the prior case law interpreting 42 U.S.C. 9627(j), the court awarded the fees "as we are required to do under the statute."

To defeat the SREA exemption defense, the government must prove that the recycler had an "objectionably reasonable basis to believe" one or more of the exclusion factors. As noted above, this is not the same legal standard of review that applies to a recycler's proactive due diligence effort needed to qualify for the SREA exemption.

The case of *U.S. v. Mountain Metal* provides useful guidance on what factors the court is likely to consider in determining whether recyclers were "objectively reasonable" in assessing the compliance of the consuming facility to which they shipped recyclables.

Although the consuming facility in *Mountain Metal* had a string of environmental violations, some of which had been reported in the media and specialist trade publications, the Court found that the three recyclers who shipped recyclables to the facility were not excluded from the SREA exemption. The Court noted that under 42 U.S.C. § 9627(f)(1) -- the exclusions for scrap metals and batteries -- an objectively reasonable basis for belief shall be determined using criteria that include (but are not limited to) the size of the person's business and the ability of the person to detect the nature of the consuming facility's operations concerning its handling, processing, reclamation, or other management activities associated with the recyclable material. In a lengthy assessment of each recycler's size, distance from the consuming facility, and their capacity to research the facility's compliance, the Court found that each had no objectively reasonable basis to believe the facility was non-compliant.

Brokered Transactions

Although the legislative history of SREA is not considered binding authority, it is worth noting Senator Lott's view of SREA with respect to brokered transactions:[145]

> *"It is common practice in the industry for scrap processors to otherwise arrange for the recycling of a secondary material through a broker. The broker chooses to which consuming facility the secondary material will be sold. In such cases, it is the responsibility of the broker, not the original person who entered into the transaction with the broker, to take reasonable care to determine the compliance status of the consuming facility."*[146]

The Useful Product Defense

[145] The term "broker" generally refers to an entity that acts as an agent or intermediary between the sellers and buyers of recyclable materials. An arranger may sell its recyclables directly to a broker who then resells the materials to consuming facilities. Brokers may also accumulate, handle, store and/or process recyclable materials before sending the materials to other consuming facilities where the materials may undergo additional processing and/or reclamation. According to unpublished 2006 EPA Interim Guidance: in exercising its enforcement discretion, EPA Regions may consider brokers as "consuming facilities" where they handle, process, reclaim or otherwise manage recyclable materials. Consuming facilities, including brokers, may become CERCLA arrangers and/or transporters when they send recyclable materials to other consuming facilities for handling, processing, reclamation or other management activities. Therefore, EPA Regions, in exercising their enforcement discretion, may consider brokers as arrangers and/or transporters under SREA, when the brokers send recyclable materials to other consuming facilities.

[146] Lott Legislative History at S15049.

Prior to SREA's enactment, the Useful Product Doctrine was one of the few ways in which scrap recyclers were able to avoid CERCLA liability at third party Superfund sites. While not universally successful as a defense (different federal Circuit Courts took different approaches to application of the Doctrine), the majority of Circuits that addressed the issue did rule in favor of scrap recyclers that sold certain materials to a consuming facility that later became a Superfund site.

Since SREA's enactment, the highest court to consider the useful product defense as it relates to recyclers has been the Ninth Circuit Court of Appeals in *Cal. Dep't of Toxic Substances Control v. Alco Pac., Inc.*[147] Although the Court did not find the defense applied under the facts of that particular case, the Court did look favorably on the District Court's analysis for determining whether the defense applies. As such, the lower court's Order provides an instructive resource:

> In its Order, [148] the Court viewed most of the materials in question as useful products, but its major concern was with slag and dross. The Court therefore conducted an extensive analysis of what constitutes waste under CERCLA and then went on to look at the precedents in two cases cited by the defendants.
>
> The Court considered the percentage of lead in the slags and drosses that the various defendants had shipped to Alco and determined that percentages in the 30-40 percent range could be considered a useful product.
>
> The Court, however, noted that cases involving slag and dross are difficult; the biggest challenge being when a company uses the by-products of its main manufacturing process or sells them for use as a raw material by others.
>
> The Court ultimately looked at Ninth Circuit precedent and determined that it should focus on (1) the commercial reality and value of the product in question; (2) a factual inquiry into the seller's intention to determine whether the transaction was just a sale to "get rid" of something of nominal value or if it was a true sale of a useful product; or (3) whether the materials in question were a principal product or by-product of the seller.
>
> Using these factors to assess the case, the Court found the slags and dross were priced according to prevailing commodity prices published in widely available sources and adjusted for the lead content in the slag or dross. The Court determined that Alco was paying the "going price" for the materials because they were prices against market prices reported in various indices.
>
> Thus, the Court found that the lead slag, dross and cuttings were as useful to Alco Pacific as any "virgin material." Accordingly, the primary motivation of the parties appeared to have been to trade in valuable metallic resources. Looking at the transaction logically, the Court considered it no different than the sale of virgin ore to a normal smelting operation.
>
> With regard to the Ninth Circuit's second factor, the Court found that the defendants were not merely contracting with Alco Pacific to "get rid" of a substance. Rather, the dross, slag, ingots,

[147] *Cal. Dep't of Toxic Substances Control v. Alco Pac., Inc., 308 F. Supp. 2d 1124 (C.D. Cal. 2004); Cal. Dep't of Toxic Substances Control v. Alco Pac., Inc., 217 F. Supp. 2d 1028 (C.D. Cal. 2002); Cal. Dep't of Toxic Substances Control v. Alco Pac., Inc., 508 F. 3D 930 (9th Cir. 2007).*

[148] *Order, Cal. Dep't of Toxic Substances Control v. Alco Pac., Inc., Case 2:01-cv-09294-SJO-FMO (C.D. Cal.) Docket Document 284, Issued February 6, 2004 (Order).*

and other products were sold for the same reason a primary lead smelting company might buy ore-as a primary resource for the activities of the company.

Finally, looking at the third factor, the Court acknowledged that slags and dross were by-products of the defendants manufacturing processes but noted that the materials had real value to the defendants and could not be properly characterized as waste.

Useful Product Defense and Battery Recyclers

The cases in which the useful product defense has been most successful for recyclers have been those in which a scrap recycler had broken lead acid batteries to reclaim the lead plates (and other lead components) and then sold that material to the consuming facility.

This is of special importance to battery recyclers, because SREA does not provide an exemption from liability under subsection (e) "*Transactions involving batteries," for those who removed the "valuable components*" of a battery.[149]

Attorneys defending a battery recycler should consider making two arguments:

- First, once the valuable components of a battery are removed from that battery, they should be deemed to be "scrap metal" and, as such, protected under SREA's subsection (d) "Transactions involving scrap metal," and in the alternative,
- The valuable components removed from a lead acid battery are a "useful product" and therefore not subject to CERCLA liability.[150]

Definition of Scrap Metal

As noted in Section 2, according to EPA, the SREA definition of scrap metal is the same as the RCRA regulatory definition of scrap metal set forth in 40 C.F.R. Section 261.1(c)(6).[151]

The 2002 EPA Internal Guidance provided to enforcement officers states:

> "*When evaluating the appropriate enforcement posture to take in CERCLA cases involving SREA's scrap metal provisions, Regions should determine whether RCRA and its implementing regulations have addressed similar or related scrap metal recycling issues, and whether the RCRA regulatory approach to the material involved at the site would be appropriate for CERCLA purposes*."[152]

A footnote to the Internal Guidance, states:

> "*Agency interpretation and regulatory actions involving scrap metal taken pursuant to RCRA may provide some guidance in determining which enforcement posture to take in CERCLA cases involving scrap metal issues. For example, in the preamble to the final rule where EPA promulgated*

[149] 42 U.S.C. § 9627(e).
[150] *Pneumo Abex Corp. v. High Point, Thomasville and Denton R. Co.,* 142 F.3d 769 (4th Cir. 1998), *United States v. Mallinckrodt, Inc.,* 343 F. Supp. 2d 809, 819 (E.D. Mo. 2004); *Douglas Cty. v. Gould, Inc.,* 871 F. Supp. 1242 (D. Neb. 1994).
[151] Internal Guidance. Section 3.0.
[152] Id.

> *40 C.F.R. Section 261.1(c)(6), EPA stated that the* ***definition of scrap excludes, inter alia, "residues generated from smelting and refining operations (i.e., drosses, slags, and sludges)." 50 Fed. Reg. 624 (Jan. 4, 1985).*** *However, EPA's interpretations and regulatory actions taken pursuant to RCRA may not always be applicable. RCRA and CERCLA are different statutes with different purposes, a distinction that may be relevant in determining the appropriate approach to take under CERCLA. CERCLA is a remedial statute that creates liability for past acts of disposal of hazardous substances. RCRA is a regulatory statute that addresses cradle to grave management of hazardous waste*." (emphasis added)[153]

It is important to note that the 1985 preamble's exclusion noted in the quote above was somewhat superseded by the 1997 rulemaking's definition of processed scrap metal which was added to 40 C.F.R. § 261.1 and reads:

> *"(c)(10) "Processed scrap metal" is scrap metal which has been manually or physically altered to either separate it into distinct materials to enhance economic value or to improve the handling of materials.* ***Processed scrap metal includes but is not limited to scrap metal which has been baled, shredded, sheared, chopped, crushed, flattened, cut, melted, or separated by metal type (i.e., sorted), and, fines, drosses and related materials which have been agglomerated.*** "(emphasis added)[154]

Although it remains arguable, a recycler faced with an EPA Region claiming that drosses are not scrap metal by SREA definition should place emphasis on the RCRA definition of processed scrap metal in its defense, especially if the drosses were agglomerated and, as processed scrap metal, excluded from the RCRA Subtitle C Definition of Solid Waste on or after August 11, 1997. There may also be a question about whether agglomeration of drosses constitutes "*melt[*ing of] *the scrap metal prior to the transaction*" (see The Melting of Scrap Metal).

In the case of slags, in the 1985 rulemaking, EPA established the definition of by-product that includes slags as an example and noted in the preamble that they are excluded from the definition of scrap metal. Later in 1990, EPA clarified in an interpretation document[155]that "*to meet the definition of scrap metal, the material must have significant metal content, i.e., greater than 50% metal*" for purposes of determining whether the scrap-metal-like material is a regulatory by-product or scrap metal. Later, in a 1997 rulemaking, EPA established the exclusion from the Definition of Solid Waste for excluded scrap metal being recycled, which included processed scrap metal, but did not explicitly include slags in that definition. There is an argument that slags would meet the definition of processed scrap metal as "*related materials which have been agglomerated*" if the agglomerated slags contained elemental metals at more than 50 percent by weight.

The inconsistencies among these definitions and their impact on whether and when certain metallic scrap materials can qualify as "scrap metal" and "recyclable material," may eventually be questions decided by the courts.

[153] Id. Footnote 9.
[154] 62 FR 25998, 26018 (May 12, 1997).
[155] EPA. "RCRA/Superfund/OUST Hotline Monthly Report Question: Clarification of By-Product Versus Scrap Metal" (9441.1990(09a); RO 13356). March 1990.

If a SREA defense is unavailable for transactions of agglomerated slags and drosses, a CERCLA "useful product" defense may be available, as noted above.[156]

The Melting of Scrap Metal

When dealing with slag or dross, recyclers need to be able to show whether the substance was the result of melting scrap metal at their facility or whether the slag or dross was purchased from another recycler. This is because SREA excludes the melting of metal prior to the transaction.

SREA states:

> *"(d) Transactions involving scrap metal*
>
> *(1) Transactions involving scrap metal shall be deemed to be arranging for recycling if the person who arranged for the transaction (by selling recyclable material or otherwise arranging for the recycling of recyclable material) can demonstrate by a preponderance of the evidence that at the time of the transaction—*
>
> ** * **
>
> *(C) the person did not melt the scrap metal prior to the transaction*
>
> (2) *For purposes of paragraph (1)(C), melting of scrap metal does not include the thermal separation of 2 or more materials due to differences in their melting points (referred to as 'sweating').*"[157]

If a recycler purchased agglomerated slags or drosses from a third party and then sent it to a consuming facility as a recyclable material, an argument could be made that the recycler did not melt the scrap metal and thus should not be adversely affected by § 9627(d)(1)(C).

When it comes to the melting of scrap metal and the SREA exemption, the 2002 EPA Internal Guidance to its enforcement officers stated:

> "*When evaluating the appropriate enforcement posture to take, Regions should consider whether the metal involved in the transaction was melted prior to the recycling transaction. CERCLA section 127(d)(1)(C) provides that an arranger must demonstrate that it did not melt the scrap metal prior to the recycling transaction. To the extent material such as dross is melted prior to the recycling transaction, it may be covered by the exclusion in Section 127(d)(1)(C) and may be outside the scope of the recycling exemption.*"[158]

Although it remains arguable, a recycler faced with an EPA Region claiming that the scrap was melted prior to the transaction should examine whether the 40 C.F.R. §261.1 definition serves its defense. There is also an argument to be made that the § 9627(d)(2) exclusion of "*sweating*" from "*melting of scrap metal*" does not also include agglomeration because agglomeration is not melting of scrap metal such that a specific exclusion from "*melting of scrap metal*" is required.

Scrap Metal – Automobiles

[156] See *United States v. Mountain Metal Co.,* 137 F. Supp. 2D at 1277 (N.D. Ala. 2001).
[157] 42 U.S.C. § 9627(d)(1)(C).
[158] Internal Guidance. Section 3.3.

There is another potential point of dispute regarding scrap metal transactions involving scrap automobiles. While EPA acknowledges that automobiles are included in the definition of scrap metal, the Agency has issued guidance indicating that fluids within automobiles as well as plastic and other synthetic components may exceed the allowable "minor amounts" of substances that would be covered by SREA. The question in dispute is what is considered "minor amounts."

The EPA says in its 2002 Internal Guidance to enforcement officers that:

> "*Regions should consider whether the fluids were removed from the vehicle or device prior to the transaction, whether the material is only composed of metal (e.g., does the material also contain plastic or other synthetic components), and whether there are "minor amounts" or greater than minor amounts of other substances adhering to it (e.g., PCBs, fluid, oil, etc.)*"[159]

The concerns here arise from the Agency's question regarding "minor amounts" and also because the "red herring" of plastic or other synthetic components that may come into play.

Recyclers who operate shredders know that for shredded steel today's technology can segregate non-metallics from the scrap metal to the extent that any remaining non-metallics would qualify as "minor or incident to" the recyclable material. However, this may not be the case for shredded nonferrous.

With EPA's Internal Guidance having been issued almost two decades ago, recyclers with automobile shredders, if challenged on this issue, will need to point out the great incentives for the bulk of non-metallics to be separated from the scrap metal before shipment to a consuming facility.

If EPA's concern relates to the contamination of a shredding facility, it already addressed that issue in its guidance by pointing out that SREA only protects those who arranged for recycling or those who transported the materials to the consuming facility. A recycler who is an owner or operator of a facility that becomes contaminated cannot benefit from the SREA exemption.

Notwithstanding the foregoing, auto dismantlers who send automobiles or other scrap to a recycler may potentially derive the benefit of the SREA exemption from liability if they meet the criteria set forth in SREA.

SECTION FIVE

CERCLA's ORIGINS

Background and Context to CERCLA's passage

The so-called Superfund law was passed in response to several unprecedented cases of industrial contamination.

[159] Id. at Section 3.2.

One of the most famous of these cases occurred in a small town called Love Canal near Niagara Falls, New York. Between 1942 and 1953, a dye, perfume and solvent manufacturer called the Hooker Chemical Company was in operation next to the town.

While active, the company dumped toxic chemicals into a nearby landfill and a partially-built canal. By the time the company closed, around 21,000 tons of toxic chemicals, including known carcinogens, were sitting in the canal.

When the company ended operations, it capped 16 acres of landfill, including the canal. The company then sold the land to the Niagara Falls School Board, which later built an elementary school on the site.

By the late 1970s, it emerged that the residents of Love Canal were experiencing numerous serious medical disorders and abnormally high rates of birth defects and miscarriages. It was soon discovered that chemicals from the canal and landfill had leached into the basements and yards of the neighborhood, as well as the playground of the elementary school.

After a series of protests, the U.S. government eventually relocated the town residents at a cost of $17 million.

Due to the immense publicity surrounding this case and others, lawmakers passed the 1980 Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund).

The goal of the law is to hold polluters financially responsible for cleaning up their toxic waste sites. The era also saw the start of the "environmental justice" movement which has continued to influence policy and legislation.

In 1986, Congress passed amendments to CERCLA, called the Superfund Amendments and Reauthorization Act (SARA). SARA made several important changes and additions to the Superfund Program, strengthening and expanding the cleanup program.

Unfortunately, CERCLA was drafted so broadly it inadvertently included recyclers among those who could be held responsible for Superfund site cleanup. For a time, CERCLA and SARA seriously damaged the scrap recycling industry.

After a prolonged effort spearheaded by ISRI, Congress finally enacted the 1999 Superfund Recycling Equity Act (SREA) which remedied the situation for recyclers.

Although recyclers can still be held responsible under CERCLA, SREA provides for an exemption from liability provided recyclers can show they meet the criteria under the Act.

APPENDIX A

Full CERCLA ("Superfund")

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COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980

"SUPERFUND"

December 31, 2002

Q:\COMP\ENVIR2\CERCLA

December 31, 2002

[As Amended Through P.L. 107–377, December 31, 2002]

TABLE OF CONTENTS FOR COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND) [1]

[1] This table of contents is not part of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 but is set forth for the convenience of the users of this publication.

COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND) [1]

AN ACT To provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Comprehensive Environmental Response, Compensation, and Liability Act of 1980".

TITLE I—HAZARDOUS SUBSTANCES RELEASES, LIABILITY, COMPENSATION

DEFINITIONS

SEC. 101. For purpose of this title—

(1) The term "act of God" means an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight.

(2) The term "Administrator" means the Administrator of the United States Environmental Protection Agency.

(3) The term "barrel" means forty-two United States gallons at sixty degrees Fahrenheit.

(4) The term "claim" means a demand in writing for a sum certain.

(5) The term "claimant" means any person who presents a claim for compensation under this Act.

(6) The term "damages" means damages for injury or loss of natural resources as set forth in section 107(a) or 111(b) of this Act.

(7) The term "drinking water supply" means any raw or finished water source that is or may be used by a public water system (as defined in the Safe Drinking Water Act) or as drinking water by one or more individuals.

(8) The term "environment" means (A) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States under the Fishery Conservation and Management Act of 1976, and (B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States.

[1] The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601–9675), commonly known as "Superfund," consists of Public Law 96–510 (Dec. 11, 1980) and the amendments made by subsequent enactments.

(9) 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.

(10) The term "federally permitted release" means (A) discharges in compliance with a permit under section 402 of the Federal Water Pollution Control Act, (B) discharges resulting from circumstances identified and reviewed and made part of the public record with respect to a permit issued or modified under section 402 of the Federal Water Pollution Control Act and subject to a condition of such permit, (C) continuous or anticipated intermittent discharges from a point source, identified in a permit or permit application under section 402 of the Federal Water Pollution Control Act, which are caused by events occurring within the scope of relevant operating or treatment systems, (D) discharges in compliance with a legally enforceable permit under section 404 of the Federal Water Pollution Control Act, (E) releases in compliance with a legally enforceable final permit issued pursuant to section 3005 (a) through (d) of the Solid Waste Disposal Act from a hazardous waste treatment, storage, or disposal facility when such permit specifically identifies the hazardous substances and makes such substances subject to a standard of practice, control procedure or bioassay limitation or condition, or other control on the hazardous substances in such releases, (F) any release in compliance with a legally enforceable permit issued under section 102 of[1] section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972, (G) any injection of fluids authorized under Federal underground injection control programs or State programs submitted for Federal approval (and not disapproved by the Administrator of the Environmental Protection Agency) pursuant to part C of the Safe Drinking Water Act, (H) any emission into the air subject to a permit or control regulation under section 111, section 112, title I part C, title I part D, or State implementation plans submitted in accordance with section 110 of the Clean Air Act (and not disapproved by the Administrator of the Environmental Protection Agency), including any schedule or waiver granted, promulgated, or approved under these sections, (I) any injection of fluids or other materials authorized under applicable State law (i) for the purpose of stimulating or treating wells for the production of crude oil, natural gas, or water, (ii) for the purpose of secondary, tertiary, or other enhanced recovery of crude oil or natural gas, or (iii) which are brought to the surface in conjunction with the production of crude oil or natural gas and which are reinjected, (J) the introduction of any pollutant into a publicly owned treatment works when such pollutant is specified in and in

[1] So in law. Probably should be "or".

compliance with applicable pretreatment standards of section 307 (b) or (c) of the Clean Water Act and enforceable requirements in a pretreatment program submitted by a State or municipality for Federal approval under section 402 of such Act, and (K) any release of source, special nuclear, or byproduct material, as those terms are defined in the Atomic Energy Act of 1954, in compliance with a legally enforceable license, permit, regulation, or order issued pursuant to the Atomic Energy Act of 1954.

(11) The term "Fund" or "Trust Fund" means the Hazardous Substance Response Fund established by section 221 [1] of this Act or, in the case of a hazardous waste disposal facility for which liability has been transferred under section 107(k) of this Act, the Post-closure Liability Fund established by section 232 [1] of this Act.

(12) The term "ground water" means water in a saturated zone or stratum beneath the surface of land or water.

(13) The term "guarantor" means any person, other than the owner or operator, who provides evidence of financial responsibility for an owner or operator under this Act.

(14) The term "hazardous substance" means (A) any substance designated pursuant to section 311(b)(2)(A) of the Federal Water Pollution Control Act, (B) any element, compound, mixture, solution, or substance designated pursuant to section 102 of this Act, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act (but not including any waste the regulation of which under the Solid Waste Disposal Act has been suspended by Act of Congress), (D) any toxic pollutant listed under section 307(a) of the Federal Water Pollution Control Act, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act, and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 7 of the Toxic Substances Control Act. 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).

(15) The term "navigable waters" or "navigable waters of the United States" means the waters of the United States, including the territorial seas.

(16) The term "natural resources" means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the fishery conservation zone established by the Fishery Conservation and Management Act of 1976), any State, local government, or any foreign govern-

[1] Sections 221 and 232 were repealed by sections 517(c)(1) and 514(b), repsectively, of Public Law 99–499.

ment, any Indian tribe, or, if such resources are subject to a trust restriction or alienation, any member of an Indian tribe.

(17) The term "offshore facility" means any facility of any kind located in, on, or under, any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel.

(18) The term "onshore facility" means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land or nonnavigable waters within the United States.

(19) The term "otherwise subject to the jurisdiction of the United States" means subject to the jurisdiction of the United States by virtue of United States citizenship, United States vessel documentation or numbering, or as provided by international agreement to which the United States is a party.

(20)(A) 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.

(B) In the case of a hazardous substance which has been accepted for transportation by a common or contract carrier and except as provided in section 107(a) (3) or (4) of this Act, (i) the term "owner or operator" shall mean such common carrier or other bona fide for hire carrier acting as an independent contractor during such transportation, (ii) the shipper of such hazardous substance shall not be considered to have caused or contributed to any release during such transportation which resulted solely from circumstances or conditions beyond his control.

(C) In the case of a hazardous substance which has been delivered by a common or contract carrier to a disposal or treatment facility and except as provided in section 107(a) (3) or (4) (i) the term "owner or operator" shall not include such common or contract carrier, and (ii) such common or contract carrier shall not be considered to have caused or contributed to any release at such disposal or treatment facility resulting from circumstances or conditions beyond its control.

(D) The term "owner or operator" does not include a unit of State or local government which acquired ownership or control involuntarily [1] through seizure or otherwise in connection

[1] Section 427 of Public Law 106–74 (113 Stat. 1095) added the phrase "through seizure or otherwise in connection with law enforcement activity" before "involuntary" the first place it appears. It was inserted after "involuntarily" as the probable intent of Congress.

with law enforcement activity 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 a State or local government shall be subject to the provisions of this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 107.

(E)[1] EXCLUSION OF LENDERS NOT PARTICIPANTS IN MANAGEMENT.—

(i) INDICIA OF OWNERSHIP TO PROTECT SECURITY.—The term "owner or operator" does not include a person that is a lender that, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect the security interest of the person in the vessel or facility.

(ii) FORECLOSURE.—The term "owner or operator" does not include a person that is a lender that did not participate in management of a vessel or facility prior to foreclosure, notwithstanding that the person—

(I) forecloses on the vessel or facility; and

(II) after foreclosure, sells, re-leases (in the case of a lease finance transaction), or liquidates the vessel or facility, maintains business activities, winds up operations, undertakes a response action under section 107(d)(1) or under the direction of an on-scene coordinator appointed under the National Contingency Plan, with respect to the vessel or facility, or takes any other measure to preserve, protect, or prepare the vessel or facility prior to sale or disposition,

if the person seeks to sell, re-lease (in the case of a lease finance transaction), or otherwise divest the person of the vessel or facility at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements.

(F) PARTICIPATION IN MANAGEMENT.—For purposes of subparagraph (E)—

(i) the term "participate in management"—

(I) means actually participating in the management or operational affairs of a vessel or facility; and

(II) does not include merely having the capacity to influence, or the unexercised right to control, vessel or facility operations;

(ii) a person that is a lender and that holds indicia of ownership primarily to protect a security interest in a vessel or facility shall be considered to participate in

[1] So in law. Indentation of subparagraphs (E) through (G) is incorrect.

management only if, while the borrower is still in possession of the vessel or facility encumbered by the security interest, the person—

(I) exercises decisionmaking control over the environmental compliance related to the vessel or facility, such that the person has undertaken responsibility for the hazardous substance handling or disposal practices related to the vessel or facility; or

(II) exercises control at a level comparable to that of a manager of the vessel or facility, such that the person has assumed or manifested responsibility—

(aa) for the overall management of the vessel or facility encompassing day-to-day decisionmaking with respect to environmental compliance; or

(bb) over all or substantially all of the operational functions (as distinguished from financial or administrative functions) of the vessel or facility other than the function of environmental compliance;

(iii) the term "participate in management" does not include performing an act or failing to act prior to the time at which a security interest is created in a vessel or facility; and

(iv) the term "participate in management" does not include—

(I) holding a security interest or abandoning or releasing a security interest;

(II) including in the terms of an extension of credit, or in a contract or security agreement relating to the extension, a covenant, warranty, or other term or condition that relates to environmental compliance;

(III) monitoring or enforcing the terms and conditions of the extension of credit or security interest;

(IV) monitoring or undertaking 1 or more inspections of the vessel or facility;

(V) requiring a response action or other lawful means of addressing the release or threatened release of a hazardous substance in connection with the vessel or facility prior to, during, or on the expiration of the term of the extension of credit;

(VI) providing financial or other advice or counseling in an effort to mitigate, prevent, or cure default or diminution in the value of the vessel or facility;

(VII) restructuring, renegotiating, or otherwise agreeing to alter the terms and conditions of the extension of credit or security interest, exercising forbearance;

(VIII) exercising other remedies that may be available under applicable law for the breach of a term or condition of the extension of credit or security agreement; or

(IX) conducting a response action under section 107(d) or under the direction of an on-scene coordinator appointed under the National Contingency Plan,

if the actions do not rise to the level of participating in management (within the meaning of clauses (i) and (ii)).

(G) OTHER TERMS.—As used in this Act:

(i) EXTENSION OF CREDIT.—The term "extension of credit" includes a lease finance transaction—

(I) in which the lessor does not initially select the leased vessel or facility and does not during the lease term control the daily operations or maintenance of the vessel or facility; or

(II) that conforms with regulations issued by the appropriate Federal banking agency or the appropriate State bank supervisor (as those terms are defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)[1] or with regulations issued by the National Credit Union Administration Board, as appropriate.

(ii) FINANCIAL OR ADMINISTRATIVE FUNCTION.—The term "financial or administrative function" includes a function such as that of a credit manager, accounts payable officer, accounts receivable officer, personnel manager, comptroller, or chief financial officer, or a similar function.

(iii) FORECLOSURE; FORECLOSE.—The terms "foreclosure" and "foreclose" mean, respectively, acquiring, and to acquire, a vessel or facility through—

(I)(aa) purchase at sale under a judgment or decree, power of sale, or nonjudicial foreclosure sale;

(bb) a deed in lieu of foreclosure, or similar conveyance from a trustee; or

(cc) repossession,

if the vessel or facility was security for an extension of credit previously contracted;

(II) conveyance pursuant to an extension of credit previously contracted, including the termination of a lease agreement; or

(III) any other formal or informal manner by which the person acquires, for subsequent disposition, title to or possession of a vessel or facility in order to protect the security interest of the person.

(iv) LENDER.—The term "lender" means—

[1] So in law. Probably should read "1813))".

(I) an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813));

(II) an insured credit union (as defined in section 101 of the Federal Credit Union Act (12 U.S.C. 1752));

(III) a bank or association chartered under the Farm Credit Act of 1971 (12 U.S.C. 2001 et seq.);

(IV) a leasing or trust company that is an affiliate of an insured depository institution;

(V) any person (including a successor or assignee of any such person) that makes a bona fide extension of credit to or takes or acquires a security interest from a nonaffiliated person;

(VI) the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Federal Agricultural Mortgage Corporation, or any other entity that in a bona fide manner buys or sells loans or interests in loans;

(VII) a person that insures or guarantees against a default in the repayment of an extension of credit, or acts as a surety with respect to an extension of credit, to a nonaffiliated person; and

(VIII) a person that provides title insurance and that acquires a vessel or facility as a result of assignment or conveyance in the course of underwriting claims and claims settlement.

(v) OPERATIONAL FUNCTION.—The term "operational function" includes a function such as that of a facility or plant manager, operations manager, chief operating officer, or chief executive officer.

(vi) SECURITY INTEREST.—The term "security interest" includes a right under a mortgage, deed of trust, assignment, judgment lien, pledge, security agreement, factoring agreement, or lease and any other right accruing to a person to secure the repayment of money, the performance of a duty, or any other obligation by a nonaffiliated person.

(21) The 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.

(22) 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, if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under section 170 of such Act, or, for the purposes of section 104 of this title or any other response action, any release of source byproduct, or special nuclear material from any processing site designated under section 102(a)(1) or 302(a) of the Uranium Mill Tailings Radiation Control Act of 1978, and (D) the normal application of fertilizer.

(23) The terms [1] "remove" or "removal" means the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 104(b) of this Act, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act. [2]

(24) The terms [1] "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. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to

[1] So in law. Probably should be "term".

[2] So in law. Probably should refer to the "Robert T. Stafford Disaster Relief and Emergency Assistance Act", pursuant to the amendment to the short title of such Act made by section 102 of Public Law 100–707.

the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or welfare; the term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.

(25) The terms [1] "respond" or "response" means remove, removal, remedy, and remedial action;,[2] all such terms (including the terms "removal" and "remedial action") include enforcement activities related thereto.

(26) The terms [1] "transport" or "transportation" means the movement of a hazardous substance by any mode, including a hazardous liquid pipeline facility (as defined in section 60101(a) of title 49, United States Code), and in the case of a hazardous substance which has been accepted for transportation by a common or contract carrier, the term "transport" or "transportation" shall include any stoppage in transit which is temporary, incidental to the transportation movement, and at the ordinary operating convenience of a common or contract carrier, and any such stoppage shall be considered as a continuity of movement and not as the storage of a hazardous substance.

(27) The terms "United States" and "State" include the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Marianas, and any other territory or possession over which the United States has jurisdiction.

(28) The term "vessel" means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

(29) The terms "disposal", "hazardous waste", and "treatment" shall have the meaning provided in section 1004 of the Solid Waste Disposal Act.

(30) The terms "territorial sea" and "contiguous zone" shall have the meaning provided in section 502 of the Federal Water Pollution Control Act.

(31) The term "national contingency plan" means the national contingency plan published under section 311(c) of the Federal Water Pollution Control Act or revised pursuant to section 105 of this Act.

(32) The terms [1] "liable" or "liability" under this title shall be construed to be the standard of liability which obtains under section 311 of the Federal Water Pollution Control Act.

(33) The term "pollutant or contaminant" shall include, but not be limited to, any element, substance, compound, or mixture, including disease-causing agents, which after release into the environment and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behav-

[1] So in law. Probably should be "term".
[2] So in law.

ioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring; except that the term "pollutant or contaminant" shall 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 paragraph (14) and shall not include natural gas, liquefied natural gas, or synthetic gas of pipeline quality (or mixtures of natural gas and such synthetic gas).

(34) The term "alternative water supplies" includes, but is not limited to, drinking water and household water supplies.

(35)(A) The term "contractual relationship", for the purpose of section 107(b)(3) includes, but is not limited to, land contracts, deeds, easements, leases, or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence:

(i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.

(ii) The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.

(iii) The defendant acquired the facility by inheritance or bequest.

In addition to establishing the foregoing, the defendant must establish that the defendant has satisfied the requirements of section 107(b)(3) (a) and (b), provides full cooperation, assistance, and facility access to the persons that are authorized to conduct response actions at the facility (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action at the facility), is in compliance with any land use restrictions established or relied on in connection with the response action at a facility, and does not impede the effectiveness or integrity of any institutional control employed at the facility in connection with a response action.

(B) REASON TO KNOW.—

(i) ALL APPROPRIATE INQUIRIES.—To establish that the defendant had no reason to know of the matter described in subparagraph (A)(i), the defendant must demonstrate to a court that—

(I) on or before the date on which the defendant acquired the facility, the defendant carried out all appropriate inquiries, as provided in clauses (ii) and (iv), into the previous ownership and uses of the facility in accordance with generally accept-

ed good commercial and customary standards and practices; and

(II) the defendant took reasonable steps to—

(aa) stop any continuing release;

(bb) prevent any threatened future release; and

(cc) prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substance.

(ii) STANDARDS AND PRACTICES.—Not later than 2 years after the date of the enactment of the Brownfields Revitalization and Environmental Restoration Act of 2001, the Administrator shall by regulation establish standards and practices for the purpose of satisfying the requirement to carry out all appropriate inquiries under clause (i).

(iii) CRITERIA.—In promulgating regulations that establish the standards and practices referred to in clause (ii), the Administrator shall include each of the following:

(I) The results of an inquiry by an environmental professional.

(II) Interviews with past and present owners, operators, and occupants of the facility for the purpose of gathering information regarding the potential for contamination at the facility.

(III) Reviews of historical sources, such as chain of title documents, aerial photographs, building department records, and land use records, to determine previous uses and occupancies of the real property since the property was first developed.

(IV) Searches for recorded environmental cleanup liens against the facility that are filed under Federal, State, or local law.

(V) Reviews of Federal, State, and local government records, waste disposal records, underground storage tank records, and hazardous waste handling, generation, treatment, disposal, and spill records, concerning contamination at or near the facility.

(VI) Visual inspections of the facility and of adjoining properties.

(VII) Specialized knowledge or experience on the part of the defendant.

(VIII) The relationship of the purchase price to the value of the property, if the property was not contaminated.

(IX) Commonly known or reasonably ascertainable information about the property.

(X) The degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation.

(iv) INTERIM STANDARDS AND PRACTICES.—

(I) PROPERTY PURCHASED BEFORE MAY 31, 1997.—With respect to property purchased before May 31, 1997, in making a determination with respect to a defendant described in clause (i), a court shall take into account—

(aa) any specialized knowledge or experience on the part of the defendant;

(bb) the relationship of the purchase price to the value of the property, if the property was not contaminated;

(cc) commonly known or reasonably ascertainable information about the property;

(dd) the obviousness of the presence or likely presence of contamination at the property; and

(ee) the ability of the defendant to detect the contamination by appropriate inspection.

(II) PROPERTY PURCHASED ON OR AFTER MAY 31, 1997.—With respect to property purchased on or after May 31, 1997, and until the Administrator promulgates the regulations described in clause (ii), the procedures of the American Society for Testing and Materials, including the document known as "Standard E1527–97", entitled "Standard Practice for Environmental Site Assessment: Phase 1 Environmental Site Assessment Process", shall satisfy the requirements in clause (i).

(v) SITE INSPECTION AND TITLE SEARCH.—In the case of property for residential use or other similar use purchased by a nongovernmental or noncommercial entity, a facility inspection and title search that reveal no basis for further investigation shall be considered to satisfy the requirements of this subparagraph.

(C) Nothing in this paragraph or in section 107(b)(3) shall diminish the liability of any previous owner or operator of such facility who would otherwise be liable under this Act. Notwithstanding this paragraph, if the defendant obtained actual knowledge of the release or threatened release of a hazardous substance at such facility when the defendant owned the real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge, such defendant shall be treated as liable under section 107(a)(1) and no defense under section 107(b)(3) shall be available to such defendant.

(D) Nothing in this paragraph shall affect the liability under this Act of a defendant who, by any act or omission, caused or contributed to the release or threatened release of a hazardous substance which is the subject of the action relating to the facility.

(36) The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village but not including any Alaska Native re-

gional or village corporation, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(37)(A) The term "service station dealer" means any person—

(i) who owns or operates a motor vehicle service station, filling station, garage, or similar retail establishment engaged in the business of selling, repairing, or servicing motor vehicles, where a significant percentage of the gross revenue of the establishment is derived from the fueling, repairing, or servicing of motor vehicles, and

(ii) who accepts for collection, accumulation, and delivery to an oil recycling facility, recycled oil that (I) has been removed from the engine of a light duty motor vehicle or household appliances by the owner of such vehicle or appliances, and (II) is presented, by such owner, to such person for collection, accumulation, and delivery to an oil recycling facility.

(B) For purposes of section 114(c), the term "service station dealer" shall, notwithstanding the provisions of subparagraph (A), include any government agency that establishes a facility solely for the purpose of accepting recycled oil that satisfies the criteria set forth in subclauses (I) and (II) of subparagraph (A)(ii), and, with respect to recycled oil that satisfies the criteria set forth in subclauses (I) and (II), owners or operators of refuse collection services who are compelled by State law to collect, accumulate, and deliver such oil to an oil recycling facility.

(C) The President shall promulgate regulations regarding the determination of what constitutes a significant percentage of the gross revenues of an establishment for purposes of this paragraph.

(38) The term "incineration vessel" means any vessel which carries hazardous substances for the purpose of incineration of such substances, so long as such substances or residues of such substances are on board.

(39) BROWNFIELD SITE.—

(A) IN GENERAL.—The term "brownfield site" means real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.

(B) EXCLUSIONS.—The term "brownfield site" does not include—

(i) a facility that is the subject of a planned or ongoing removal action under this title;

(ii) a facility that is listed on the National Priorities List or is proposed for listing;

(iii) a facility that is the subject of a unilateral administrative order, a court order, an administrative order on consent or judicial consent decree that has been issued to or entered into by the parties under this Act;

(iv) a facility that is the subject of a unilateral administrative order, a court order, an administrative order on consent or judicial consent decree that has been issued to or entered into by the parties, or a facility to which a permit has been issued by the United States or an authorized State under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.), the Federal Water Pollution Control Act (33 U.S.C. 1321), the Toxic Substances Control Act (15 U.S.C. 2601 et seq.), or the Safe Drinking Water Act (42 U.S.C. 300f et seq.);

(v) a facility that—

(I) is subject to corrective action under section 3004(u) or 3008(h) of the Solid Waste Disposal Act (42 U.S.C. 6924(u), 6928(h)); and

(II) to which a corrective action permit or order has been issued or modified to require the implementation of corrective measures;

(vi) a land disposal unit with respect to which—

(I) a closure notification under subtitle C of the Solid Waste Disposal Act (42 U.S.C. 6921 et seq.) has been submitted; and

(II) closure requirements have been specified in a closure plan or permit;

(vii) a facility that is subject to the jurisdiction, custody, or control of a department, agency, or instrumentality of the United States, except for land held in trust by the United States for an Indian tribe;

(viii) a portion of a facility—

(I) at which there has been a release of polychlorinated biphenyls; and

(II) that is subject to remediation under the Toxic Substances Control Act (15 U.S.C. 2601 et seq.); or

(ix) a portion of a facility, for which portion, assistance for response activity has been obtained under subtitle I of the Solid Waste Disposal Act (42 U.S.C. 6991 et seq.) from the Leaking Underground Storage Tank Trust Fund established under section 9508 of the Internal Revenue Code of 1986.

(C) SITE-BY-SITE DETERMINATIONS.—Notwithstanding subparagraph (B) and on a site-by-site basis, the President may authorize financial assistance under section 104(k) to an eligible entity at a site included in clause (i), (iv), (v), (vi), (viii), or (ix) of subparagraph (B) if the President finds that financial assistance will protect human health and the environment, and either promote economic development or enable the creation of, preservation of, or addition to parks, greenways, undeveloped property, other recreational property, or other property used for nonprofit purposes.

(D) ADDITIONAL AREAS.—For the purposes of section 104(k), the term "brownfield site" includes a site that—

(i) meets the definition of "brownfield site" under subparagraphs (A) through (C); and

(ii)(I) is contaminated by a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(II)(aa) is contaminated by petroleum or a petroleum product excluded from the definition of "hazardous substance" under section 101; and

(bb) is a site determined by the Administrator or the State, as appropriate, to be—

(AA) of relatively low risk, as compared with other petroleum-only sites in the State; and

(BB) a site for which there is no viable responsible party and which will be assessed, investigated, or cleaned up by a person that is not potentially liable for cleaning up the site; and

(cc) is not subject to any order issued under section 9003(h) of the Solid Waste Disposal Act (42 U.S.C. 6991b(h)); or

(III) is mine-scarred land.

(40) BONA FIDE PROSPECTIVE PURCHASER.—The term "bona fide prospective purchaser" means a person (or a tenant of a person) that acquires ownership of a facility after the date of the enactment of this paragraph and that establishes each of the following by a preponderance of the evidence:

(A) DISPOSAL PRIOR TO ACQUISITION.—All disposal of hazardous substances at the facility occurred before the person acquired the facility.

(B) INQUIRIES.—

(i) IN GENERAL.—The person made all appropriate inquiries into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices in accordance with clauses (ii) and (iii).

(ii) STANDARDS AND PRACTICES.—The standards and practices referred to in clauses (ii) and (iv) of paragraph (35)(B) shall be considered to satisfy the requirements of this subparagraph.

(iii) RESIDENTIAL USE.—In the case of property in residential or other similar use at the time of purchase by a nongovernmental or noncommercial entity, a facility inspection and title search that reveal no basis for further investigation shall be considered to satisfy the requirements of this subparagraph.

(C) NOTICES.—The person provides all legally required notices with respect to the discovery or release of any hazardous substances at the facility.

(D) CARE.—The person exercises appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to—

(i) stop any continuing release;

(ii) prevent any threatened future release; and

(iii) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance.

(E) COOPERATION, ASSISTANCE, AND ACCESS.—The person provides full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration at a vessel or facility (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response actions or natural resource restoration at the vessel or facility).

(F) INSTITUTIONAL CONTROL.—The person—

(i) is in compliance with any land use restrictions established or relied on in connection with the response action at a vessel or facility; and

(ii) does not impede the effectiveness or integrity of any institutional control employed at the vessel or facility in connection with a response action.

(G) REQUESTS; SUBPOENAS.—The person complies with any request for information or administrative subpoena issued by the President under this Act.

(H) NO AFFILIATION.—The person is not—

(i) potentially liable, or affiliated with any other person that is potentially liable, for response costs at a facility through—

(I) any direct or indirect familial relationship; or

(II) any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by the instruments by which title to the facility is conveyed or financed or by a contract for the sale of goods or services); or

(ii) the result of a reorganization of a business entity that was potentially liable.

(41) ELIGIBLE RESPONSE SITE.—

(A) IN GENERAL.—The term "eligible response site" means a site that meets the definition of a brownfield site in subparagraphs (A) and (B) of paragraph (39), as modified by subparagraphs (B) and (C) of this paragraph.

(B) INCLUSIONS.—The term "eligible response site" includes—

(i) notwithstanding paragraph (39)(B)(ix), a portion of a facility, for which portion assistance for response activity has been obtained under subtitle I of the Solid Waste Disposal Act (42 U.S.C. 6991 et seq.) from the Leaking Underground Storage Tank Trust Fund established under section 9508 of the Internal Revenue Code of 1986; or

(ii) a site for which, notwithstanding the exclusions provided in subparagraph (C) or paragraph (39)(B), the President determines, on a site-by-site basis and after consultation with the State, that limitations on enforcement under section 128 at sites spec-

ified in clause (iv), (v), (vi) or (viii) of paragraph (39)(B) would be appropriate and will—

(I) protect human health and the environment; and

(II) promote economic development or facilitate the creation of, preservation of, or addition to a park, a greenway, undeveloped property, recreational property, or other property used for nonprofit purposes.

(C) EXCLUSIONS.—The term "eligible response site" does not include—

(i) a facility for which the President—

(I) conducts or has conducted a preliminary assessment or site inspection; and

(II) after consultation with the State, determines or has determined that the site obtains a preliminary score sufficient for possible listing on the National Priorities List, or that the site otherwise qualifies for listing on the National Priorities List; unless the President has made a determination that no further Federal action will be taken; or

(ii) facilities that the President determines warrant particular consideration as identified by regulation, such as sites posing a threat to a sole-source drinking water aquifer or a sensitive ecosystem.

[42 U.S.C. 9601]

REPORTABLE QUANTITIES AND ADDITIONAL DESIGNATIONS

SEC. 102. (a) The Administrator shall promulgate and revise as may be appropriate, regulations designating as hazardous substances, in addition to those referred to in section 101(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 environment, and shall promulgate regulations establishing that quantity of any hazardous substance the release of which shall be reported pursuant to section 103 of this title. The Administrator may determine that one single quantity shall be the reportable quantity for any hazardous substance, regardless of the medium into which the hazardous substance is released.

For all hazardous substances for which proposed regulations establishing reportable quantities were published in the Federal Register under this subsection on or before March 1, 1986, the Administrator shall promulgate under this subsection final regulations establishing reportable quantities not later than December 31, 1986. For all hazardous substances for which proposed regulations establishing reportable quantities were not published in the Federal Register under this subsection on or before March 1, 1986, the Administrator shall publish under this subsection proposed regulations establishing reportable quantities not later than December 31, 1986, and promulgate final regulations under this subsection establishing reportable quantities not later than April 30, 1988.

December 31, 2002

(b) Unless and until superseded by regulations establishing a reportable quantity under subsection (a) of this section for any hazardous substance as defined in section 101(14) of this title, (1) a quantity of one pound, or (2) for those hazardous substances for which reportable quantities have been established pursuant to section 311(b)(4) of the Federal Water Pollution Control Act, such reportable quantity, shall be deemed that quantity, the release of which requires notification pursuant to section 103 (a) or (b) of this title.

[42 U.S.C. 9602]

NOTICES, PENALTIES

SEC. 103. (a) Any person in charge of a vessel or an offshore or an onshore facility shall, as soon as he has knowledge of any release (other than a federally permitted release) of a hazardous substance from such vessel or facility in quantities equal to or greater than those determined pursuant to section 102 of this title, immediately notify the National Response Center established under the Clean Water Act of such release. The National Response Center shall convey the notification expeditiously to all appropriate Government agencies, including the Governor of any affected State.

(b) Any person—

(1) in charge of a vessel from which a hazardous substance is released, other than a federally permitted release, into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or

(2) in charge of a vessel from which a hazardous substance is released, other than a federally permitted release, which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976), and who is otherwise subject to the jurisdiction of the United States at the time of the release, or

(3) in charge of a facility from which a hazardous substance is released, other than a federally permitted release, in a quantity equal to or greater than that determined pursuant to section 102 of this title who fails to notify immediately the appropriate agency of the United States Government as soon as he has knowledge of such release or who submits in such a notification any information which he knows to be false or misleading shall, upon conviction, be fined in accordance with the applicable provisions of title 18 of the United States Code or imprisoned for not more than 3 years (or not more than 5 years in the case of a second or subsequent conviction), or both. Notification received pursuant to this subsection or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.

(c) Within one hundred and eighty days after the enactment of this Act, any person who owns or operates or who at the time of disposal owned or operated, or who accepted hazardous substances

for transport and selected, a facility at which hazardous substances (as defined in section 101(14)(C) of this title) are or have been stored, treated, or disposed of shall, unless such facility has a permit issued under, or has been accorded interim status under, subtitle C of the Solid Waste Disposal Act, notify the Administrator of the Environmental Protection Agency of the existence of such facility, specifying the amount and type of any hazardous substance to be found there, and any known, suspected, or likely releases of such substances from such facility. The Administrator may prescribe in greater detail the manner and form of the notice and the information included. The Administrator shall notify the affected State agency, or any department designated by the Governor to receive such notice, of the existence of such facility. Any person who knowingly fails to notify the Administrator of the existence of any such facility shall, upon conviction, be fined not more than $10,000, or imprisoned for not more than one year, or both. In addition, any such person who knowingly fails to provide the notice required by this subsection shall not be entitled to any limitation of liability or to any defenses to liability set out in section 107 of this Act: *Provided, however,* That notification under this subsection is not required for any facility which would be reportable hereunder solely as a result of any stoppage in transit which is temporary, incidental to the transportation movement, or at the ordinary operating convenience of a common or contract carrier, and such stoppage shall be considered as a continuity of movement and not as the storage of a hazardous substance. Notification received pursuant to this subsection or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.

(d)(1) The Administrator of the Environmental Protection Agency is authorized to promulgate rules and regulations specifying, with respect to—

(A) the location, title, or condition of a facility, and

(B) the identity, characteristics, quantity, origin, or condition (including containerization and previous treatment) of any hazardous substances contained or deposited in a facility;

the records which shall be retained by any person required to provide the notification of a facility set out in subsection (c) of this section. Such specification shall be in accordance with the provisions of this subsection.

(2) Beginning with the date of enactment of this Act, for fifty years thereafter or for fifty years after the date of establishment of a record (whichever is later), or at any such earlier time as a waiver if obtained under paragraph (3) of this subsection, it shall be unlawful for any such person knowingly to destroy, mutilate, erase, dispose of, conceal, or otherwise render unavailable or unreadable or falsify any records identified in paragraph (1) of this subsection. Any person who violates this paragraph shall, upon conviction, be fined in accordance with the applicable provisions of title 18 of the United States Code or imprisoned for not more than 3 years (or not more than 5 years in the case of a second or subsequent conviction), or both.

(3) At any time prior to the date which occurs fifty years after the date of enactment of this Act, any person identified under paragraph (1) of this subsection may apply to the Administrator of the Environmental Protection Agency for a waiver of the provisions of the first sentence of paragraph (2) of this subsection. The Administrator is authorized to grant such waiver if, in his discretion, such waiver would not unreasonably interfere with the attainment of the purposes and provisions of this Act. The Administrator shall promulgate rules and regulations regarding such a waiver so as to inform parties of the proper application procedure and conditions for approval of such a waiver.

(4) Notwithstanding the provisions of this subsection, the Administrator of the Environmental Protection Agency may in his discretion require any such person to retain any record identified pursuant to paragraph (1) of this subsection for such a time period in excess of the period specified in paragraph (2) of this subsection as the Administrator determines to be necessary to protect the public health or welfare.

(e) This section shall not apply to the application of a pesticide product registered under the Federal Insecticide, Fungicide, and Rodenticide Act or to the handling and storage of such a pesticide product by an agricultural producer.

(f) No notification shall be required under subsection (a) or (b) of this section for any release of a hazardous substance—

(1) which is required to be reported (or specifically exempted from a requirement for reporting) under subtitle C of the Solid Waste Disposal Act or regulations thereunder and which has been reported to the National Response Center, or

(2) which is a continuous release, stable in quantity and rate, and is—

(A) from a facility for which notification has been given under subsection (c) of this section, or

(B) a release of which notification has been given under subsections (a) and (b) of this section for a period sufficient to establish the continuity, quantity, and regularity of such release:

Provided, That notification in accordance with subsections (a) and (b) of this paragraph shall be given for releases subject to this paragraph annually, or at such time as there is any statistically significant increase in the quantity of any hazardous substance or constituent thereof released, above that previously reported or occurring.

[42 U.S.C. 9603]

RESPONSE AUTHORITIES

SEC. 104. (a)(1) Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous sub-

stance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment. When the President determines that such action will be done properly and promptly by the owner or operator of the facility or vessel or by any other responsible party, the President may allow such person to carry out the action, conduct the remedial investigation, or conduct the feasibility study in accordance with section 122. No remedial investigation or feasibility study (RI/FS) shall be authorized except on a determination by the President that the party is qualified to conduct the RI/FS and only if the President contracts with or arranges for a qualified person to assist the President in overseeing and reviewing the conduct of such RI/FS and if the responsible party agrees to reimburse the Fund for any cost incurred by the President under, or in connection with, the oversight contract or arrangement. In no event shall a potentially responsible party be subject to a lesser standard of liability, receive preferential treatment, or in any other way, whether direct or indirect, benefit from any such arrangements as a response action contractor, or as a person hired or retained by such a response action contractor, with respect to the release or facility in question. The President shall give primary attention to those releases which the President deems may present a public health threat.

(2) REMOVAL ACTION.—Any removal action undertaken by the President under this subsection (or by any other person referred to in section 122) should, to the extent the President deems practicable, contribute to the efficient performance of any long term remedial action with respect to the release or threatened release concerned.

(3) LIMITATIONS ON RESPONSE.—The President shall not provide for a removal or remedial action under this section in response to a release or threat of release—

(A) of a naturally occurring substance in its unaltered form, or altered solely through naturally occurring processes or phenomena, from a location where it is naturally found;

(B) from products which are part of the structure of, and result in exposure within, residential buildings or business or community structures; or

(C) into public or private drinking water supplies due to deterioration of the system through ordinary use.

(4) EXCEPTION TO LIMITATIONS.—Notwithstanding paragraph (3) of this subsection, to the extent authorized by this section, the President may respond to any release or threat of release if in the President's discretion, it constitutes a public health or environmental emergency and no other person with the authority and capability to respond to the emergency will do so in a timely manner.

(b)(1) INFORMATION; STUDIES AND INVESTIGATIONS.—Whenever the President is authorized to act pursuant to subsection (a) of this section, or whenever the President has reason to believe that a release has occurred or is about to occur, or that illness, disease, or complaints thereof may be attributable to exposure to a hazardous substance, pollutant, or contaminant and that a release may have

occurred or be occurring, he may undertake such investigations, monitoring, surveys, testing, and other information gathering as he may deem necessary or appropriate to identify the existence and extent of the release or threat thereof, the source and nature of the hazardous substances, pollutants or contaminants involved, and the extent of danger to the public health or welfare or to the environment. In addition, the President may undertake such planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations as he may deem necessary or appropriate to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this Act.

(2) COORDINATION OF INVESTIGATIONS.—The President shall promptly notify the appropriate Federal and State natural resource trustees of potential damages to natural resources resulting from releases under investigation pursuant to this section and shall seek to coordinate the assessments, investigations, and planning under this section with such Federal and State trustees.

(c)(1) Unless (A) the President finds that (i) continued response actions are immediately required to prevent, limit, or mitigate an emergency, (ii) there is an immediate risk to public health or welfare or the environment, and (iii) such assistance will not otherwise be provided on a timely basis, or (B) the President has determined the appropriate remedial actions pursuant to paragraph (2) of this subsection and the State or States in which the source of the release is located have complied with the requirements of paragraph (3) of this subsection, or (C) continued response action is otherwise appropriate and consistent with the remedial action to be taken [1] obligations from the Fund, other than those authorized by subsection (b) of this section, shall not continue after $2,000,000 has been obligated for response actions or 12 months has elapsed from the date of initial response to a release or threatened release of hazardous substances.

(2) The President shall consult with the affected State or States before determining any appropriate remedial action to be taken pursuant to the authority granted under subsection (a) of this section.

(3) The President shall not provide any remedial actions pursuant to this section unless the State in which the release occurs first enters into a contract or cooperative agreement with the President providing assurances deemed adequate by the President that (A) the State will assure all future maintenance of the removal and remedial actions provided for the expected life of such actions as determined by the President; (B) the State will assure the availability of a hazardous waste disposal facility acceptable to the President and in compliance with the requirements of subtitle C of the Solid Waste Disposal Act for any necessary offsite storage, destruction, treatment, or secure disposition of the hazardous substances; and (C) the State will pay or assure payment of (i) 10 per centum of the costs of the remedial action, including all future maintenance, or (ii) 50 percent (or such greater amount as the President may determine appropriate, taking into account the degree of responsibility of the State or political subdivision for the release) of any

[1] So in law. Probably should be followed by a comma.

sums expended in response to a release at a facility, that was operated by the State or a political subdivision thereof, either directly or through a contractual relationship or otherwise, at the time of any disposal of hazardous substances therein. For the purpose of clause (ii) of this subparagraph, the term "facility" does not include navigable waters or the beds underlying those waters. The President shall grant the State a credit against the share of the costs for which it is responsible under this paragraph for any documented direct out-of-pocket non-Federal funds expended or obligated by the State or a political subdivision thereof after January 1, 1978, and before the date of enactment of this Act for cost-eligible response actions and claims for damages compensable under section 111 of this title relating to the specific release in question: *Provided, however,* That in no event shall the amount of the credit granted exceed the total response costs relating to the release. In the case of remedial action to be taken on land or water held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe (if such land or water is subject to a trust restriction on alienation), or otherwise within the borders of an Indian reservation, the requirements of this paragraph for assurances regarding future maintenance and cost-sharing shall not apply, and the President shall provide the assurance required by this paragraph regarding the availability of a hazardous waste disposal facility.

(4) SELECTION OF REMEDIAL ACTION.—The President shall select remedial actions to carry out this section in accordance with section 121 of this Act (relating to cleanup standards).

(5) STATE CREDITS.—

(A) GRANTING OF CREDIT.—The President shall grant a State a credit against the share of the costs, for which it is responsible under paragraph (3) with respect to a facility listed on the National Priorities List under the National Contingency Plan, for amounts expended by a State for remedial action at such facility pursuant to a contract or cooperative agreement with the President. The credit under this paragraph shall be limited to those State expenses which the President determines to be reasonable, documented, direct out-of-pocket expenditures of non-Federal funds.

(B) EXPENSES BEFORE LISTING OR AGREEMENT.—The credit under this paragraph shall include expenses for remedial action at a facility incurred before the listing of the facility on the National Priorities List or before a contract or cooperative agreement is entered into under subsection (d) for the facility if—

(i) after such expenses are incurred the facility is listed on such list and a contract or cooperative agreement is entered into for the facility, and

(ii) the President determines that such expenses would have been credited to the State under subparagraph (A) had the expenditures been made after listing of the facility on such list and after the date on which such contract or cooperative agreement is entered into.

(C) RESPONSE ACTIONS BETWEEN 1978 AND 1980.—The credit under this paragraph shall include funds expended or obligated

by the State or a political subdivision thereof after January 1, 1978, and before December 11, 1980, for cost-eligible response actions and claims for damages compensable under section 111.

(D) STATE EXPENSES AFTER DECEMBER 11, 1980, IN EXCESS OF 10 PERCENT OF COSTS.—The credit under this paragraph shall include 90 percent of State expenses incurred at a facility owned, but not operated, by such State or by a political subdivision thereof. Such credit applies only to expenses incurred pursuant to a contract or cooperative agreement under subsection (d) and only to expenses incurred after December 11, 1980, but before the date of the enactment of this paragraph.

(E) ITEM-BY-ITEM APPROVAL.—In the case of expenditures made after the date of the enactment of this paragraph, the President may require prior approval of each item of expenditure as a condition of granting a credit under this paragraph.

(F) USE OF CREDITS.—Credits granted under this paragraph for funds expended with respect to a facility may be used by the State to reduce all or part of the share of costs otherwise required to be paid by the State under paragraph (3) in connection with remedial actions at such facility. If the amount of funds for which credit is allowed under this paragraph exceeds such share of costs for such facility, the State may use the amount of such excess to reduce all or part of the share of such costs at other facilities in that State. A credit shall not entitle the State to any direct payment.

(6) OPERATION AND MAINTENANCE.—For the purposes of paragraph (3) of this subsection, in the case of ground or surface water contamination, completed remedial action includes the completion of treatment or other measures, whether taken onsite or offsite, necessary to restore ground and surface water quality to a level that assures protection of human health and the environment. With respect to such measures, the operation of such measures for a period of up to 10 years after the construction or installation and commencement of operation shall be considered remedial action. Activities required to maintain the effectiveness of such measures following such period or the completion of remedial action, whichever is earlier, shall be considered operation or maintenance.

(7) LIMITATION ON SOURCE OF FUNDS FOR O&M.—During any period after the availability of funds received by the Hazardous Substance Superfund established under subchapter A of chapter 98 of the Internal Revenue Code of 1954 from tax revenues or appropriations from general revenues, the Federal share of the payment of the cost of operation or maintenance pursuant to paragraph (3)(C)(i) or paragraph (6) of this subsection (relating to operation and maintenance) shall be from funds received by the Hazardous Substance Superfund from amounts recovered on behalf of such fund under this Act.

(8) RECONTRACTING.—The President is authorized to undertake or continue whatever interim remedial actions the President determines to be appropriate to reduce risks to public health or the environment where the performance of a complete remedial action requires recontracting because of the discovery of sources, types, or quantities of hazardous substances not known at the time of entry

into the original contract. The total cost of interim actions undertaken at a facility pursuant to this paragraph shall not exceed $2,000,000.

(9) SITING.—Effective 3 years after the enactment of the Superfund Amendments and Reauthorization Act of 1986, the President shall not provide any remedial actions pursuant to this section unless the State in which the release occurs first enters into a contract or cooperative agreement with the President providing assurances deemed adequate by the President that the State will assure the availability of hazardous waste treatment or disposal facilities which—

(A) have adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated within the State during the 20-year period following the date of such contract or cooperative agreement and to be disposed of, treated, or destroyed,

(B) are within the State or outside the State in accordance with an interstate agreement or regional agreement or authority,

(C) are acceptable to the President, and

(D) are in compliance with the requirements of subtitle C of the Solid Waste Disposal Act.

(d)(1) COOPERATIVE AGREEMENTS.—

(A) STATE APPLICATIONS.—A State or political subdivision thereof or Indian tribe may apply to the President to carry out actions authorized in this section. If the President determines that the State or political subdivision or Indian tribe has the capability to carry out any or all of such actions in accordance with the criteria and priorities established pursuant to section 105(a)(8) and to carry out related enforcement actions, the President may enter into a contract or cooperative agreement with the State or political subdivision or Indian tribe to carry out such actions. The President shall make a determination regarding such an application within 90 days after the President receives the application.

(B) TERMS AND CONDITIONS.—A contract or cooperative agreement under this paragraph shall be subject to such terms and conditions as the President may prescribe. The contract or cooperative agreement may cover a specific facility or specific facilities.

(C) REIMBURSEMENTS.—Any State which expended funds during the period beginning September 30, 1985, and ending on the date of the enactment of this subparagraph for response actions at any site included on the National Priorities List and subject to a cooperative agreement under this Act shall be reimbursed for the share of costs of such actions for which the Federal Government is responsible under this Act.

(2) If the President enters into a cost-sharing agreement pursuant to subsection (c) of this section or a contract or cooperative agreement pursuant to this subsection, and the State or political subdivision thereof fails to comply with any requirements of the contract, the President may, after providing sixty days notice, seek in the appropriate Federal district court to enforce the contract or

to recover any funds advanced or any costs incurred because of the breach of the contract by the State or political subdivision.

(3) Where a State or a political subdivision thereof is acting in behalf of the President, the President is authorized to provide technical and legal assistance in the administration and enforcement of any contract or subcontract in connection with response actions assisted under this title, and to intervene in any civil action involving the enforcement of such contract or subcontract.

(4) Where two or more noncontiguous facilities are reasonably related on the basis of geography, or on the basis of the threat, or potential threat to the public health or welfare or the environment, the President may, in his discretion, treat these related facilities as one for purposes of this section.

(e) INFORMATION GATHERING AND ACCESS.—

(1) ACTION AUTHORIZED.—Any officer, employee, or representative of the President, duly designated by the President, is authorized to take action under paragraph (2), (3), or (4) (or any combination thereof) at a vessel, facility, establishment, place, property, or location or, in the case of paragraph (3) or (4), at any vessel, facility, establishment, place, property, or location which is adjacent to the vessel, facility, establishment, place, property, or location referred to in such paragraph (3) or (4). Any duly designated officer, employee, or representative of a State or political subdivision under a contract or cooperative agreement under subsection (d)(1) is also authorized to take such action. The authority of paragraphs (3) and (4) may be exercised only if there is a reasonable basis to believe there may be a release or threat of release of a hazardous substance or pollutant or contaminant. The authority of this subsection may be exercised only for the purposes of determining the need for response, or choosing or taking any response action under this title, or otherwise enforcing the provisions of this title.

(2) ACCESS TO INFORMATION.—Any officer, employee, or representative described in paragraph (1) may require any person who has or may have information relevant to any of the following to furnish, upon reasonable notice, information or documents relating to such matter:

(A) The identification, nature, and quantity of materials which have been or are generated, treated, stored, or disposed of at a vessel or facility or transported to a vessel or facility.

(B) The nature or extent of a release or threatened release of a hazardous substance or pollutant or contaminant at or from a vessel or facility.

(C) Information relating to the ability of a person to pay for or to perform a cleanup.

In addition, upon reasonable notice, such person either (i) shall grant any such officer, employee, or representative access at all reasonable times to any vessel, facility, establishment, place, property, or location to inspect and copy all documents or records relating to such matters or (ii) shall copy and furnish to the officer, employee, or representative all such documents or records, at the option and expense of such person.

(3) ENTRY.—Any officer, employee, or representative described in paragraph (1) is authorized to enter at reasonable times any of the following:

(A) Any vessel, facility, establishment, or other place or property where any hazardous substance or pollutant or contaminant may be or has been generated, stored, treated, disposed of, or transported from.

(B) Any vessel, facility, establishment, or other place or property from which or to which a hazardous substance or pollutant or contaminant has been or may have been released.

(C) Any vessel, facility, establishment, or other place or property where such release is or may be threatened.

(D) Any vessel, facility, establishment, or other place or property where entry is needed to determine the need for response or the appropriate response or to effectuate a response action under this title.

(4) INSPECTION AND SAMPLES.—

(A) AUTHORITY.—Any officer, employee or representative described in paragraph (1) is authorized to inspect and obtain samples from any vessel, facility, establishment, or other place or property referred to in paragraph (3) or from any location of any suspected hazardous substance or pollutant or contaminant. Any such officer, employee, or representative is authorized to inspect and obtain samples of any containers or labeling for suspected hazardous substances or pollutants or contaminants. Each such inspection shall be completed with reasonable promptness.

(B) SAMPLES.—If the officer, employee, or representative obtains any samples, before leaving the premises he shall give to the owner, operator, tenant, or other person in charge of the place from which the samples were obtained a receipt describing the sample obtained and, if requested, a portion of each such sample. A copy of the results of any analysis made of such samples shall be furnished promptly to the owner, operator, tenant, or other person in charge, if such person can be located.

(5) COMPLIANCE ORDERS.—

(A) ISSUANCE.—If consent is not granted regarding any request made by an officer, employee, or representative under paragraph (2), (3), or (4), the President may issue an order directing compliance with the request. The order may be issued after such notice and opportunity for consultation as is reasonably appropriate under the circumstances.

(B) COMPLIANCE.—The President may ask the Attorney General to commence a civil action to compel compliance with a request or order referred to in subparagraph (A). Where there is a reasonable basis to believe there may be a release or threat of a release of a hazardous substance or pollutant or contaminant, the court shall take the following actions:

(i) In the case of interference with entry or inspection, the court shall enjoin such interference or direct

compliance with orders to prohibit interference with entry or inspection unless under the circumstances of the case the demand for entry or inspection is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.

(ii) In the case of information or document requests or orders, the court shall enjoin interference with such information or document requests or orders or direct compliance with the requests or orders to provide such information or documents unless under the circumstances of the case the demand for information or documents is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.

The court may assess a civil penalty not to exceed $25,000 for each day of noncompliance against any person who unreasonably fails to comply with the provisions of paragraph (2), (3), or (4) or an order issued pursuant to subparagraph (A) of this paragraph.

(6) OTHER AUTHORITY.—Nothing in this subsection shall preclude the President from securing access or obtaining information in any other lawful manner.

(7) CONFIDENTIALITY OF INFORMATION.—(A) Any records, reports, or information obtained from any person under this section (including records, reports, or information obtained by representatives of the President) shall be available to the public, except that upon a showing satisfactory to the President (or the State, as the case may be) by any person that records, reports, or information, or particular part thereof (other than health or safety effects data), to which the President (or the State, as the case may be) or any officer, employee, or representative has access under this section if made public would divulge information entitled to protection under section 1905 of title 18 of the United States Code, such information or particular portion thereof shall be considered confidential in accordance with the purposes of that section, except that such record, report, document or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this Act, or when relevant in any proceeding under this Act.

(B) Any person not subject to the provisions of section 1905 of title 18 of the United States Code who knowingly and willfully divulges or discloses any information entitled to protection under this subsection shall, upon conviction, be subject to a fine of not more than $5,000 or to imprisonment not to exceed one year, or both.

(C) In submitting data under this Act, a person required to provide such data may (i) designate the data which such person believes is entitled to protection under this subsection and (ii) submit such designated data separately from other data submitted under this Act. A designation under this paragraph shall be made in writing and in such manner as the President may prescribe by regulation.

(D) Notwithstanding any limitation contained in this section or any other provision of law, all information reported to or otherwise obtained by the President (or any representative of the President) under this Act shall be made available, upon written request of any duly authorized committee of the Congress, to such committee.

(E) No person required to provide information under this Act may claim that the information is entitled to protection under this paragraph unless such person shows each of the following:

(i) Such person has not disclosed the information to any other person, other than a member of a local emergency planning committee established under title III of the Amendments and Reauthorization Act of 1986 [1], an officer or employee of the United States or a State or local government, an employee of such person, or a person who is bound by a confidentiality agreement, and such person has taken reasonable measures to protect the confidentiality of such information and intends to continue to take such measures.

(ii) The information is not required to be disclosed, or otherwise made available, to the public under any other Federal or State law.

(iii) Disclosure of the information is likely to cause substantial harm to the competitive position of such person.

(iv) The specific chemical identity, if sought to be protected, is not readily discoverable through reverse engineering.

(F) The following information with respect to any hazardous substance at the facility or vessel shall not be entitled to protection under this paragraph:

(i) The trade name, common name, or generic class or category of the hazardous substance.

(ii) The physical properties of the substance, including its boiling point, melting point, flash point, specific gravity, vapor density, solubility in water, and vapor pressure at 20 degrees celsius.

(iii) The hazards to health and the environment posed by the substance, including physical hazards (such as explosion) and potential acute and chronic health hazards.

(iv) The potential routes of human exposure to the substance at the facility, establishment, place, or property being investigated, entered, or inspected under this subsection.

(v) The location of disposal of any waste stream.

(vi) Any monitoring data or analysis of monitoring data pertaining to disposal activities.

(vii) Any hydrogeologic or geologic data.

(viii) Any groundwater monitoring data.

[1] So in law. Probably means title III of the Superfund Amendments and Reauthorization Act of 1986 (P.L. 99–499; 100 Stat. 1728).

(f) In awarding contracts to any person engaged in response actions, the President or the State, in any case where it is awarding contracts pursuant to a contract entered into under subsection (d) of this section, shall require compliance with Federal health and safety standards established under section 301(f) of this Act by contractors and subcontractors as a condition of such contracts.

(g)(1) All laborers and mechanics employed by contractors or subcontractors in the performance of construction, repair, or alteration work funded in whole or in part under this section shall be paid wages at rates not less than those prevailing on projects of a character similar in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act. The President shall not approve any such funding without first obtaining adequate assurance that required labor standards will be maintained upon the construction work.

(2) The Secretary of Labor shall have, with respect to the labor standards specified in paragraph (1), the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (15 F.R. 3176; 64 Stat. 1267) and section 276c of title 40 of the United States Code.

(h) Notwithstanding any other provision of law, subject to the provisions of section 111 of this Act, the President may authorize the use of such emergency procurement powers as he deems necessary to effect the purpose of this Act. Upon determination that such procedures are necessary, the President shall promulgate regulations prescribing the circumstances under which such authority shall be used and the procedures governing the use of such authority.

(i)(1) There is hereby established within the Public Health Service an agency, to be known as the Agency for Toxic Substances and Disease Registry, which shall report directly to the Surgeon General of the United States. The Administrator of said Agency shall, with the cooperation of the Administrator of the Environmental Protection Agency, the Commissioner of the Food and Drug Administration, the Directors of the National Institute of Medicine, National Institute of Environmental Health Sciences, National Institute of Occupational Safety and Health, Centers for Disease Control and Prevention, the Administrator of the Occupational Safety and Health Administration, the Administrator of the Social Security Administration, the Secretary of Transportation, and appropriate State and local health officials, effectuate and implement the health related authorities of this Act. In addition, said Administrator shall—

(A) in cooperation with the States, establish and maintain a national registry of serious diseases and illnesses and a national registry of persons exposed to toxic substances;

(B) establish and maintain inventory of literature, research, and studies on the health effects of toxic substances;

(C) in cooperation with the States, and other agencies of the Federal Government, establish and maintain a complete listing of areas closed to the public or otherwise restricted in use because of toxic substance contamination;

(D) in cases of public health emergencies caused or believed to be caused by exposure to toxic substances, provide

medical care and testing to exposed individuals, including but not limited to tissue sampling, chromosomal testing where appropriate, epidemiological studies, or any other assistance appropriate under the circumstances; and

(E) either independently or as part of other health status survey, conduct periodic survey and screening programs to determine relationships between exposure to toxic substances and illness. In cases of public health emergencies, exposed persons shall be eligible for admission to hospitals and other facilities and services operated or provided by the Public Health Service.

(2)(A) Within 6 months after the enactment of the Superfund Amendments and Reauthorization Act of 1986, the Administrator of the Agency for Toxic Substances and Disease Registry (ATSDR) and the Administrator of the Environmental Protection Agency ("EPA") shall prepare a list, in order of priority, of at least 100 hazardous substances which are most commonly found at facilities on the National Priorities List and which, in their sole discretion, they determine are posing the most significant potential threat to human health due to their known or suspected toxicity to humans and the potential for human exposure to such substances at facilities on the National Priorities List or at facilities to which a response to a release or a threatened release under this section is under consideration.

(B) Within 24 months after the enactment of the Superfund Amendments and Reauthorization Act of 1986, the Administrator of ATSDR and the Administrator of EPA shall revise the list prepared under subparagraph (A). Such revision shall include, in order of priority, the addition of 100 or more such hazardous substances. In each of the 3 consecutive 12-month periods that follow, the Administrator of ATSDR and the Administrator of EPA shall revise, in the same manner as provided in the 2 preceding sentences, such list to include not fewer than 25 additional hazardous substances per revision. The Administrator of ATSDR and the Administrator of EPA shall not less often than once every year thereafter revise such list to include additional hazardous substances in accordance with the criteria in subparagraph (A).

(3) Based on all available information, including information maintained under paragraph (1)(B) and data developed and collected on the health effects of hazardous substances under this paragraph, the Administrator of ATSDR shall prepare toxicological profiles of each of the substances listed pursuant to paragraph (2). The toxicological profiles shall be prepared in accordance with guidelines developed by the Administrator of ATSDR and the Administrator of EPA. Such profiles shall include, but not be limited to each of the following:

(A) An examination, summary, and interpretation of available toxicological information and epidemiologic evaluations on a hazardous substance in order to ascertain the levels of significant human exposure for the substance and the associated acute, subacute, and chronic health effects.

(B) A determination of whether adequate information on the health effects of each substance is available or in the process of development to determine levels of exposure which

present a significant risk to human health of acute, subacute, and chronic health effects.

(C) Where appropriate, an identification of toxicological testing needed to identify the types or levels of exposure that may present significant risk of adverse health effects in humans.

Any toxicological profile or revision thereof shall reflect the Administrator of ATSDR's assessment of all relevant toxicological testing which has been peer reviewed. The profiles required to be prepared under this paragraph for those hazardous substances listed under subparagraph (A) of paragraph (2) shall be completed, at a rate of no fewer than 25 per year, within 4 years after the enactment of the Superfund Amendments and Reauthorization Act of 1986. A profile required on a substance listed pursuant to subparagraph (B) of paragraph (2) shall be completed within 3 years after addition to the list. The profiles prepared under this paragraph shall be of those substances highest on the list of priorities under paragraph (2) for which profiles have not previously been prepared. Profiles required under this paragraph shall be revised and republished as necessary, but no less often than once every 3 years. Such profiles shall be provided to the States and made available to other interested parties.

(4) The Administrator of the ATSDR shall provide consultations upon request on health issues relating to exposure to hazardous or toxic substances, on the basis of available information, to the Administrator of EPA, State officials, and local officials. Such consultations to individuals may be provided by States under cooperative agreements established under this Act.

(5)(A) For each hazardous substance listed pursuant to paragraph (2), the Administrator of ATSDR (in consultation with the Administrator of EPA and other agencies and programs of the Public Health Service) shall assess whether adequate information on the health effects of such substance is available. For any such substance for which adequate information is not available (or under development), the Administrator of ATSDR, in cooperation with the Director of the National Toxicology Program, shall assure the initiation of a program of research designed to determine the health effects (and techniques for development of methods to determine such health effects) of such substance. Where feasible, such program shall seek to develop methods to determine the health effects of such substance in combination with other substances with which it is commonly found. Before assuring the initiation of such program, the Administrator of ATSDR shall consider recommendations of the Interagency Testing Committee established under section 4(e) of the Toxic Substances Control Act on the types of research that should be done. Such program shall include, to the extent necessary to supplement existing information, but shall not be limited to—

(i) laboratory and other studies to determine short, intermediate, and long-term health effects;

(ii) laboratory and other studies to determine organ-specific, site-specific, and system-specific acute and chronic toxicity;

(iii) laboratory and other studies to determine the manner in which such substances are metabolized or to otherwise develop an understanding of the biokinetics of such substances; and

(iv) where there is a possibility of obtaining human data, the collection of such information.

(B) In assessing the need to perform laboratory and other studies, as required by subparagraph (A), the Administrator of ATSDR shall consider—

(i) the availability and quality of existing test data concerning the substance on the suspected health effect in question;

(ii) the extent to which testing already in progress will, in a timely fashion, provide data that will be adequate to support the preparation of toxicological profiles as required by paragraph (3); and

(iii) such other scientific and technical factors as the Administrator of ATSDR may determine are necessary for the effective implementation of this subsection.

(C) In the development and implementation of any research program under this paragraph, the Administrator of ATSDR and the Administrator of EPA shall coordinate such research program implemented under this paragraph with the National Toxicology Program and with programs of toxicological testing established under the Toxic Substances Control Act and the Federal Insecticide, Fungicide and Rodenticide Act. The purpose of such coordination shall be to avoid duplication of effort and to assure that the hazardous substances listed pursuant to this subsection are tested thoroughly at the earliest practicable date. Where appropriate, consistent with such purpose, a research program under this paragraph may be carried out using such programs of toxicological testing.

(D) It is the sense of the Congress that the costs of research programs under this paragraph be borne by the manufacturers and processors of the hazardous substance in question, as required in programs of toxicological testing under the Toxic Substances Control Act. Within 1 year after the enactment of the Superfund Amendments and Reauthorization Act of 1986, the Administrator of EPA shall promulgate regulations which provide, where appropriate, for payment of such costs by manufacturers and processors under the Toxic Substances Control Act, and registrants under the Federal Insecticide, Fungicide, and Rodenticide Act, and recovery of such costs from responsible parties under this Act.

(6)(A) The Administrator of ATSDR shall perform a health assessment for each facility on the National Priorities List established under section 105. Such health assessment shall be completed not later than December 10, 1988, for each facility proposed for inclusion on such list prior to the date of the enactment of the Superfund Amendments and Reauthorization Act of 1986 or not later than one year after the date of proposal for inclusion on such list for each facility proposed for inclusion on such list after such date of enactment.

(B) The Administrator of ATSDR may perform health assessments for releases or facilities where individual persons or licensed

physicians provide information that individuals have been exposed to a hazardous substance, for which the probable source of such exposure is a release. In addition to other methods (formal or informal) of providing such information, such individual persons or licensed physicians may submit a petition to the Administrator of ATSDR providing such information and requesting a health assessment. If such a petition is submitted and the Administrator of ATSDR does not initiate a health assessment, the Administrator of ATSDR shall provide a written explanation of why a health assessment is not appropriate.

(C) In determining the priority in which to conduct health assessments under this subsection, the Administrator of ATSDR, in consultation with the Administrator of EPA, shall give priority to those facilities at which there is documented evidence of the release of hazardous substances, at which the potential risk to human health appears highest, and for which in the judgment of the Administrator of ATSDR existing health assessment data are inadequate to assess the potential risk to human health as provided in subparagraph (F). In determining the priorities for conducting health assessments under this subsection, the Administrator of ATSDR shall consider the National Priorities List schedules and the needs of the Environmental Protection Agency and other Federal agencies pursuant to schedules for remedial investigation and feasibility studies.

(D) Where a health assessment is done at a site on the National Priorities List, the Administrator of ATSDR shall complete such assessment promptly and, to the maximum extent practicable, before the completion of the remedial investigation and feasibility study at the facility concerned.

(E) Any State or political subdivision carrying out a health assessment for a facility shall report the results of the assessment to the Administrator of ATSDR and the Administrator of EPA and shall include recommendations with respect to further activities which need to be carried out under this section. The Administrator of ATSDR shall state such recommendation in any report on the results of any assessment carried out directly by the Administrator of ATSDR for such facility and shall issue periodic reports which include the results of all the assessments carried out under this subsection.

(F) For the purposes of this subsection and section 111(c)(4), the term "health assessments" shall include preliminary assessments of the potential risk to human health posed by individual sites and facilities, based on such factors as the nature and extent of contamination, the existence of potential pathways of human exposure (including ground or surface water contamination, air emissions, and food chain contamination), the size and potential susceptibility of the community within the likely pathways of exposure, the comparison of expected human exposure levels to the short-term and long-term health effects associated with identified hazardous substances and any available recommended exposure or tolerance limits for such hazardous substances, and the comparison of existing morbidity and mortality data on diseases that may be associated with the observed levels of exposure. The Administrator of

ATSDR shall use appropriate data, risk assessments, risk evaluations and studies available from the Administrator of EPA.

(G) The purpose of health assessments under this subsection shall be to assist in determining whether actions under paragraph (11) of this subsection should be taken to reduce human exposure to hazardous substances from a facility and whether additional information on human exposure and associated health risks is needed and should be acquired by conducting epidemiological studies under paragraph (7), establishing a registry under paragraph (8), establishing a health surveillance program under paragraph (9), or through other means. In using the results of health assessments for determining additional actions to be taken under this section, the Administrator of ATSDR may consider additional information on the risks to the potentially affected population from all sources of such hazardous substances including known point or nonpoint sources other than those from the facility in question.

(H) At the completion of each health assessment, the Administrator of ATSDR shall provide the Administrator of EPA and each affected State with the results of such assessment, together with any recommendations for further actions under this subsection or otherwise under this Act. In addition, if the health assessment indicates that the release or threatened release concerned may pose a serious threat to human health or the environment, the Administrator of ATSDR shall so notify the Administrator of EPA who shall promptly evaluate such release or threatened release in accordance with the hazard ranking system referred to in section 105(a)(8)(A) to determine whether the site shall be placed on the National Priorities List or, if the site is already on the list, the Administrator of ATSDR may recommend to the Administrator of EPA that the site be accorded a higher priority.

(7)(A) Whenever in the judgment of the Administrator of ATSDR it is appropriate on the basis of the results of a health assessment, the Administrator of ATSDR shall conduct a pilot study of health effects for selected groups of exposed individuals in order to determine the desirability of conducting full scale epidemiological or other health studies of the entire exposed population.

(B) Whenever in the judgment of the Administrator of ATSDR it is appropriate on the basis of the results of such pilot study or other study or health assessment, the Administrator of ATSDR shall conduct such full scale epidemiological or other health studies as may be necessary to determine the health effects on the population exposed to hazardous substances from a release or threatened release. If a significant excess of disease in a population is identified, the letter of transmittal of such study shall include an assessment of other risk factors, other than a release, that may, in the judgment of the peer review group, be associated with such disease, if such risk factors were not taken into account in the design or conduct of the study.

(8) In any case in which the results of a health assessment indicate a potential significant risk to human health, the Administrator of ATSDR shall consider whether the establishment of a registry of exposed persons would contribute to accomplishing the purposes of this subsection, taking into account circumstances bearing on the usefulness of such a registry, including the seriousness or

unique character of identified diseases or the likelihood of population migration from the affected area.

(9) Where the Administrator of ATSDR has determined that there is a significant increased risk of adverse health effects in humans from exposure to hazardous substances based on the results of a health assessment conducted under paragraph (6), an epidemiologic study conducted under paragraph (7), or an exposure registry that has been established under paragraph (8), and the Administrator of ATSDR has determined that such exposure is the result of a release from a facility, the Administrator of ATSDR shall initiate a health surveillance program for such population. This program shall include but not be limited to—

(A) periodic medical testing where appropriate of population subgroups to screen for diseases for which the population or subgroup is at significant increased risk; and

(B) a mechanism to refer for treatment those individuals within such population who are screened positive for such diseases.

(10) Two years after the date of the enactment of the Superfund Amendments and Reauthorization Act of 1986, and every 2 years thereafter, the Administrator of ATSDR shall prepare and submit to the Administrator of EPA and to the Congress a report on the results of the activities of ATSDR regarding—

(A) health assessments and pilot health effects studies conducted;

(B) epidemiologic studies conducted;

(C) hazardous substances which have been listed under paragraph (2), toxicological profiles which have been developed, and toxicologic testing which has been conducted or which is being conducted under this subsection;

(D) registries established under paragraph (8); and

(E) an overall assessment, based on the results of activities conducted by the Administrator of ATSDR of the linkage between human exposure to individual or combinations of hazardous substances due to releases from facilities covered by this Act or the Solid Waste Disposal Act and any increased incidence or prevalence of adverse health effects in humans.

(11) If a health assessment or other study carried out under this subsection contains a finding that the exposure concerned presents a significant risk to human health, the President shall take such steps as may be necessary to reduce such exposure and eliminate or substantially mitigate the significant risk to human health. Such steps may include the use of any authority under this Act, including, but not limited to—

(A) provision of alternative water supplies, and

(B) permanent or temporary relocation of individuals.

In any case in which information is insufficient, in the judgment of the Administrator of ATSDR or the President to determine a significant human exposure level with respect to a hazardous substance, the President may take such steps as may be necessary to reduce the exposure of any person to such hazardous substance to such level as the President deems necessary to protect human health.

(12) In any case which is the subject of a petition, a health assessment or study, or a research program under this subsection, nothing in this subsection shall be construed to delay or otherwise affect or impair the authority of the President, the Administrator of ATSDR or the Administrator of EPA to exercise any authority vested in the President, the Administrator of ATSDR or the Administrator of EPA under any other provision of law (including, but not limited to, the imminent hazard authority of section 7003 of the Solid Waste Disposal Act) or the response and abatement authorities of this Act.

(13) All studies and results of research conducted under this subsection (other than health assessments) shall be reported or adopted only after appropriate peer review. Such peer review shall be completed, to the maximum extent practicable, within a period of 60 days. In the case of research conducted under the National Toxicology Program, such peer review may be conducted by the Board of Scientific Counselors. In the case of other research, such peer review shall be conducted by panels consisting of no less than three nor more than seven members, who shall be disinterested scientific experts selected for such purpose by the Administrator of ATSDR or the Administrator of EPA, as appropriate, on the basis of their reputation for scientific objectivity and the lack of institutional ties with any person involved in the conduct of the study or research under review. Support services for such panels shall be provided by the Agency for Toxic Substances and Disease Registry, or by the Environmental Protection Agency, as appropriate.

(14) In the implementation of this subsection and other health-related authorities of this Act, the Administrator of ATSDR shall assemble, develop as necessary, and distribute to the States, and upon request to medical colleges, physicians, and other health professionals, appropriate educational materials (including short courses) on the medical surveillance, screening, and methods of diagnosis and treatment of injury or disease related to exposure to hazardous substances (giving priority to those listed in paragraph (2)), through such means as the Administrator of ATSDR deems appropriate.

(15) The activities of the Administrator of ATSDR described in this subsection and section 111(c)(4) shall be carried out by the Administrator of ATSDR, either directly or through cooperative agreements with States (or political subdivisions thereof) which the Administrator of ATSDR determines are capable of carrying out such activities. Such activities shall include provision of consultations on health information, the conduct of health assessments, including those required under section 3019(b) of the Solid Waste Disposal Act, health studies, registries, and health surveillance.

(16) The President shall provide adequate personnel for ATSDR, which shall not be fewer than 100 employees. For purposes of determining the number of employees under this subsection, an employee employed by ATSDR on a part-time career employment basis shall be counted as a fraction which is determined by dividing 40 hours into the average number of hours of such employee's regularly scheduled workweek.

(17) In accordance with section 120 (relating to Federal facilities), the Administrator of ATSDR shall have the same authorities

under this section with respect to facilities owned or operated by a department, agency, or instrumentality of the United States as the Administrator of ATSDR has with respect to any nongovernmental entity.

(18) If the Administrator of ATSDR determines that it is appropriate for purposes of this section to treat a pollutant or contaminant as a hazardous substance, such pollutant or contaminant shall be treated as a hazardous substance for such purpose.

(j) ACQUISITION OF PROPERTY.—

(1) AUTHORITY.—The President is authorized to acquire, by purchase, lease, condemnation, donation, or otherwise, any real property or any interest in real property that the President in his discretion determines is needed to conduct a remedial action under this Act. There shall be no cause of action to compel the President to acquire any interest in real property under this Act.

(2) STATE ASSURANCE.—The President may use the authority of paragraph (1) for a remedial action only if, before an interest in real estate is acquired under this subsection, the State in which the interest to be acquired is located assures the President, through a contract or cooperative agreement or otherwise, that the State will accept transfer of the interest following completion of the remedial action.

(3) EXEMPTION.—No Federal, State, or local government agency shall be liable under this Act solely as a result of acquiring an interest in real estate under this subsection.

(k) BROWNFIELDS REVITALIZATION FUNDING.—

(1) DEFINITION OF ELIGIBLE ENTITY.—In this subsection, the term "eligible entity" means—

(A) a general purpose unit of local government;

(B) a land clearance authority or other quasi-governmental entity that operates under the supervision and control of or as an agent of a general purpose unit of local government;

(C) a government entity created by a State legislature;

(D) a regional council or group of general purpose units of local government;

(E) a redevelopment agency that is chartered or otherwise sanctioned by a State;

(F) a State;

(G) an Indian Tribe other than in Alaska; or

(H) an Alaska Native Regional Corporation and an Alaska Native Village Corporation as those terms are defined in the Alaska Native Claims Settlement Act (43 U.S.C. 1601 and following) and the Metlakatla Indian community.

(2) BROWNFIELD SITE CHARACTERIZATION AND ASSESSMENT GRANT PROGRAM.—

(A) ESTABLISHMENT OF PROGRAM.—The Administrator shall establish a program to—

(i) provide grants to inventory, characterize, assess, and conduct planning related to brownfield sites under subparagraph (B); and

(ii) perform targeted site assessments at brownfield sites.

(B) ASSISTANCE FOR SITE CHARACTERIZATION AND ASSESSMENT.—

(i) IN GENERAL.—On approval of an application made by an eligible entity, the Administrator may make a grant to the eligible entity to be used for programs to inventory, characterize, assess, and conduct planning related to one or more brownfield sites.

(ii) SITE CHARACTERIZATION AND ASSESSMENT.—A site characterization and assessment carried out with the use of a grant under clause (i) shall be performed in accordance with section 101(35)(B).

(3) GRANTS AND LOANS FOR BROWNFIELD REMEDIATION.—

(A) GRANTS PROVIDED BY THE PRESIDENT.—Subject to paragraphs (4) and (5), the President shall establish a program to provide grants to—

(i) eligible entities, to be used for capitalization of revolving loan funds; and

(ii) eligible entities or nonprofit organizations, where warranted, as determined by the President based on considerations under subparagraph (C), to be used directly for remediation of one or more brownfield sites owned by the entity or organization that receives the grant and in amounts not to exceed $200,000 for each site to be remediated.

(B) LOANS AND GRANTS PROVIDED BY ELIGIBLE ENTITIES.—An eligible entity that receives a grant under subparagraph (A)(i) shall use the grant funds to provide assistance for the remediation of brownfield sites in the form of—

(i) one or more loans to an eligible entity, a site owner, a site developer, or another person; or

(ii) one or more grants to an eligible entity or other nonprofit organization, where warranted, as determined by the eligible entity that is providing the assistance, based on considerations under subparagraph (C), to remediate sites owned by the eligible entity or nonprofit organization that receives the grant.

(C) CONSIDERATIONS.—In determining whether a grant under subparagraph (A)(ii) or (B)(ii) is warranted, the President or the eligible entity, as the case may be, shall take into consideration—

(i) the extent to which a grant will facilitate the creation of, preservation of, or addition to a park, a greenway, undeveloped property, recreational property, or other property used for nonprofit purposes;

(ii) the extent to which a grant will meet the needs of a community that has an inability to draw on other sources of funding for environmental remediation and subsequent redevelopment of the area in which a brownfield site is located because of the small population or low income of the community;

(iii) the extent to which a grant will facilitate the use or reuse of existing infrastructure;

(iv) the benefit of promoting the long-term availability of funds from a revolving loan fund for brownfield remediation; and

(v) such other similar factors as the Administrator considers appropriate to consider for the purposes of this subsection.

(D) TRANSITION.—Revolving loan funds that have been established before the date of the enactment of this subsection may be used in accordance with this paragraph.

(4) GENERAL PROVISIONS.—

(A) MAXIMUM GRANT AMOUNT.—

(i) BROWNFIELD SITE CHARACTERIZATION AND ASSESSMENT.—

(I) IN GENERAL.—A grant under paragraph (2) may be awarded to an eligible entity on a community-wide or site-by-site basis, and shall not exceed, for any individual brownfield site covered by the grant, $200,000.

(II) WAIVER.—The Administrator may waive the $200,000 limitation under subclause (I) to permit the brownfield site to receive a grant of not to exceed $350,000, based on the anticipated level of contamination, size, or status of ownership of the site.

(ii) BROWNFIELD REMEDIATION.—A grant under paragraph (3)(A)(i) may be awarded to an eligible entity on a community-wide or site-by-site basis, not to exceed $1,000,000 per eligible entity. The Administrator may make an additional grant to an eligible entity described in the previous sentence for any year after the year for which the initial grant is made, taking into consideration—

(I) the number of sites and number of communities that are addressed by the revolving loan fund;

(II) the demand for funding by eligible entities that have not previously received a grant under this subsection;

(III) the demonstrated ability of the eligible entity to use the revolving loan fund to enhance remediation and provide funds on a continuing basis; and

(IV) such other similar factors as the Administrator considers appropriate to carry out this subsection.

(B) PROHIBITION.—

(i) IN GENERAL.—No part of a grant or loan under this subsection may be used for the payment of—

(I) a penalty or fine;

(II) a Federal cost-share requirement;

(III) an administrative cost;

(IV) a response cost at a brownfield site for which the recipient of the grant or loan is potentially liable under section 107; or

(V) a cost of compliance with any Federal law (including a Federal law specified in section 101(39)(B)), excluding the cost of compliance with laws applicable to the cleanup.

(ii) EXCLUSIONS.—For the purposes of clause (i)(III), the term "administrative cost" does not include the cost of—

(I) investigation and identification of the extent of contamination;

(II) design and performance of a response action; or

(III) monitoring of a natural resource.

(C) ASSISTANCE FOR DEVELOPMENT OF LOCAL GOVERNMENT SITE REMEDIATION PROGRAMS.—A local government that receives a grant under this subsection may use not to exceed 10 percent of the grant funds to develop and implement a brownfields program that may include—

(i) monitoring the health of populations exposed to one or more hazardous substances from a brownfield site; and

(ii) monitoring and enforcement of any institutional control used to prevent human exposure to any hazardous substance from a brownfield site.

(D) INSURANCE.—A recipient of a grant or loan awarded under paragraph (2) or (3) that performs a characterization, assessment, or remediation of a brownfield site may use a portion of the grant or loan to purchase insurance for the characterization, assessment, or remediation of that site.

(5) GRANT APPLICATIONS.—

(A) SUBMISSION.—

(i) IN GENERAL.—

(I) APPLICATION.—An eligible entity may submit to the Administrator, through a regional office of the Environmental Protection Agency and in such form as the Administrator may require, an application for a grant under this subsection for one or more brownfield sites (including information on the criteria used by the Administrator to rank applications under subparagraph (C), to the extent that the information is available).

(II) NCP REQUIREMENTS.—The Administrator may include in any requirement for submission of an application under subclause (I) a requirement of the National Contingency Plan only to the extent that the requirement is relevant and appropriate to the program under this subsection.

(ii) COORDINATION.—The Administrator shall coordinate with other Federal agencies to assist in making eligible entities aware of other available Federal resources.

(iii) GUIDANCE.—The Administrator shall publish guidance to assist eligible entities in applying for grants under this subsection.

(B) APPROVAL.—The Administrator shall—

(i) at least annually, complete a review of applications for grants that are received from eligible entities under this subsection; and

(ii) award grants under this subsection to eligible entities that the Administrator determines have the highest rankings under the ranking criteria established under subparagraph (C).

(C) RANKING CRITERIA.—The Administrator shall establish a system for ranking grant applications received under this paragraph that includes the following criteria:

(i) The extent to which a grant will stimulate the availability of other funds for environmental assessment or remediation, and subsequent reuse, of an area in which one or more brownfield sites are located.

(ii) The potential of the proposed project or the development plan for an area in which one or more brownfield sites are located to stimulate economic development of the area on completion of the cleanup.

(iii) The extent to which a grant would address or facilitate the identification and reduction of threats to human health and the environment, including threats in areas in which there is a greater-than-normal incidence of diseases or conditions (including cancer, asthma, or birth defects) that may be associated with exposure to hazardous substances, pollutants, or contaminants.

(iv) The extent to which a grant would facilitate the use or reuse of existing infrastructure.

(v) The extent to which a grant would facilitate the creation of, preservation of, or addition to a park, a greenway, undeveloped property, recreational property, or other property used for nonprofit purposes.

(vi) The extent to which a grant would meet the needs of a community that has an inability to draw on other sources of funding for environmental remediation and subsequent redevelopment of the area in which a brownfield site is located because of the small population or low income of the community.

(vii) The extent to which the applicant is eligible for funding from other sources.

(viii) The extent to which a grant will further the fair distribution of funding between urban and nonurban areas.

(ix) The extent to which the grant provides for involvement of the local community in the process of making decisions relating to cleanup and future use of a brownfield site.

(x) The extent to which a grant would address or facilitate the identification and reduction of threats to the health or welfare of children, pregnant women, mi-

nority or low-income communities, or other sensitive populations.

(6) IMPLEMENTATION OF BROWNFIELDS PROGRAMS.—

(A) ESTABLISHMENT OF PROGRAM.—The Administrator may provide, or fund eligible entities or nonprofit organizations to provide, training, research, and technical assistance to individuals and organizations, as appropriate, to facilitate the inventory of brownfield sites, site assessments, remediation of brownfield sites, community involvement, or site preparation.

(B) FUNDING RESTRICTIONS.—The total Federal funds to be expended by the Administrator under this paragraph shall not exceed 15 percent of the total amount appropriated to carry out this subsection in any fiscal year.

(7) AUDITS.—

(A) IN GENERAL.—The Inspector General of the Environmental Protection Agency shall conduct such reviews or audits of grants and loans under this subsection as the Inspector General considers necessary to carry out this subsection.

(B) PROCEDURE.—An audit under this subparagraph shall be conducted in accordance with the auditing procedures of the General Accounting Office, including chapter 75 of title 31, United States Code.

(C) VIOLATIONS.—If the Administrator determines that a person that receives a grant or loan under this subsection has violated or is in violation of a condition of the grant, loan, or applicable Federal law, the Administrator may—

(i) terminate the grant or loan;

(ii) require the person to repay any funds received; and

(iii) seek any other legal remedies available to the Administrator.

(D) REPORT TO CONGRESS.—Not later than 3 years after the date of the enactment of this subsection, the Inspector General of the Environmental Protection Agency shall submit to Congress a report that provides a description of the management of the program (including a description of the allocation of funds under this subsection).

(8) LEVERAGING.—An eligible entity that receives a grant under this subsection may use the grant funds for a portion of a project at a brownfield site for which funding is received from other sources if the grant funds are used only for the purposes described in paragraph (2) or (3).

(9) AGREEMENTS.—Each grant or loan made under this subsection shall—

(A) include a requirement of the National Contingency Plan only to the extent that the requirement is relevant and appropriate to the program under this subsection, as determined by the Administrator; and

(B) be subject to an agreement that—

(i) requires the recipient to—

(I) comply with all applicable Federal and State laws; and

(II) ensure that the cleanup protects human health and the environment;

(ii) requires that the recipient use the grant or loan exclusively for purposes specified in paragraph (2) or (3), as applicable;

(iii) in the case of an application by an eligible entity under paragraph (3)(A), requires the eligible entity to pay a matching share (which may be in the form of a contribution of labor, material, or services) of at least 20 percent, from non-Federal sources of funding, unless the Administrator determines that the matching share would place an undue hardship on the eligible entity; and

(iv) contains such other terms and conditions as the Administrator determines to be necessary to carry out this subsection.

(10) FACILITY OTHER THAN BROWNFIELD SITE.—The fact that a facility may not be a brownfield site within the meaning of section 101(39)(A) has no effect on the eligibility of the facility for assistance under any other provision of Federal law.

(11) EFFECT ON FEDERAL LAWS.—Nothing in this subsection affects any liability or response authority under any Federal law, including—

(A) this Act (including the last sentence of section 101(14));

(B) the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.);

(C) the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.);

(D) the Toxic Substances Control Act (15 U.S.C. 2601 et seq.); and

(E) the Safe Drinking Water Act (42 U.S.C. 300f et seq.).

(12) FUNDING.—

(A) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated to carry out this subsection $200,000,000 for each of fiscal years 2002 through 2006.

(B) USE OF CERTAIN FUNDS.—Of the amount made available under subparagraph (A), $50,000,000, or, if the amount made available is less than $200,000,000, 25 percent of the amount made available, shall be used for site characterization, assessment, and remediation of facilities described in section 101(39)(D)(ii)(II).

[42 U.S.C. 9604]

NATIONAL CONTINGENCY PLAN

SEC. 105. (a) REVISION AND REPUBLICATION.—Within one hundred and eighty days after the enactment of this Act, the President shall, after notice and opportunity for public comments, revise and republish the national contingency plan for the removal of oil and hazardous substances, originally prepared and published pursuant

to section 311 of the Federal Water Pollution Control Act, to reflect and effectuate the responsibilities and powers created by this Act, in addition to those matters specified in section 311(c)(2).[1] Such revision shall include a section of the plan to be known as the national hazardous substance response plan which shall establish procedures and standards for responding to releases of hazardous substances, pollutants, and contaminants, which shall include at a minimum:

(1) methods for discovering and investigating facilities at which hazardous substances have been disposed of or otherwise come to be located;

(2) methods for evaluating, including analyses of relative cost, and remedying any releases or threats of releases from facilities which pose substantial danger to the public health or the environment;

(3) methods and criteria for determining the appropriate extent of removal, remedy, and other measures authorized by this Act;

(4) appropriate roles and responsibilities for the Federal, State, and local governments and for interstate and nongovernmental entities in effectuating the plan;

(5) provision for identification, procurement, maintenance, and storage of response equipment and supplies;

(6) a method for and assignment of responsibility for reporting the existence of such facilities which may be located on federally owned or controlled properties and any releases of hazardous substances from such facilities;

(7) means of assuring that remedial action measures are cost-effective over the period of potential exposure to the hazardous substances or contaminated materials;

(8)(A) criteria for determining priorities among releases or threatened releases throughout the United States for the purpose of taking remedial action and, to the extent practicable taking into account the potential urgency of such action, for the purpose of taking removal action. Criteria and priorities under this paragraph shall be based upon relative risk or danger to public health or welfare or the environment, in the judgment of the President, taking into account to the extent possible the population at risk, the hazard potential of the hazardous substances at such facilities, the potential for contamination of drinking water supplies, the potential for direct human contact, the potential for destruction of sensitive ecosystems, the damage to natural resources which may affect the human food chain and which is associated with any release or threatened release, the contamination or potential contamination of the ambient air which is associated with the release or threatened release, State preparedness to assume State costs and responsibilities, and other appropriate factors;

(B) based upon the criteria set forth in subparagraph (A) of this paragraph, the President shall list as part of the plan national priorities among the known releases or threatened re-

[1] Probably should refer to section 311(d)(2), pursuant to general amendments made to such section by section 4201(a) of Public Law 101–380.

leases throughout the United States and shall revise the list no less often than annually. Within one year after the date of enactment of this Act, and annually thereafter, each State shall establish and submit for consideration by the President priorities for remedial action among known releases and potential releases in that State based upon the criteria set forth in subparagraph (A) of this paragraph. In assembling or revising the national list, the President shall consider any priorities established by the States. To the extent practicable, the highest priority facilities shall be designated individually and shall be referred to as the "top priority among known response targets", and, to the extent practicable, shall include among the one hundred highest priority facilities one such facility from each State which shall be the facility designated by the State as presenting the greatest danger to public health or welfare or the environment among the known facilities in such State. A State shall be allowed to designate its highest priority facility only once. Other priority facilities or incidents may be listed singly or grouped for response priority purposes;

(9) specified roles for private organizations and entities in preparation for response and in responding to releases of hazardous substances, including identification of appropriate qualifications and capacity therefor and including consideration of minority firms in accordance with subsection (f); and

(10) standards and testing procedures by which alternative or innovative treatment technologies can be determined to be appropriate for utilization in response actions authorized by this Act.

The plan shall specify procedures, techniques, materials, equipment, and methods to be employed in identifying, removing, or remedying releases of hazardous substances comparable to those required under section 311(c)(2)[1] (F) and (G) and (j)(1) of the Federal Water Pollution Control Act. Following publication of the revised national contingency plan, the response to and actions to minimize damage from hazardous substances releases shall, to the greatest extent possible, be in accordance with the provisions of the plan. The President may, from time to time, revise and republish the national contingency plan.

(b) REVISION OF PLAN.—Not later than 18 months after the enactment of the Superfund Amendments and Reauthorization Act of 1986, the President shall revise the National Contingency Plan to reflect the requirements of such amendments. The portion of such Plan known as "the National Hazardous Substance Response Plan" shall be revised to provide procedures and standards for remedial actions undertaken pursuant to this Act which are consistent with amendments made by the Superfund Amendments and Reauthorization Act of 1986 relating to the selection of remedial action.

(c) HAZARD RANKING SYSTEM.—

(1) REVISION.—Not later than 18 months after the enactment of the Superfund Amendments and Reauthorization Act of 1986 and after publication of notice and opportunity for sub-

[1] Probably should refer to section 311(d)(2), pursuant to general amendments made to such section by section 4201(a) of Public Law 101–380.

mission of comments in accordance with section 553 of title 5, United States Code, the President shall by rule promulgate amendments to the hazard ranking system in effect on September 1, 1984. Such amendments shall assure, to the maximum extent feasible, that the hazard ranking system accurately assesses the relative degree of risk to human health and the environment posed by sites and facilities subject to review. The President shall establish an effective date for the amended hazard ranking system which is not later than 24 months after enactment of the Superfund Amendments and Reauthorization Act of 1986. Such amended hazard ranking system shall be applied to any site or facility to be newly listed on the National Priorities List after the effective date established by the President. Until such effective date of the regulations, the hazard ranking system in effect on September 1, 1984, shall continue in full force and effect.

(2) HEALTH ASSESSMENT OF WATER CONTAMINATION RISKS.—In carrying out this subsection, the President shall ensure that the human health risks associated with the contamination or potential contamination (either directly or as a result of the runoff of any hazardous substance or pollutant or contaminant from sites or facilities) of surface water are appropriately assessed where such surface water is, or can be, used for recreation or potable water consumption. In making the assessment required pursuant to the preceding sentence, the President shall take into account the potential migration of any hazardous substance or pollutant or contaminant through such surface water to downstream sources of drinking water.

(3) REEVALUATION NOT REQUIRED.—The President shall not be required to reevaluate, after the date of the enactment of the Superfund Amendments and Reauthorization Act of 1986, the hazard ranking of any facility which was evaluated in accordance with the criteria under this section before the effective date of the amendments to the hazard ranking system under this subsection and which was assigned a national priority under the National Contingency Plan.

(4) NEW INFORMATION.—Nothing in paragraph (3) shall preclude the President from taking new information into account in undertaking response actions under this Act.

(d) PETITION FOR ASSESSMENT OF RELEASE.—Any person who is, or may be, affected by a release or threatened release of a hazardous substance or pollutant or contaminant, may petition the President to conduct a preliminary assessment of the hazards to public health and the environment which are associated with such release or threatened release. If the President has not previously conducted a preliminary assessment of such release, the President shall, within 12 months after the receipt of any such petition, complete such assessment or provide an explanation of why the assessment is not appropriate. If the preliminary assessment indicates that the release or threatened release concerned may pose a threat to human health or the environment, the President shall promptly evaluate such release or threatened release in accordance with the hazard ranking system referred to in paragraph (8)(A) of subsection

(a) to determine the national priority of such release or threatened release.

(e) RELEASES FROM EARLIER SITES.—Whenever there has been, after January 1, 1985, a significant release of hazardous substances or pollutants or contaminants from a site which is listed by the President as a "Site Cleaned Up To Date" on the National Priorities List (revised edition, December 1984) the site shall be restored to the National Priorities List, without application of the hazard ranking system.

(f) MINORITY CONTRACTORS.—In awarding contracts under this Act, the President shall consider the availability of qualified minority firms. The President shall describe, as part of any annual report submitted to the Congress under this Act, the participation of minority firms in contracts carried out under this Act. Such report shall contain a brief description of the contracts which have been awarded to minority firms under this Act and of the efforts made by the President to encourage the participation of such firms in programs carried out under this Act.

(g) SPECIAL STUDY WASTES.—

(1) APPLICATION.—This subsection applies to facilities—

(A) which as of the date of enactment of the Superfund Amendments and Reauthorization Act of 1986 were not included on, or proposed for inclusion on, the National Priorities List; and

(B) at which special study wastes described in paragraph (2), (3)(A)(ii) or (3)(A)(iii) of section 3001(b) of the Solid Waste Disposal Act are present in significant quantities, including any such facility from which there has been a release of a special study waste.

(2) CONSIDERATIONS IN ADDING FACILITIES TO NPL.—Pending revision of the hazard ranking system under subsection (c), the President shall consider each of the following factors in adding facilities covered by this section to the National Priorities List:

(A) The extent to which hazard ranking system score for the facility is affected by the presence of any special study waste at, or any release from, such facility.

(B) Available information as to the quantity, toxicity, and concentration of hazardous substances that are constituents of any special study waste at, or released from such facility, the extent of or potential for release of such hazardous constituents, the exposure or potential exposure to human population and the environment, and the degree of hazard to human health or the environment posed by the release of such hazardous constituents at such facility. This subparagraph refers only to available information on actual concentrations of hazardous substances and not on the total quantity of special study waste at such facility.

(3) SAVINGS PROVISIONS.—Nothing in this subsection shall be construed to limit the authority of the President to remove any facility which as of the date of enactment of the Superfund Amendments and Reauthorization Act of 1986 is included on the National Priorities List from such List, or not to list any

facility which as of such date is proposed for inclusion on such list.

(4) INFORMATION GATHERING AND ANALYSIS.—Nothing in this Act shall be construed to preclude the expenditure of monies from the Fund for gathering and analysis of information which will enable the President to consider the specific factors required by paragraph (2).

(h) NPL DEFERRAL.—

(1) DEFERRAL TO STATE VOLUNTARY CLEANUPS.—At the request of a State and subject to paragraphs (2) and (3), the President generally shall defer final listing of an eligible response site on the National Priorities List if the President determines that—

(A) the State, or another party under an agreement with or order from the State, is conducting a response action at the eligible response site—

(i) in compliance with a State program that specifically governs response actions for the protection of public health and the environment; and

(ii) that will provide long-term protection of human health and the environment; or

(B) the State is actively pursuing an agreement to perform a response action described in subparagraph (A) at the site with a person that the State has reason to believe is capable of conducting a response action that meets the requirements of subparagraph (A).

(2) PROGRESS TOWARD CLEANUP.—If, after the last day of the 1-year period beginning on the date on which the President proposes to list an eligible response site on the National Priorities List, the President determines that the State or other party is not making reasonable progress toward completing a response action at the eligible response site, the President may list the eligible response site on the National Priorities List.

(3) CLEANUP AGREEMENTS.—With respect to an eligible response site under paragraph (1)(B), if, after the last day of the 1-year period beginning on the date on which the President proposes to list the eligible response site on the National Priorities List, an agreement described in paragraph (1)(B) has not been reached, the President may defer the listing of the eligible response site on the National Priorities List for an additional period of not to exceed 180 days if the President determines deferring the listing would be appropriate based on—

(A) the complexity of the site;

(B) substantial progress made in negotiations; and

(C) other appropriate factors, as determined by the President.

(4) EXCEPTIONS.—The President may decline to defer, or elect to discontinue a deferral of, a listing of an eligible response site on the National Priorities List if the President determines that—

(A) deferral would not be appropriate because the State, as an owner or operator or a significant contributor of hazardous substances to the facility, is a potentially responsible party;

(B) the criteria under the National Contingency Plan for issuance of a health advisory have been met; or

(C) the conditions in paragraphs (1) through (3), as applicable, are no longer being met.

[42 U.S.C. 9605]

ABATEMENT ACTION

SEC. 106. (a) In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

(b)(1) Any person who, without sufficient cause, willfully violates, or fails or refuses to comply with, any order of the President under subsection (a) may, in an action brought in the appropriate United States district court to enforce such order, be fined not more than $25,000 for each day in which such violation occurs or such failure to comply continues.

(2)(A) Any person who receives and complies with the terms of any order issued under subsection (a) may, within 60 days after completion of the required action, petition the President for reimbursement from the Fund for the reasonable costs of such action, plus interest. Any interest payable under this paragraph shall accrue on the amounts expended from the date of expenditure at the same rate as specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of the Internal Revenue Code of 1954.

(B) If the President refuses to grant all or part of a petition made under this paragraph, the petitioner may within 30 days of receipt of such refusal file an action against the President in the appropriate United States district court seeking reimbursement from the Fund.

(C) Except as provided in subparagraph (D), to obtain reimbursement, the petitioner shall establish by a preponderance of the evidence that it is not liable for response costs under section 107(a) and that costs for which it seeks reimbursement are reasonable in light of the action required by the relevant order.

(D) A petitioner who is liable for response costs under section 107(a) may also recover its reasonable costs of response to the extent that it can demonstrate, on the administrative record, that the President's decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with law. Reimbursement awarded under this subparagraph shall include all reasonable response costs incurred by the petitioner pur-

suant to the portions of the order found to be arbitrary and capricious or otherwise not in accordance with law.

(E) Reimbursement awarded by a court under subparagraph (C) or (D) may include appropriate costs, fees, and other expenses in accordance with subsections (a) and (d) of section 2412 of title 28 of the United States Code.

(c) Within one hundred and eighty days after enactment of this Act, the Administrator of the Environmental Protection Agency shall, after consultation with the Attorney General, establish and publish guidelines for using the imminent hazard, enforcement, and emergency response authorities of this section and other existing statutes administered by the Administrator of the Environmental Protection Agency to effectuate the responsibilities and powers created by this Act. Such guidelines shall to the extent practicable be consistent with the national hazardous substance response plan, and shall include, at a minimum, the assignment of responsibility for coordinating response actions with the issuance of administrative orders, enforcement of standards and permits, the gathering of information, and other imminent hazard and emergency powers authorized by (1) sections 311(c)(2),[1] 308, 309, and 504(a) of the Federal Water Pollution Control Act, (2) sections 3007, 3008, 3013, and 7003 of the Solid Waste Disposal Act, (3) sections 1445 and 1431 of the Safe Drinking Water Act, (4) sections 113, 114, and 303 of the Clean Air Act, and (5) section 7 of the Toxic Substances Control Act.

[42 U.S.C. 9606]

LIABILITY

SEC. 107. (a) Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance,[2] shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

[1] See footnote 1 under section 105(a).
[2] Matter after this point appears to modify paragraphs (1) through (4).

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

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

(D) the costs of any health assessment or health effects study carried out under section 104(i).

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of the Internal Revenue Code of 1954. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences. [1]

(b) 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), if the defendant establishes by a preponderance of the evidence that (a) [2] he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) [3] he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

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[1] Section 209 of the Water Resources Development Act of 1996 (Public Law 104–303; 110 Stat. 3681) provides:

SEC. 209. [42 U.S.C. 9607 note] RECOVERY OF COSTS.

Amounts recovered under section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9607) for any response action taken by the Secretary in support of the civil works program of the Department of the Army and any other amounts recovered by the Secretary from a contractor, insurer, surety, or other person to reimburse the Department of the Army for any expenditure for environmental response activities in support of the Army civil works program shall be credited to the appropriate trust fund account from which the cost of such response action has been paid or will be charged.

[2] So in law. Probably should be "(A)".

[3] So in law. Probably should be "(B)".

(c)(1) Except as provided in paragraph (2) of this subsection, the liability under this section of an owner or operator or other responsible person for each release of a hazardous substance or incident involving release of a hazardous substance shall not exceed—

(A) for any vessel, other than an incineration vessel, which carries any hazardous substance as cargo or residue, $300 per gross ton, or $5,000,000, whichever is greater;

(B) for any other vessel, other than an incineration vessel, $300 per gross ton, or $500,000, whichever is greater;

(C) for any motor vehicle, aircraft, hazardous liquid pipeline facility (as defined in section 60101(a) of title 49, United States Code), or rolling stock, $50,000,000 or such lesser amount as the President shall establish by regulation, but in no event less than $5,000,000 (or, for releases of hazardous substances as defined in section 101(14)(A) of this title into the navigable waters, $8,000,000). Such regulations shall take into account the size, type, location, storage, and handling capacity and other matters relating to the likelihood of release in each such class and to the economic impact of such limits on each such class; or

(D) for any incineration vessel or any facility other than those specified in subparagraph (C) of this paragraph, the total of all costs of response plus $50,000,000 for any damages under this title.

(2) Notwithstanding the limitations in paragraph (1) of this subsection, the liability of an owner or operator or other responsible person under this section shall be the full and total costs of response and damages, if (A)(i) the release or threat of release of a hazardous substance was the result of willful misconduct or willful negligence within the privity or knowledge of such person, or (ii) the primary cause of the release was a violation (within the privity or knowledge of such person) of applicable safety, construction, or operating standards or regulations; or (B) such person fails or refuses to provide all reasonable cooperation and assistance requested by a responsible public official in connection with response activities under the national contingency plan with respect to regulated carriers subject to the provisions of title 49 of the United States Code or vessels subject to the provisions of title 33 or 46 of the United States Code, subparagraph (A)(ii) of this paragraph shall be deemed to refer to Federal standards or regulations.

(3) If any person who is liable for a release or threat of release of a hazardous substance fails without sufficient cause to properly provide removal or remedial action upon order of the President pursuant to section 104 or 106 of this Act, such person may be liable to the United States for punitive damages in an amount at least equal to, and not more than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action. The President is authorized to commence a civil action against any such person to recover the punitive damages, which shall be in addition to any costs recovered from such person pursuant to section 112(c) of this Act. Any moneys received by the United States pursuant to this subsection shall be deposited in the Fund.

(d) RENDERING CARE OR ADVICE.—

(1) IN GENERAL.—Except as provided in paragraph (2), no person shall be liable under this title for costs or damages as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with the National Contingency Plan ("NCP") or at the direction of an onscene coordinator appointed under such plan, with respect to an incident creating a danger to public health or welfare or the environment as a result of any releases of a hazardous substance or the threat thereof. This paragraph shall not preclude liability for costs or damages as the result of negligence on the part of such person.

(2) STATE AND LOCAL GOVERNMENTS.—No State or local government shall be liable under this title for costs or damages as a result of actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person. This paragraph shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the State or local government. For the purpose of the preceding sentence, reckless, willful, or wanton misconduct shall constitute gross negligence.

(3) SAVINGS PROVISION.—This subsection shall not alter the liability of any person covered by the provisions of paragraph (1), (2), (3), or (4) of subsection (a) of this section with respect to the release or threatened release concerned.

(e)(1) No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

(2) Nothing in this title, including the provisions of paragraph (1) of this subsection, shall bar a cause of action that an owner or operator or any other person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person.

(f)(1) NATURAL RESOURCES LIABILITY.—In the case of an injury to, destruction of, or loss of natural resources under subparagraph (C) of subsection (a) liability shall be to the United States Government and to any State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State and to any Indian tribe for natural resources belonging to, managed by, controlled by, or appertaining to such tribe, or held in trust for the benefit of such tribe, or belonging to a member of such tribe if such resources are subject to a trust restriction on alienation: *Provided, however,* That no liability to the United States or State or Indian tribe shall be imposed under subparagraph (C) of subsection (a), where the party sought to be charged has demonstrated that the damages to natural resources complained of were specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement, or other comparable environment analysis, and the decision to grant a permit or license authorizes such commitment

of natural resources, and the facility or project was otherwise operating within the terms of its permit or license, so long as, in the case of damages to an Indian tribe occurring pursuant to a Federal permit or license, the issuance of that permit or license was not inconsistent with the fiduciary duty of the United States with respect to such Indian tribe. The President, or the authorized representative of any State, shall act on behalf of the public as trustee of such natural resources to recover for such damages. Sums recovered by the United States Government as trustee under this subsection shall be retained by the trustee, without further appropriation, for use only to restore, replace, or acquire the equivalent of such natural resources. Sums recovered by a State [1] as trustee under this subsection shall be available for use only to restore, replace, or acquire the equivalent of such natural resources by the State. [1] The measure of damages in any action under subparagraph (C) of subsection (a) shall not be limited by the sums which can be used to restore or replace such resources. There shall be no double recovery under this Act for natural resource damages, including the costs of damage assessment or restoration, rehabilitation, or acquisition for the same release and natural resource. There shall be no recovery under the authority of subparagraph (C) of subsection (a) where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before the enactment of this Act.

(2) DESIGNATION OF FEDERAL AND STATE OFFICIALS.— [2]

(A) FEDERAL.—The President shall designate in the National Contingency Plan published under section 105 of this Act the Federal officials who shall act on behalf of the public as trustees for natural resources under this Act and section 311 of the Federal Water Pollution Control Act. Such officials shall assess damages for injury to, destruction of, or loss of natural resources for purposes of this Act and such section 311 for those resources under their trusteeship and may, upon request of and reimbursement from a State and at the Federal officials' discretion, assess damages for those natural resources under the State's trusteeship.

(B) STATE.—The Governor of each State shall designate State officials who may act on behalf of the public as trustees for natural resources under this Act and section 311 of the Federal Water Pollution Control Act and shall notify the President of such designations. Such State officials shall assess damages to natural resources for the purposes of this Act and such section 311 for those natural resources under their trusteeship.

(C) REBUTTABLE PRESUMPTION.—Any determination or assessment of damages to natural resources for the purposes of this Act and section 311 of the Federal Water Pol-

[1] The words "or the Indian tribe" were inserted after the words "State Government" in the previous version of this sentence, but the same law also removed the sentence containing those words and replaced it with this new sentence which does not contain the words "State Government". See sections 107(d)(2) and 207(c)(2)(D) of the Superfund Amendments and Reauthorization Act of 1986.

[2] So in law (Pub. Law. 99–499, 100 Stat. 1629). Margin is incorrect.

lution Control Act made by a Federal or State trustee in accordance with the regulations promulgated under section 301(c) of this Act shall have the force and effect of a rebuttable presumption on behalf of the trustee in any administrative or judicial proceeding under this Act or section 311 of the Federal Water Pollution Control Act.

(g) FEDERAL AGENCIES.—For provisions relating to Federal agencies, see section 120 of this Act.

(h) The owner or operator of a vessel shall be liable in accordance with this section, under maritime tort law, and as provided under section 114 of this Act notwithstanding any provision of the Act of March 3, 1851 (46 U.S.C. 183ff) or the absence of any physical damage to the proprietary interest of the claimant.

(i) No person (including the United States or any State) or Indian tribe may recover under the authority of this section for any response costs or damages resulting from the application of a pesticide product registered under the Federal Insecticide, Fungicide, and Rodenticide Act. Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action of such hazardous substance.

(j) Recovery by any person (including the United States or any State or Indian tribe) for response costs or damages resulting from a federally permitted release shall be pursuant to existing law in lieu of this section. Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action of such hazardous substance. In addition, costs of response incurred by the Federal Government in connection with a discharge specified in section 101(10) (B) or (C) shall be recoverable in an action brought under section 309(b) of the Clean Water Act.

(k)(1) The liability established by this section or any other law for the owner or operator of a hazardous waste disposal facility which has received a permit under subtitle C of the Solid Waste Disposal Act, shall be transferred to and assumed by the Post-closure Liability Fund established by section 232 [1] of this Act when—

(A) such facility and the owner and operator thereof has complied with the requirements of subtitle C of the Solid Waste Disposal Act and regulations issued thereunder, which may affect the performance of such facility after closure; and

(B) such facility has been closed in accordance with such regulations and the conditions of such permit, and such facility and the surrounding area have been monitored as required by such regulations and permit conditions for a period not to exceed five years after closure to demonstrate that there is no substantial likelihood that any migration offsite or release

[1] Section 232 was repealed by section 514(b) of Public Law 99–499.

from confinement of any hazardous substance or other risk to public health or welfare will occur.

(2) Such transfer of liability shall be effective ninety days after the owner or operator of such facility notifies the Administrator of the Environmental Protection Agency (and the State where it has an authorized program under section 3006(b) of the Solid Waste Disposal Act) that the conditions imposed by this subsection have been satisfied. If within such ninety-day period the Administrator of the Environmental Protection Agency or such State determines that any such facility has not complied with all the conditions imposed by this subsection or that insufficient information has been provided to demonstrate such compliance, the Administrator or such State shall so notify the owner and operator of such facility and the administrator of the Fund established by section 232 [1] of this Act, and the owner and operator of such facility shall continue to be liable with respect to such facility under this section and other law until such time as the Administrator and such State determines that such facility has complied with all conditions imposed by this subsection. A determination by the Administrator or such State that a facility has not complied with all conditions imposed by this subsection or that insufficient information has been supplied to demonstrate compliance, shall be a final administrative action for purposes of judicial review. A request for additional information shall state in specific terms the data required.

(3) In addition to the assumption of liability of owners and operators under paragraph (1) of this subsection, the Post-closure Liability Fund established by section 232 [1] of this Act may be used to pay costs of monitoring and care and maintenance of a site incurred by other persons after the period of monitoring required by regulations under subtitle C of the Solid Waste Disposal Act for hazardous waste disposal facilities meeting the conditions of paragraph (1) of this subsection.

(4)(A) Not later than one year after the date of enactment of this Act, the Secretary of the Treasury shall conduct a study and shall submit a report thereon to the Congress on the feasibility of establishing or qualifying an optional system of private insurance for postclosure financial responsibility for hazardous waste disposal facilities to which this subsection applies. Such study shall include a specification of adequate and realistic minimum standards to assure that any such privately placed insurance will carry out the purposes of this subsection in a reliable, enforceable, and practical manner. Such a study shall include an examination of the public and private incentives, programs, and actions necessary to make privately placed insurance a practical and effective option to the financing system for the Post-closure Liability Fund provided in title II of this Act.

(B) Not later than eighteen months after the date of enactment of this Act and after a public hearing, the President shall by rule determine whether or not it is feasible to establish or qualify an optional system of private insurance for postclosure financial responsibility for hazardous waste disposal facilities to which this subsection applies. If the President determines the establishment

[1] See footnote 1 on previous page.

or qualification of such a system would be infeasible, he shall promptly publish an explanation of the reasons for such a determination. If the President determines the establishment or qualification of such a system would be feasible, he shall promptly publish notice of such determination. Not later than six months after an affirmative determination under the preceding sentence and after a public hearing, the President shall by rule promulgate adequate and realistic minimum standards which must be met by any such privately placed insurance, taking into account the purposes of this Act and this subsection. Such rules shall also specify reasonably expeditious procedures by which privately placed insurance plans can qualify as meeting such minimum standards.

(C) In the event any privately placed insurance plan qualifies under subparagraph (B), any person enrolled in, and complying with the terms of, such plan shall be excluded from the provisions of paragraphs (1), (2), and (3) of this subsection and exempt from the requirements to pay any tax or fee to the Post-closure Liability Fund under title II of this Act.

(D) The President may issue such rules and take such other actions as are necessary to effectuate the purposes of this paragraph.

(5) SUSPENSION OF LIABILITY TRANSFER.—Notwithstanding paragraphs (1), (2), (3), and (4) of this subsection and subsection (j) of section 111 of this Act, no liability shall be transferred to or assumed by the Post-Closure Liability Trust Fund [1] established by section 232 [2] of this Act prior to completion of the study required under paragraph (6) of this subsection, transmission of a report of such study to both Houses of Congress, and authorization of such a transfer or assumption by Act of Congress following receipt of such study and report.

(6) STUDY OF OPTIONS FOR POST-CLOSURE PROGRAM.—

(A) STUDY.—The Comptroller General shall conduct a study of options for a program for the management of the liabilities associated with hazardous waste treatment, storage, and disposal sites after their closure which complements the policies set forth in the Hazardous and Solid Waste Amendments of 1984 and assures the protection of human health and the environment.

(B) PROGRAM ELEMENTS.—The program referred to in subparagraph (A) shall be designed to assure each of the following:

(i) Incentives are created and maintained for the safe management and disposal of hazardous wastes so as to assure protection of human health and the environment.

(ii) Members of the public will have reasonable confidence that hazardous wastes will be managed and disposed of safely and that resources will be available to address any problems that may arise and to cover costs of long-term monitoring, care, and maintenance of such sites.

(iii) Persons who are or seek to become owners and operators of hazardous waste disposal facilities will be able to manage their potential future liabilities and to attract the investment capital necessary to build, operate, and

[1] So in law. Probably should be "Post-closure Liability Trust Fund".
[2] Section 232 was repealed by section 514(b) of Public Law 99–499.

close such facilities in a manner which assures protection of human health and the environment.

(C) ASSESSMENTS.—The study under this paragraph shall include assessments of treatment, storage, and disposal facilities which have been or are likely to be issued a permit under section 3005 of the Solid Waste Disposal Act and the likelihood of future insolvency on the part of owners and operators of such facilities. Separate assessments shall be made for different classes of facilities and for different classes of land disposal facilities and shall include but not be limited to—

(i) the current and future financial capabilities of facility owners and operators;

(ii) the current and future costs associated with facilities, including the costs of routine monitoring and maintenance, compliance monitoring, corrective action, natural resource damages, and liability for damages to third parties; and

(iii) the availability of mechanisms by which owners and operators of such facilities can assure that current and future costs, including post-closure costs, will be financed.

(D) PROCEDURES.—In carrying out the responsibilities of this paragraph, the Comptroller General shall consult with the Administrator, the Secretary of Commerce, the Secretary of the Treasury, and the heads of other appropriate Federal agencies.

(E) CONSIDERATION OF OPTIONS.—In conducting the study under this paragraph, the Comptroller General shall consider various mechanisms and combinations of mechanisms to complement the policies set forth in the Hazardous and Solid Waste Amendments of 1984 to serve the purposes set forth in subparagraph (B) and to assure that the current and future costs associated with hazardous waste facilities, including post-closure costs, will be adequately financed and, to the greatest extent possible, borne by the owners and operators of such facilities. Mechanisms to be considered include, but are not limited to—

(i) revisions to closure, post-closure, and financial responsibility requirements under subtitles C and I of the Solid Waste Disposal Act;

(ii) voluntary risk pooling by owners and operators;

(iii) legislation to require risk pooling by owners and operators;

(iv) modification of the Post-Closure Liability Trust Fund [1] previously established by section 232 [2] of this Act, and the conditions for transfer of liability under this subsection, including limiting the transfer of some or all liability under this subsection only in the case of insolvency of owners and operators;

(v) private insurance;

(vi) insurance provided by the Federal Government;

[1] So in law. Probably should be "Post-closure Liability Trust Fund".
[2] See footnote 2 on previous page.

(vii) coinsurance, reinsurance, or pooled-risk insurance, whether provided by the private sector or provided or assisted by the Federal Government; and

(viii) creation of a new program to be administered by a new or existing Federal agency or by a federally chartered corporation.

(F) RECOMMENDATIONS.—The Comptroller General shall consider options for funding any program under this section and shall, to the extent necessary, make recommendations to the appropriate committees of Congress for additional authority to implement such program.

(l) FEDERAL LIEN.—

(1) IN GENERAL.—All costs and damages for which a person is liable to the United States under subsection (a) of this section (other than the owner or operator of a vessel under paragraph (1) of subsection (a)) shall constitute a lien in favor of the United States upon all real property and rights to such property which—

(A) belong to such person; and

(B) are subject to or affected by a removal or remedial action.

(2) DURATION.—The lien imposed by this subsection shall arise at the later of the following:

(A) The time costs are first incurred by the United States with respect to a response action under this Act.

(B) The time that the person referred to in paragraph (1) is provided (by certified or registered mail) written notice of potential liability.

Such lien shall continue until the liability for the costs (or a judgment against the person arising out of such liability) is satisfied or becomes unenforceable through operation of the statute of limitations provided in section 113.

(3) NOTICE AND VALIDITY.—The lien imposed by this subsection shall be subject to the rights of any purchaser, holder of a security interest, or judgment lien creditor whose interest is perfected under applicable State law before notice of the lien has been filed in the appropriate office within the State (or county or other governmental subdivision), as designated by State law, in which the real property subject to the lien is located. Any such purchaser, holder of a security interest, or judgment lien creditor shall be afforded the same protections against the lien imposed by this subsection as are afforded under State law against a judgment lien which arises out of an unsecured obligation and which arises as of the time of the filing of the notice of the lien imposed by this subsection. If the State has not by law designated one office for the receipt of such notices of liens, the notice shall be filed in the office of the clerk of the United States district court for the district in which the real property is located. For purposes of this subsection, the terms "purchaser" and "security interest" shall have the definitions provided under section 6323(h) of the Internal Revenue Code of 1954.

(4) ACTION IN REM.—The costs constituting the lien may be recovered in an action in rem in the United States district

court for the district in which the removal or remedial action is occurring or has occurred. Nothing in this subsection shall affect the right of the United States to bring an action against any person to recover all costs and damages for which such person is liable under subsection (a) of this section.

(m) MARITIME LIEN.—All costs and damages for which the owner or operator of a vessel is liable under subsection (a)(1) with respect to a release or threatened release from such vessel shall constitute a maritime lien in favor of the United States on such vessel. Such costs may be recovered in an action in rem in the district court of the United States for the district in which the vessel may be found. Nothing in this subsection shall affect the right of the United States to bring an action against the owner or operator of such vessel in any court of competent jurisdiction to recover such costs.

(n)[1] LIABILITY OF FIDUCIARIES.—

(1) IN GENERAL.—The liability of a fiduciary under any provision of this Act for the release or threatened release of a hazardous substance at, from, or in connection with a vessel or facility held in a fiduciary capacity shall not exceed the assets held in the fiduciary capacity.

(2) EXCLUSION.—Paragraph (1) does not apply to the extent that a person is liable under this Act independently of the person's ownership of a vessel or facility as a fiduciary or actions taken in a fiduciary capacity.

(3) LIMITATION.—Paragraphs (1) and (4) do not limit the liability pertaining to a release or threatened release of a hazardous substance if negligence of a fiduciary causes or contributes to the release or threatened release.

(4) SAFE HARBOR.—A fiduciary shall not be liable in its personal capacity under this Act for—

[1] Subtitle E of title II of Public Law 104–208 added subsection (n) to section 107. Sections 2504 and 2505 of that subtitle provide:

SEC. 2504. LENDER LIABILITY RULE.

(a) IN GENERAL.—Effective on the date of enactment of this Act, the portion of the final rule issued by the Administrator of the Environmental Protection Agency on April 29, 1992 (57 Fed. Reg. 18,344), prescribing section 300.1105 of title 40, Code of Federal Regulations, shall be deemed to have been validly issued under authority of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.) and to have been effective according to the terms of the final rule. No additional judicial proceedings shall be necessary or may be held with respect to such portion of the final rule. Any reference in that portion of the final rule to section 300.1100 of title 40, Code of Federal Regulations, shall be deemed to be a reference to the amendments made by this subtitle.

(b) JUDICIAL REVIEW.—Notwithstanding section 113(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9613(a)), no court shall have jurisdiction to review the portion of the final rule issued by the Administrator of the Environmental Protection Agency on April 29, 1992 (57 Fed. Reg. 18,344) that prescribed section 300.1105 of title 40, Code of Federal Regulations.

(c) AMENDMENT.—No provision of this section shall be construed as limiting the authority of the President or a delegee of the President to amend the portion of the final rule issued by the Administrator of the Environmental Protection Agency on April 29, 1992 (57 Fed. Reg. 18,344), prescribing section 300.1105 of title 40, Code of Federal Regulations, consistent with the amendments made by this subtitle and other applicable law.

(d) JUDICIAL REVIEW.—No provision of this section shall be construed as precluding judicial review of any amendment of section 300.1105 of title 40, Code of Federal Regulations, made after the date of enactment of this Act.

SEC. 2505. EFFECTIVE DATE.

The amendments made by this subtitle shall be applicable with respect to any claim that has not been finally adjudicated as of the date of enactment of this Act.

(A) undertaking or directing another person to undertake a response action under subsection (d)(1) or under the direction of an on scene coordinator designated under the National Contingency Plan;

(B) undertaking or directing another person to undertake any other lawful means of addressing a hazardous substance in connection with the vessel or facility;

(C) terminating the fiduciary relationship;

(D) including in the terms of the fiduciary agreement a covenant, warranty, or other term or condition that relates to compliance with an environmental law, or monitoring, modifying or enforcing the term or condition;

(E) monitoring or undertaking 1 or more inspections of the vessel or facility;

(F) providing financial or other advice or counseling to other parties to the fiduciary relationship, including the settlor or beneficiary;

(G) restructuring, renegotiating, or otherwise altering the terms and conditions of the fiduciary relationship;

(H) administering, as a fiduciary, a vessel or facility that was contaminated before the fiduciary relationship began; or

(I) declining to take any of the actions described in subparagraphs (B) through (H).

(5) DEFINITIONS.—As used in this Act:

(A) FIDUCIARY.—The term "fiduciary"—

(i) means a person acting for the benefit of another party as a bona fide—

(I) trustee;

(II) executor;

(III) administrator;

(IV) custodian;

(V) guardian of estates or guardian ad litem;

(VI) receiver;

(VII) conservator;

(VIII) committee of estates of incapacitated persons;

(IX) personal representative;

(X) trustee (including a successor to a trustee) under an indenture agreement, trust agreement, lease, or similar financing agreement, for debt securities, certificates of interest or certificates of participation in debt securities, or other forms of indebtedness as to which the trustee is not, in the capacity of trustee, the lender; or

(XI) representative in any other capacity that the Administrator, after providing public notice, determines to be similar to the capacities described in subclauses (I) through (X); and

(ii) does not include—

(I) a person that is acting as a fiduciary with respect to a trust or other fiduciary estate that was organized for the primary purpose of, or is engaged in, actively carrying on a trade or business

for profit, unless the trust or other fiduciary estate was created as part of, or to facilitate, 1 or more estate plans or because of the incapacity of a natural person; or

(II) a person that acquires ownership or control of a vessel or facility with the objective purpose of avoiding liability of the person or of any other person.

(B) FIDUCIARY CAPACITY.—The term "fiduciary capacity" means the capacity of a person in holding title to a vessel or facility, or otherwise having control of or an interest in the vessel or facility, pursuant to the exercise of the responsibilities of the person as a fiduciary.

(6) SAVINGS CLAUSE.—Nothing in this subsection—

(A) affects the rights or immunities or other defenses that are available under this Act or other law that is applicable to a person subject to this subsection; or

(B) creates any liability for a person or a private right of action against a fiduciary or any other person.

(7) NO EFFECT ON CERTAIN PERSONS.—Nothing in this subsection applies to a person if the person—

(A)(i) acts in a capacity other than that of a fiduciary or in a beneficiary capacity; and

(ii) in that capacity, directly or indirectly benefits from a trust or fiduciary relationship; or

(B)(i) is a beneficiary and a fiduciary with respect to the same fiduciary estate; and

(ii) as a fiduciary, receives benefits that exceed customary or reasonable compensation, and incidental benefits, permitted under other applicable law.

(8) LIMITATION.—This subsection does not preclude a claim under this Act against—

(A) the assets of the estate or trust administered by the fiduciary; or

(B) a nonemployee agent or independent contractor retained by a fiduciary.

(o) DE MICROMIS EXEMPTION.—

(1) IN GENERAL.—Except as provided in paragraph (2), a person shall not be liable, with respect to response costs at a facility on the National Priorities List, under this Act if liability is based solely on paragraph (3) or (4) of subsection (a), and the person, except as provided in paragraph (4) of this subsection, can demonstrate that—

(A) the total amount of the material containing hazardous substances that the person arranged for disposal or treatment of, arranged with a transporter for transport for disposal or treatment of, or accepted for transport for disposal or treatment, at the facility was less than 110 gallons of liquid materials or less than 200 pounds of solid materials (or such greater or lesser amounts as the Administrator may determine by regulation); and

(B) all or part of the disposal, treatment, or transport concerned occurred before April 1, 2001.

(2) EXCEPTIONS.—Paragraph (1) shall not apply in a case in which—

(A) the President determines that—

(i) the materials containing hazardous substances referred to in paragraph (1) have contributed significantly or could contribute significantly, either individually or in the aggregate, to the cost of the response action or natural resource restoration with respect to the facility; or

(ii) the person has failed to comply with an information request or administrative subpoena issued by the President under this Act or has impeded or is impeding, through action or inaction, the performance of a response action or natural resource restoration with respect to the facility; or

(B) a person has been convicted of a criminal violation for the conduct to which the exemption would apply, and that conviction has not been vitiated on appeal or otherwise.

(3) NO JUDICIAL REVIEW.—A determination by the President under paragraph (2)(A) shall not be subject to judicial review.

(4) NONGOVERNMENTAL THIRD-PARTY CONTRIBUTION ACTIONS.—In the case of a contribution action, with respect to response costs at a facility on the National Priorities List, brought by a party, other than a Federal, State, or local government, under this Act, the burden of proof shall be on the party bringing the action to demonstrate that the conditions described in paragraph (1)(A) and (B) of this subsection are not met.

(p) MUNICIPAL SOLID WASTE EXEMPTION.—

(1) IN GENERAL.—Except as provided in paragraph (2) of this subsection, a person shall not be liable, with respect to response costs at a facility on the National Priorities List, under paragraph (3) of subsection (a) for municipal solid waste disposed of at a facility if the person, except as provided in paragraph (5) of this subsection, can demonstrate that the person is—

(A) an owner, operator, or lessee of residential property from which all of the person's municipal solid waste was generated with respect to the facility;

(B) a business entity (including a parent, subsidiary, or affiliate of the entity) that, during its 3 taxable years preceding the date of transmittal of written notification from the President of its potential liability under this section, employed on average not more than 100 full-time individuals, or the equivalent thereof, and that is a small business concern (within the meaning of the Small Business Act (15 U.S.C. 631 et seq.)) from which was generated all of the municipal solid waste attributable to the entity with respect to the facility; or

(C) an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code that, during its taxable

year preceding the date of transmittal of written notification from the President of its potential liability under this section, employed not more than 100 paid individuals at the location from which was generated all of the municipal solid waste attributable to the organization with respect to the facility.

For purposes of this subsection, the term "affiliate" has the meaning of that term provided in the definition of "small business concern" in regulations promulgated by the Small Business Administration in accordance with the Small Business Act (15 U.S.C. 631 et seq.).

(2) EXCEPTION.—Paragraph (1) shall not apply in a case in which the President determines that—

(A) the municipal solid waste referred to in paragraph (1) has contributed significantly or could contribute significantly, either individually or in the aggregate, to the cost of the response action or natural resource restoration with respect to the facility;

(B) the person has failed to comply with an information request or administrative subpoena issued by the President under this Act; or

(C) the person has impeded or is impeding, through action or inaction, the performance of a response action or natural resource restoration with respect to the facility.

(3) NO JUDICIAL REVIEW.—A determination by the President under paragraph (2) shall not be subject to judicial review.

(4) DEFINITION OF MUNICIPAL SOLID WASTE.—

(A) IN GENERAL.—For purposes of this subsection, the term "municipal solid waste" means waste material—

(i) generated by a household (including a single or multifamily residence); and

(ii) generated by a commercial, industrial, or institutional entity, to the extent that the waste material—

(I) is essentially the same as waste normally generated by a household;

(II) is collected and disposed of with other municipal solid waste as part of normal municipal solid waste collection services; and

(III) contains a relative quantity of hazardous substances no greater than the relative quantity of hazardous substances contained in waste material generated by a typical single-family household.

(B) EXAMPLES.—Examples of municipal solid waste under subparagraph (A) include food and yard waste, paper, clothing, appliances, consumer product packaging, disposable diapers, office supplies, cosmetics, glass and metal food containers, elementary or secondary school science laboratory waste, and household hazardous waste.

(C) EXCLUSIONS.—The term "municipal solid waste" does not include—

(i) combustion ash generated by resource recovery facilities or municipal incinerators; or

(ii) waste material from manufacturing or processing operations (including pollution control operations) that is not essentially the same as waste normally generated by households.

(5) BURDEN OF PROOF.—In the case of an action, with respect to response costs at a facility on the National Priorities List, brought under section 107 or 113 by—

(A) a party, other than a Federal, State, or local government, with respect to municipal solid waste disposed of on or after April 1, 2001; or

(B) any party with respect to municipal solid waste disposed of before April 1, 2001, the burden of proof shall be on the party bringing the action to demonstrate that the conditions described in paragraphs (1) and (4) for exemption for entities and organizations described in paragraph (1)(B) and (C) are not met.

(6) CERTAIN ACTIONS NOT PERMITTED.—No contribution action may be brought by a party, other than a Federal, State, or local government, under this Act with respect to circumstances described in paragraph (1)(A).

(7) COSTS AND FEES.—A nongovernmental entity that commences, after the date of the enactment of this subsection, a contribution action under this Act shall be liable to the defendant for all reasonable costs of defending the action, including all reasonable attorney's fees and expert witness fees, if the defendant is not liable for contribution based on an exemption under this subsection or subsection (o).

(q) CONTIGUOUS PROPERTIES.—

(1) NOT CONSIDERED TO BE AN OWNER OR OPERATOR.—

(A) IN GENERAL.—A person that owns real property that is contiguous to or otherwise similarly situated with respect to, and that is or may be contaminated by a release or threatened release of a hazardous substance from, real property that is not owned by that person shall not be considered to be an owner or operator of a vessel or facility under paragraph (1) or (2) of subsection (a) solely by reason of the contamination if—

(i) the person did not cause, contribute, or consent to the release or threatened release;

(ii) the person is not—

(I) potentially liable, or affiliated with any other person that is potentially liable, for response costs at a facility through any direct or indirect familial relationship or any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by a contract for the sale of goods or services); or

(II) the result of a reorganization of a business entity that was potentially liable;

(iii) the person takes reasonable steps to—

(I) stop any continuing release;

(II) prevent any threatened future release; and

(III) prevent or limit human, environmental, or natural resource exposure to any hazardous substance released on or from property owned by that person;

(iv) the person provides full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration at the vessel or facility from which there has been a release or threatened release (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action or natural resource restoration at the vessel or facility);

(v) the person—

(I) is in compliance with any land use restrictions established or relied on in connection with the response action at the facility; and

(II) does not impede the effectiveness or integrity of any institutional control employed in connection with a response action;

(vi) the person is in compliance with any request for information or administrative subpoena issued by the President under this Act;

(vii) the person provides all legally required notices with respect to the discovery or release of any hazardous substances at the facility; and

(viii) at the time at which the person acquired the property, the person—

(I) conducted all appropriate inquiry within the meaning of section 101(35)(B) with respect to the property; and

(II) did not know or have reason to know that the property was or could be contaminated by a release or threatened release of one or more hazardous substances from other real property not owned or operated by the person.

(B) DEMONSTRATION.—To qualify as a person described in subparagraph (A), a person must establish by a preponderance of the evidence that the conditions in clauses (i) through (viii) of subparagraph (A) have been met.

(C) BONA FIDE PROSPECTIVE PURCHASER.—Any person that does not qualify as a person described in this paragraph because the person had, or had reason to have, knowledge specified in subparagraph (A)(viii) at the time of acquisition of the real property may qualify as a bona fide prospective purchaser under section 101(40) if the person is otherwise described in that section.

(D) GROUND WATER.—With respect to a hazardous substance from one or more sources that are not on the property of a person that is a contiguous property owner that enters ground water beneath the property of the person solely as a result of subsurface migration in an aquifer, subparagraph (A)(iii) shall not require the person to conduct ground water investigations or to install ground

water remediation systems, except in accordance with the policy of the Environmental Protection Agency concerning owners of property containing contaminated aquifers, dated May 24, 1995.

(2) EFFECT OF LAW.—With respect to a person described in this subsection, nothing in this subsection—

(A) limits any defense to liability that may be available to the person under any other provision of law; or

(B) imposes liability on the person that is not otherwise imposed by subsection (a).

(3) ASSURANCES.—The Administrator may—

(A) issue an assurance that no enforcement action under this Act will be initiated against a person described in paragraph (1); and

(B) grant a person described in paragraph (1) protection against a cost recovery or contribution action under section 113(f).

(r) PROSPECTIVE PURCHASER AND WINDFALL LIEN.—

(1) LIMITATION ON LIABILITY.—Notwithstanding subsection (a)(1), a bona fide prospective purchaser whose potential liability for a release or threatened release is based solely on the purchaser's being considered to be an owner or operator of a facility shall not be liable as long as the bona fide prospective purchaser does not impede the performance of a response action or natural resource restoration.

(2) LIEN.—If there are unrecovered response costs incurred by the United States at a facility for which an owner of the facility is not liable by reason of paragraph (1), and if each of the conditions described in paragraph (3) is met, the United States shall have a lien on the facility, or may by agreement with the owner, obtain from the owner a lien on any other property or other assurance of payment satisfactory to the Administrator, for the unrecovered response costs.

(3) CONDITIONS.—The conditions referred to in paragraph (2) are the following:

(A) RESPONSE ACTION.—A response action for which there are unrecovered costs of the United States is carried out at the facility.

(B) FAIR MARKET VALUE.—The response action increases the fair market value of the facility above the fair market value of the facility that existed before the response action was initiated.

(4) AMOUNT; DURATION.—A lien under paragraph (2)—

(A) shall be in an amount not to exceed the increase in fair market value of the property attributable to the response action at the time of a sale or other disposition of the property;

(B) shall arise at the time at which costs are first incurred by the United States with respect to a response action at the facility;

(C) shall be subject to the requirements of subsection (l)(3); and

(D) shall continue until the earlier of—

(i) satisfaction of the lien by sale or other means; or

(ii) notwithstanding any statute of limitations under section 113, recovery of all response costs incurred at the facility.

[42 U.S.C. 9607]

FINANCIAL RESPONSIBILITY

SEC. 108. (a)(1) The owner or operator of each vessel (except a non-self-propelled barge that does not carry hazardous substances as cargo) over three hundred gross tons that uses any port or place in the United States or the navigable waters or any offshore facility, shall establish and maintain, in accordance with regulations promulgated by the President, evidence of financial responsibility of $300 per gross ton (or for a vessel carrying hazardous substances as cargo, or $5,000,000, whichever is greater) to cover the liability prescribed under paragraph (1) of section 107(a) of this Act. Financial responsibility may be established by any one, or any combination, of the following: insurance, guarantee, surety bond, or qualification as a self-insurer. Any bond filed shall be issued by a bonding company authorized to do business in the United States. In cases where an owner or operator owns, operates, or charters more than one vessel subject to this subsection, evidence of financial responsibility need be established only to meet the maximum liability applicable to the largest of such vessels.

(2) The Secretary of the Treasury shall withhold or revoke the clearance required by section 4197 of the Revised Statutes of the United States of any vessel subject to this subsection that does not have certification furnished by the President that the financial responsibility provisions of paragraph (1) of this subsection have been complied with.

(3) The Secretary of Transportation, in accordance with regulations issued by him, shall (A) deny entry to any port or place in the United States or navigable waters to, and (B) detain at the port or place in the United States from which it is about to depart for any other port or place in the United States, any vessel subject to this subsection that, upon request, does not produce certification furnished by the President that the financial responsibility provisions of paragraph (1) of this subsection have been complied with.

(4) In addition to the financial responsibility provisions of paragraph (1) of this subsection, the President shall require additional evidence of financial responsibility for incineration vessels in such amounts, and to cover such liabilities recognized by law, as the President deems appropriate, taking into account the potential risks posed by incineration and transport for incineration, and any other factors deemed relevant.

(b)(1) Beginning not earlier than five years after the date of enactment of this Act, the President shall promulgate requirements (for facilities in addition to those under subtitle C of the Solid Waste Disposal Act and other Federal law) that classes of facilities establish and maintain evidence of financial responsibility consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of haz-

ardous substances. Not later than three years after the date of enactment of the Act, the President shall identify those classes for which requirements will be first developed and publish notice of such identification in the Federal Register. Priority in the development of such requirements shall be accorded to those classes of facilities, owners, and operators which the President determines present the highest level of risk of injury.

(2) The level of financial responsibility shall be initially established, and, when necessary, adjusted to protect against the level of risk which the President in his discretion believes is appropriate based on the payment experience of the Fund, commercial insurers, courts settlements and judgments, and voluntary claims satisfaction. To the maximum extent practicable, the President shall cooperate with and seek the advice of the commercial insurance industry in developing financial responsibility requirements. Financial responsibility may be established by any one, or any combination, of the following: insurance, guarantee, surety bond, letter of credit, or qualification as a self-insurer. In promulgating requirements under this section, the President is authorized to specify policy or other contractual terms, conditions, or defenses which are necessary, or which are unacceptable, in establishing such evidence of financial responsibility in order to effectuate the purposes of this Act.

(3) Regulations promulgated under this subsection shall incrementally impose financial responsibility requirements as quickly as can reasonably be achieved but in no event more than 4 years after the date of promulgation. Where possible, the level of financial responsibility which the President believes appropriate as a final requirement shall be achieved through incremental, annual increases in the requirements.

(4) Where a facility is owned or operated by more than one person, evidence of financial responsibility covering the facility may be established and maintained by one of the owners or operators, or, in consolidated form, by or on behalf of two or more owners or operators. When evidence of financial responsibility is established in a consolidated form, the proportional share of each participant shall be shown. The evidence shall be accompanied by a statement authorizing the applicant to act for and in behalf of each participant in submitting and maintaining the evidence of financial responsibility.

(5) The requirements for evidence of financial responsibility for motor carriers covered by this Act shall be determined under section 30 of the Motor Carrier Act of 1980, Public Law 96–296.

(c) DIRECT ACTION.—

(1) RELEASES FROM VESSELS.—In the case of a release or threatened release from a vessel, any claim authorized by section 107 or 111 may be asserted directly against any guarantor providing evidence of financial responsibility for such vessel under subsection (a). In defending such a claim, the guarantor may invoke all rights and defenses which would be available to the owner or operator under this title. The guarantor may also invoke the defense that the incident was caused by the willful misconduct of the owner or operator, but the guarantor may not invoke any other defense that the guarantor might

have been entitled to invoke in a proceeding brought by the owner or operator against him.

(2) RELEASES FROM FACILITIES.—In the case of a release or threatened release from a facility, any claim authorized by section 107 or 111 may be asserted directly against any guarantor providing evidence of financial responsibility for such facility under subsection (b), if the person liable under section 107 is in bankruptcy, reorganization, or arrangement pursuant to the Federal Bankruptcy Code, or if, with reasonable diligence, jurisdiction in the Federal courts cannot be obtained over a person liable under section 107 who is likely to be solvent at the time of judgment. In the case of any action pursuant to this paragraph, the guarantor shall be entitled to invoke all rights and defenses which would have been available to the person liable under section 107 if any action had been brought against such person by the claimant and all rights and defenses which would have been available to the guarantor if an action had been brought against the guarantor by such person.

(d) LIMITATION OF GUARANTOR LIABILITY.—

(1) TOTAL LIABILITY.—The total liability of any guarantor in a direct action suit brought under this section shall be limited to the aggregate amount of the monetary limits of the policy of insurance, guarantee, surety bond, letter of credit, or similar instrument obtained from the guarantor by the person subject to liability under section 107 for the purpose of satisfying the requirement for evidence of financial responsibility.

(2) OTHER LIABILITY.—Nothing in this subsection shall be construed to limit any other State or Federal statutory, contractual, or common law liability of a guarantor, including, but not limited to, the liability of such guarantor for bad faith either in negotiating or in failing to negotiate the settlement of any claim. Nothing in this subsection shall be construed, interpreted, or applied to diminish the liability of any person under section 107 of this Act or other applicable law.

[42 U.S.C. 9608]

CIVIL PENALTIES AND AWARDS

SEC. 109. (a) CLASS I ADMINISTRATIVE PENALTY.—

(1) VIOLATIONS.—A civil penalty of not more than $25,000 per violation may be assessed by the President in the case of any of the following—

(A) A violation of the requirements of section 103 (a) or (b) (relating to notice).

(B) A violation of the requirements of section 103(d)(2) (relating to destruction of records, etc.).

(C) A violation of the requirements of section 108 (relating to financial responsibility, etc.), the regulations issued under section 108, or with any denial or detention order under section 108.

(D) A violation of an order under section 122(d)(3) (relating to settlement agreements for action under section 104(b)).

(E) Any failure or refusal referred to in section 122(l) (relating to violations of administrative orders, consent decrees, or agreements under section 120).

(2) NOTICE AND HEARINGS.—No civil penalty may be assessed under this subsection unless the person accused of the violation is given notice and opportunity for a hearing with respect to the violation.

(3) DETERMINING AMOUNT.—In determining the amount of any penalty assessed pursuant to this subsection, the President shall take into account the nature, circumstances, extent and gravity of the violation or violations and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.

(4) REVIEW.—Any person against whom a civil penalty is assessed under this subsection may obtain review thereof in the appropriate district court of the United States by filing a notice of appeal in such court within 30 days from the date of such order and by simultaneously sending a copy of such notice by certified mail to the President. The President shall promptly file in such court a certified copy of the record upon which such violation was found or such penalty imposed. If any person fails to pay an assessment of a civil penalty after it has become a final and unappealable order or after the appropriate court has entered final judgment in favor of the United States, the President may request the Attorney General of the United States to institute a civil action in an appropriate district court of the United States to collect the penalty, and such court shall have jurisdiction to hear and decide any such action. In hearing such action, the court shall have authority to review the violation and the assessment of the civil penalty on the record.

(5) SUBPOENAS.—The President may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, or documents in connection with hearings under this subsection. In case of contumacy or refusal to obey a subpoena issued pursuant to this paragraph and served upon any person, the district court of the United States for any district in which such person is found, resides, or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the administrative law judge or to appear and produce documents before the administrative law judge, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(b) CLASS II ADMINISTRATIVE PENALTY.—A civil penalty of not more than $25,000 per day for each day during which the violation continues may be assessed by the President in the case of any of the following—

(1) A violation of the notice requirements of section 103 (a) or (b).

(2) A violation of section 103(d)(2) (relating to destruction of records, etc.).

(3) A violation of the requirements of section 108 (relating to financial responsibility, etc.), the regulations issued under section 108, or with any denial or detention order under section 108.

(4) A violation of an order under section 122(d)(3) (relating to settlement agreements for action under section 104(b)).

(5) Any failure or refusal referred to in section 122(l) (relating to violations of administrative orders, consent decrees, or agreements under section 120).

In the case of a second or subsequent violation the amount of such penalty may be not more than $75,000 for each day during which the violation continues. Any civil penalty under this subsection shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected after notice and opportunity for hearing on the record in accordance with section 554 of title 5 of the United States Code. In any proceeding for the assessment of a civil penalty under this subsection the President may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents and may promulgate rules for discovery procedures. Any person who requested a hearing with respect to a civil penalty under this subsection and who is aggrieved by an order assessing the civil penalty may file a petition for judicial review of such order with the United States Court of Appeals for the District of Columbia Circuit or for any other circuit in which such person resides or transacts business. Such a petition may only be filed within the 30-day period beginning on the date the order making such assessment was issued.

(c) JUDICIAL ASSESSMENT.—The President may bring an action in the United States district court for the appropriate district to assess and collect a penalty of not more than $25,000 per day for each day during which the violation (or failure or refusal) continues in the case of any of the following—

(1) A violation of the notice requirements of section 103 (a) or (b).

(2) A violation of section 103(d)(2) (relating to destruction of records, etc.).

(3) A violation of the requirements of section 108 (relating to financial responsibility, etc.), the regulations issued under section 108, or with any denial or detention order under section 108.

(4) A violation of an order under section 122(d)(3) (relating to settlement agreements for action under section 104(b)).

(5) Any failure or refusal referred to in section 122(l) (relating to violations of administrative orders, consent decrees, or agreements under section 120).

In the case of a second or subsequent violation (or failure or refusal), the amount of such penalty may be not more than $75,000 for each day during which the violation (or failure or refusal) continues. For additional provisions providing for judicial assessment of civil penalties for failure to comply with a request or order under section 104(e) (relating to information gathering and access authorities), see section 104(e).

(d) AWARDS.—The President may pay an award of up to $10,000 to any individual who provides information leading to the arrest and conviction of any person for a violation subject to a criminal penalty under this Act, including any violation of section 103 and any other violation referred to in this section. The President shall, by regulation, prescribe criteria for such an award and may pay any award under this subsection from the Fund, as provided in section 111.

(e) PROCUREMENT PROCEDURES.—Notwithstanding any other provision of law, any executive agency may use competitive procedures or procedures other than competitive procedures to procure the services of experts for use in preparing or prosecuting a civil or criminal action under this Act, whether or not the expert is expected to testify at trial. The executive agency need not provide any written justification for the use of procedures other than competitive procedures when procuring such expert services under this Act and need not furnish for publication in the Commerce Business Daily or otherwise any notice of solicitation or synopsis with respect to such procurement.

(f) SAVINGS CLAUSE.—Action taken by the President pursuant to this section shall not affect or limit the President's authority to enforce any provisions of this Act.

[42 U.S.C. 9609]

EMPLOYEE PROTECTION

SEC. 110. (a) No person shall fire or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has provided information to a State or to the Federal Government, filed, instituted, or caused to be filed or instituted any proceeding under this Act, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this Act.

(b) Any employee or a representative of employees who believes that he has been fired or otherwise discriminated against by any person in violation of subsection (a) of this section may, within thirty days after such alleged violation occurs, apply to the Secretary of Labor for a review of such firing or alleged discrimination. A copy of the application shall be sent to such person, who shall be the respondent. Upon receipt of such application, the Secretary of Labor shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing at the request of any party to such review to enable the parties to present information relating to such alleged violation. The parties shall be given written notice of the time and place of the hearing at least five days prior to the hearing. Any such hearing shall be of record and shall be subject to section 554 of title 5, United States Code. Upon receiving the report of such investigation, the Secretary of Labor shall make findings of fact. If he finds that such violation did occur, he shall issue a decision, incorporating an order therein and his findings, requiring the party committing such violation to take such affirmative action to abate

the violation as the Secretary of Labor deems appropriate, including, but not limited to, the rehiring or reinstatement of the employee or representative of employees to his former position with compensation. If he finds that there was no such violation, he shall issue an order denying the application. Such order issued by the Secretary of Labor under this subparagraph shall be subject to judicial review in the same manner as orders and decisions are subject to judicial review under this Act.

(c) Whenever an order is issued under this section to abate such violation, at the request of the applicant a sum equal to the aggregate amount of all costs and expenses (including the attorney's fees) determined by the Secretary of Labor to have been reasonably incurred by the applicant for, or in connection with, the institution and prosecution of such proceedings, shall be assessed against the person committing such violation.

(d) This section shall have no application to any employee who acting without discretion from his employer (or his agent) deliberately violates any requirement of this Act.

(e) The President shall conduct continuing evaluations of potential loss of shifts of employment which may result from the administration or enforcement of the provisions of this Act, including, where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such administration or enforcement. Any employee who is discharged, or laid off, threatened with discharge or layoff, or otherwise discriminated against by any person because of the alleged results of such administration or enforcement, or any representative of such employee, may request the President to conduct a full investigation of the matter and, at the request of any party, shall hold public hearings, require the parties, including the employer involved, to present information relating to the actual or potential effect of such administration or enforcement on employment and any alleged discharge, layoff, or other discrimination, and the detailed reasons or justification therefore.[1] Any such hearing shall be of record and shall be subject to section 554 of title 5, United States Code. Upon receiving the report of such investigation, the President shall make findings of fact as to the effect of such administration or enforcement on employment and on the alleged discharge, layoff, or discrimination and shall make such recommendations as he deems appropriate. Such report, findings, and recommendations shall be available to the public. Nothing in this subsection shall be construed to require or authorize the President or any State to modify or withdraw any action, standard, limitation, or any other requirement of this Act.

[42 U.S.C. 9610]

USES OF FUND

SEC. 111. (a) IN GENERAL.—For the purposes specified in this section there is authorized to be appropriated from the Hazardous Substance Superfund established under subchapter A of chapter 98 of the Internal Revenue Code of 1986 not more than $8,500,000,000 for the 5-year period beginning on the date of enactment of the Superfund Amendments and Reauthorization Act of 1986, and not

[1] So in law.

more than $5,100,000,000 for the period commencing October 1, 1991, and ending September 30, 1994, and such sums shall remain available until expended. The preceding sentence constitutes a specific authorization for the funds appropriated under title II of Public Law 99–160 (relating to payment to the Hazardous Substances Trust Fund). The President shall use the money in the Fund for the following purposes:

(1) Payment of governmental response costs incurred pursuant to section 104 of this title, including costs incurred pursuant to the Intervention on the High Seas Act.

(2) Payment of any claim for necessary response costs incurred by any other person as a result of carrying out the national contingency plan established under section 311(c)[1] of the Clean Water Act and amended by section 105 of this title: *Provided, however,* That such costs must be approved under said plan and certified by the responsible Federal official.

(3) Payment of any claim authorized by subsection (b) of this section and finally decided pursuant to section 112 of this title, including those costs set out in subsection 112(c)(3) of this title.

(4) Payment of costs specified under subsection (c) of this section.

(5) GRANTS FOR TECHNICAL ASSISTANCE.—The cost of grants under section 117(e) (relating to public participation grants for technical assistance).

(6) LEAD CONTAMINATED SOIL.—Payment of not to exceed $15,000,000 for the costs of a pilot program for removal, decontamination, or other action with respect to lead-contaminated soil in one to three different metropolitan areas.

The President shall not pay for any administrative costs or expenses out of the Fund unless such costs and expenses are reasonably necessary for and incidental to the implementation of this title.

(b)(1) IN GENERAL.—Claims asserted and compensable but unsatisfied under provisions of section 311 of the Clean Water Act, which are modified by section 304 of this Act may be asserted against the Fund under this title; and other claims resulting from a release or threat of release of a hazardous substance from a vessel or a facility may be asserted against the Fund under this title for injury to, or destruction or loss of, natural resources, including cost for damage assessment: *Provided, however,* That any such claim may be asserted only by the President, as trustee, for natural resources over which the United States has sovereign rights, or natural resources within the territory or the fishery conservation zone of the United States to the extent they are managed or protected by the United States, or by any State for natural resources within the boundary of that State belonging to, managed by, controlled by, or appertaining to the State, or by any Indian tribe or by the United States acting on behalf of any Indian tribe for natural resources belonging to, managed by, controlled by, or appertaining to such tribe, or held in trust for the benefit of such tribe,

[1] Probably should refer to section 311(d). See footnote 1 under section 105(a).

or belonging to a member of such tribe if such resources are subject to a trust restriction on alienation.

(2) LIMITATION ON PAYMENT OF NATURAL RESOURCE CLAIMS.—

(A) GENERAL REQUIREMENTS.—No natural resource claim may be paid from the Fund unless the President determines that the claimant has exhausted all administrative and judicial remedies to recover the amount of such claim from persons who may be liable under section 107.

(B) DEFINITION.—As used in this paragraph, the term "natural resource claim" means any claim for injury to, or destruction or loss of, natural resources. The term does not include any claim for the costs of natural resource damage assessment.

(c) Uses of the Fund under subsection (a) of this section include—

(1) The costs of assessing both short-term and long-term injury to, destruction of, or loss of any natural resources resulting from a release of a hazardous substance.

(2) The costs of Federal or State or Indian tribe efforts in the restoration, rehabilitation, or replacement or acquiring the equivalent of any natural resources injured, destroyed, or lost as a result of a release of a hazardous substance.

(3) Subject to such amounts as are provided in appropriation Acts, the costs of a program to identify, investigate, and take enforcement and abatement action against releases of hazardous substances.

(4) Any costs incurred in accordance with subsection (m) of this section (relating to ATSDR) and section 104(i), including the costs of epidemiologic and laboratory studies, health assessments, preparation of toxicologic profiles, development and maintenance of a registry of persons exposed to hazardous substances to allow long-term health effect studies, and diagnostic services not otherwise available to determine whether persons in populations exposed to hazardous substances in connection with a release or a suspected release are suffering from long-latency diseases.

(5) Subject to such amounts as are provided in appropriation Acts, the costs of providing equipment and similar overhead, related to the purposes of this Act and section 311 of the Clean Water Act, and needed to supplement equipment and services available through contractors or other non-Federal entities, and of establishing and maintaining damage assessment capability, for any Federal agency involved in strike forces, emergency task forces, or other response teams under the national contingency plan.

(6) Subject to such amounts as are provided in appropriation Acts, the costs of a program to protect the health and safety of employees involved in response to hazardous substance releases. Such program shall be developed jointly by the Environmental Protection Agency, the Occupational Safety and Health Administration, and the National Institute for Occupational Safety and Health and shall include, but not be limited to, measures for identifying and assessing hazards to which persons engaged in removal, remedy, or other response to haz-

ardous substances may be exposed, methods to protect workers from such hazards, and necessary regulatory and enforcement measures to assure adequate protection of such employees.

(7) EVALUATION COSTS UNDER PETITION PROVISIONS OF SECTION 105(d).—Costs incurred by the President in evaluating facilities pursuant to petitions under section 105(d) (relating to petitions for assessment of release).

(8) CONTRACT COSTS UNDER SECTION 104(a)(1).—The costs of contracts or arrangements entered into under section 104(a)(1) to oversee and review the conduct of remedial investigations and feasibility studies undertaken by persons other than the President and the costs of appropriate Federal and State oversight of remedial activities at National Priorities List sites resulting from consent orders or settlement agreements.

(9) ACQUISITION COSTS UNDER SECTION 104(j).—The costs incurred by the President in acquiring real estate or interests in real estate under section 104(j) (relating to acquisition of property).

(10) RESEARCH, DEVELOPMENT, AND DEMONSTRATION COSTS UNDER SECTION 311.—The cost of carrying out section 311 (relating to research, development, and demonstration), except that the amounts available for such purposes shall not exceed the amounts specified in subsection (n) of this section.

(11) LOCAL GOVERNMENT REIMBURSEMENT.—Reimbursements to local governments under section 123, except that during the 8-fiscal year period beginning October 1, 1986, not more than 0.1 percent of the total amount appropriated from the Fund may be used for such reimbursements.

(12) WORKER TRAINING AND EDUCATION GRANTS.—The costs of grants under section 126(g) of the Superfund Amendments and Reauthorization Act of 1986 for training and education of workers to the extent that such costs do not exceed $10,000,000 [1] for each of the fiscal years 1987, 1988, 1989, 1990, 1991, 1992, 1993, and 1994.

(13) AWARDS UNDER SECTION 109.—The costs of any awards granted under section 109(d).

(14) LEAD POISONING STUDY.—The cost of carrying out the study under subsection (f) of section 118 of the Superfund Amendments and Reauthorization Act of 1986 (relating to lead poisoning in children).

(d)(1) No money in the Fund may be used under subsection (c)(1) and (2) of this section, nor for the payment of any claim under subsection (b) of this section, where the injury, destruction, or loss of natural resources and the release of a hazardous substance from which such damages resulted have occurred wholly before the enactment of this Act.

(2) No money in the Fund may be used for the payment of any claim under subsection (b) of this section where such expenses are associated with injury or loss resulting from long-term exposure to

[1] Public Law 101–144 (103 Stat. 857) purported to amend section 9611(c)(12) of the Superfund Amendments and Reauthorization Act of 1986 (SARA) by striking "$10,000,000" and inserting "$20,000,000". The amendment made by Public Law 101–144 probably should have been made to section 111(c)(12) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, which is designated as section 9611 in title 42, United States Code.

ambient concentrations of air pollutants from multiple or diffuse sources.

(e)(1) Claims against or presented to the Fund shall not be valid or paid in excess of the total money in the Fund at any one time. Such claims become valid only when additional money is collected, appropriated, or otherwise added to the Fund. Should the total claims outstanding at any time exceed the current balance of the Fund, the President shall pay such claims, to the extent authorized under this section, in full in the order in which they were finally determined.

(2) In any fiscal year, 85 percent of the money credited to the Fund under title II of this Act shall be available only for the purposes specified in paragraphs (1), (2), and (4) of subsection (a) of this section. No money in the Fund may be used for the payment of any claim under subsection (a)(3) or subsection (b) of this section in any fiscal year for which the President determines that all of the Fund is needed for response to threats to public health from releases or threatened releases of hazardous substances.

(3) No money in the Fund shall be available for remedial action, other than actions specified in subsection (c) of this section, with respect to federally owned facilities; except that money in the Fund shall be available for the provision of alternative water supplies (including the reimbursement of costs incurred by a municipality) in any case involving groundwater contamination outside the boundaries of a federally owned facility in which the federally owned facility is not the only potentially responsible party.

(4) Paragraphs (1) and (4) of subsection (a) of this section shall in the aggregate be subject to such amounts as are provided in appropriation Acts.

(f) The President is authorized to promulgate regulations designating one or more Federal officials who may obligate money in the Fund in accordance with this section or portions thereof. The President is also authorized to delegate authority to obligate money in the Fund or to settle claims to officials of a State or Indian tribe operating under a contract or cooperative agreement with the Federal Government pursuant to section 104(d) of this title.

(g) The President shall provide for the promulgation of rules and regulations with respect to the notice to be provided to potential injured parties by an owner and operator of any vessel, or facility from which a hazardous substance has been released. Such rules and regulations shall consider the scope and form of the notice which would be appropriate to carry out the purposes of this title. Upon promulgation of such rules and regulations, the owner and operator of any vessel or facility from which a hazardous substance has been released shall provide notice in accordance with such rules and regulations. With respect to releases from public vessels, the President shall provide such notification as is appropriate to potential injured parties. Until the promulgation of such rules and regulations, the owner and operator of any vessel or facility from which a hazardous substance has been released shall provide reasonable notice to potential injured parties by publication in local newspapers serving the affected area.

[Subsection (h) repealed.]

December 31, 2002

(i) Except in a situation requiring action to avoid an irreversible loss of natural resources or to prevent or reduce any continuing danger to natural resources or similar need for emergency action, funds may not be used under this Act for the restoration, rehabilitation, or replacement or acquisition of the equivalent of any natural resources until a plan for the use of such funds for such purposes has been developed and adopted by affected Federal agencies and the Governor or Governors of any State having sustained damage to natural resources within its borders, belonging to, managed by or appertaining to such State, and by the governing body of any Indian tribe having sustained damage to natural resources belonging to, managed by, controlled by, or appertaining to such tribe, or held in trust for the benefit of such tribe, or belonging to a member of such tribe if such resources are subject to a trust restriction on alienation, after adequate public notice and opportunity for hearing and consideration of all public comment.

(j) The President shall use the money in the Post-closure Liability Fund for any of the purposes specified in subsection (a) of this section with respect to a hazardous waste disposal facility for which liability has transferred to such fund under section 107(k) of this Act, and, in addition, for payment of any claim or appropriate request for costs of response, damages, or other compensation for injury or loss under section 107 of this Act or any other State or Federal law, resulting from a release of a hazardous substance from such a facility.

(k) INSPECTOR GENERAL.—In each fiscal year, the Inspector General of each department, agency, or instrumentality of the United States which is carrying out any authority of this Act shall conduct an annual audit of all payments, obligations, reimbursements, or other uses of the Fund in the prior fiscal year, to assure that the Fund is being properly administered and that claims are being appropriately and expeditiously considered. The audit shall include an examination of a sample of agreements with States (in accordance with the provisions of the Single Audit Act) carrying out response actions under this title and an examination of remedial investigations and feasibility studies prepared for remedial actions. The Inspector General shall submit to the Congress an annual report regarding the audit report required under this subsection. The report shall contain such recommendations as the Inspector General deems appropriate. Each department, agency, or instrumentality of the United States shall cooperate with its inspector general in carrying out this subsection.

(l) To the extent that the provisions of this Act permit, a foreign claimant may assert a claim to the same extent that a United States claimant may assert a claim if—

(1) the release of a hazardous substance occurred (A) in the navigable waters or (B) in or on the territorial sea or adjacent shoreline of a foreign country of which the claimant is a resident;

(2) the claimant is not otherwise compensated for his loss;

(3) the hazardous substance was released from a facility or from a vessel located adjacent to or within the navigable waters or was discharged in connection with activities conducted under the Outer Continental Shelf Lands Act, as amended (43

U.S.C. 1331 et seq.) or the Deepwater Port Act of 1974, as amended (33 U.S.C. 1501 et seq.); and

(4) recovery is authorized by a treaty or an executive agreement between the United States and foreign country involved, or if the Secretary of State, in consultation with the Attorney General and other appropriate officials, certifies that such country provides a comparable remedy for United States claimants.

(m) AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY.—There shall be directly available to the Agency for Toxic Substances and Disease Registry to be used for the purpose of carrying out activities described in subsection (c)(4) and section 104(i) not less than $50,000,000 per fiscal year for each of fiscal years 1987 and 1988, not less than $55,000,000 for fiscal year 1989, and not less than $60,000,000 per fiscal year for each of fiscal years 1990, 1991, 1992, 1993, and 1994. Any funds so made available which are not obligated by the end of the fiscal year in which made available shall be returned to the Fund.

(n) LIMITATIONS ON RESEARCH, DEVELOPMENT, AND DEMONSTRATION PROGRAM.—

(1) SECTION 311(b).—For each of the fiscal years 1987, 1988, 1989, 1990, 1991, 1992, 1993, and 1994, not more than $20,000,000 of the amounts available in the Fund may be used for the purposes of carrying out the applied research, development, and demonstration program for alternative or innovative technologies and training program authorized under section 311(b) (relating to research, development, and demonstration) other than basic research. Such amounts shall remain available until expended.

(2) SECTION 311(a).—From the amounts available in the Fund, not more than the following amounts may be used for the purposes of section 311(a) (relating to hazardous substance research, demonstration, and training activities):

(A) For the fiscal year 1987, $3,000,000.

(B) For the fiscal year 1988, $10,000,000.

(C) For the fiscal year 1989, $20,000,000.

(D) For the fiscal year 1990, $30,000,000.

(E) For each of the fiscal years 1991, 1992, 1993, and 1994, $35,000,000.

No more than 10 percent of such amounts shall be used for training under section 311(a) in any fiscal year.

(3) SECTION 311(d).—For each of the fiscal years 1987, 1988, 1989, 1990, 1991, 1992, 1993, and 1994, not more than $5,000,000 of the amounts available in the Fund may be used for the purposes of section 311(d) (relating to university hazardous substance research centers).

(o) NOTIFICATION PROCEDURES FOR LIMITATIONS ON CERTAIN PAYMENTS.—Not later than 90 days after the enactment of this subsection, the President shall develop and implement procedures to adequately notify, as soon as practicable after a site is included on the National Priorities List, concerned local and State officials and other concerned persons of the limitations, set forth in subsection (a)(2) of this section, on the payment of claims for necessary response costs incurred with respect to such site.

(p) GENERAL REVENUE SHARE OF SUPERFUND.—

(1) IN GENERAL.—The following sums are authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, to the Hazardous Substance Superfund:

(A) For fiscal year 1987, $212,500,000.
(B) For fiscal year 1988, $212,500,000.
(C) For fiscal year 1989, $212,500,000.
(D) For fiscal year 1990, $212,500,000.
(E) For fiscal year 1991, $212,500,000.
(F) For fiscal year 1992, $212,500,000.
(G) For fiscal year 1993, $212,500,000.
(H) For fiscal year 1994, $212,500,000.

In addition there is authorized to be appropriated to the Hazardous Substance Superfund for each fiscal year an amount equal to so much of the aggregate amount authorized to be appropriated under this subsection (and paragraph (2) of section 221(b)[1] of the Hazardous Substance Response Revenue Act of 1980) as has not been appropriated before the beginning of the fiscal year involved.

(2) COMPUTATION.—The amounts authorized to be appropriated under paragraph (1) of this subsection in a given fiscal year shall be available only to the extent that such amount exceeds the amount determined by the Secretary under section 9507(b)(2) of the Internal Revenue Code of 1986 for the prior fiscal year.

[42 U.S.C. 9611]

CLAIMS PROCEDURE

SEC. 112. (a) CLAIMS AGAINST THE FUND FOR RESPONSE COSTS.—No claim may be asserted against the Fund pursuant to section 111(a) unless such claim is presented in the first instance to the owner, operator, or guarantor of the vessel or facility from which a hazardous substance has been released, if known to the claimant, and to any other person known to the claimant who may be liable under section 107. In any case where the claim has not been satisfied within 60 days of presentation in accordance with this subsection, the claimant may present the claim to the Fund for payment. No claim against the Fund may be approved or certified during the pendency of an action by the claimant in court to recover costs which are the subject of the claim.

(b)(1) PRESCRIBING FORMS AND PROCEDURES.—The President shall prescribe appropriate forms and procedures for claims filed hereunder, which shall include a provision requiring the claimant to make a sworn verification of the claim to the best of his knowledge. Any person who knowingly gives or causes to be given any false information as a part of any such claim shall, upon conviction, be fined in accordance with the applicable provisions of title 18 of the United States Code or imprisoned for not more than 3 years (or not more than 5 years in the case of a second or subsequent conviction), or both.

(2) PAYMENT OR REQUEST FOR HEARING.—The President may, if satisfied that the information developed during the processing of

[1] Section 221(b) was repealed by section 517(c)(1) of Public Law 99–499.

the claim warrants it, make and pay an award of the claim, except that no claim may be awarded to the extent that a judicial judgment has been made on the costs that are the subject of the claim. If the President declines to pay all or part of the claim, the claimant may, within 30 days after receiving notice of the President's decision, request an administrative hearing.

(3) BURDEN OF PROOF.—In any proceeding under this subsection, the claimant shall bear the burden of proving his claim.

(4) DECISIONS.—All administrative decisions made hereunder shall be in writing, with notification to all appropriate parties, and shall be rendered within 90 days of submission of a claim to an administrative law judge, unless all the parties to the claim agree in writing to an extension or unless the President, in his discretion, extends the time limit for a period not to exceed sixty days.

(5) FINALITY AND APPEAL.—All administrative decisions hereunder shall be final, and any party to the proceeding may appeal a decision within 30 days of notification of the award or decision. Any such appeal shall be made to the Federal district court for the district where the release or threat of release took place. In any such appeal, the decision shall be considered binding and conclusive, and shall not be overturned except for arbitrary or capricious abuse of discretion.

(6) PAYMENT.—Within 20 days after the expiration of the appeal period for any administrative decision concerning an award, or within 20 days after the final judicial determination of any appeal taken pursuant to this subsection, the President shall pay any such award from the Fund. The President shall determine the method, terms, and time of payment.

(c)(1) Payment of any claim by the Fund under this section shall be subject to the United States Government acquiring by subrogation the rights of the claimant to recover those costs of removal or damages for which it has compensated the claimant from the person responsible or liable for such release.

(2) Any person, including the Fund, who pays compensation pursuant to this Act to any claimant for damages or costs resulting from a release of a hazardous substance shall be subrogated to all rights, claims, and causes of action for such damages and costs of removal that the claimant has under this Act or any other law.

(3) Upon request of the President, the Attorney General shall commence an action on behalf of the Fund to recover any compensation paid by the Fund to any claimant pursuant to this title, and, without regard to any limitation of liability, all interest, administrative and adjudicative costs, and attorney's fees incurred by the Fund by reason of the claim. Such an action may be commenced against any owner, operator, or guarantor, or against any other person who is liable, pursuant to any law, to the compensated claimant or to the Fund, for the damages or costs for which compensation was paid.

(d) STATUTE OF LIMITATIONS.—

(1) CLAIMS FOR RECOVERY OF COSTS.—No claim may be presented under this section for recovery of the costs referred to in section 107(a) after the date 6 years after the date of completion of all response action.

(2) CLAIMS FOR RECOVERY OF DAMAGES.—No claim may be presented under this section for recovery of the damages referred to in section 107(a) unless the claim is presented within 3 years after the later of the following:

(A) The date of the discovery of the loss and its connection with the release in question.

(B) The date on which final regulations are promulgated under section 301(c).

(3) MINORS AND INCOMPETENTS.—The time limitations contained herein shall not begin to run—

(A) against a minor until the earlier of the date when such minor reaches 18 years of age or the date on which a legal representative is duly appointed for the minor, or

(B) against an incompetent person until the earlier of the date on which such person's incompetency ends or the date on which a legal representative is duly appointed for such incompetent person.

(e) Regardless of any State statutory or common law to the contrary, no person who asserts a claim against the Fund pursuant to this title shall be deemed or held to have waived any other claim not covered or assertable against the Fund under this title arising from the same incident, transaction, or set of circumstances, nor to have split a cause of action. Further, no person asserting a claim against the Fund pursuant to this title shall as a result of any determination of a question of fact or law made in connection with that claim be deemed or held to be collaterally estopped from raising such question in connection with any other claim not covered or assertable against the Fund under this title arising from the same incident, transaction, or set of circumstances.

(f) DOUBLE RECOVERY PROHIBITED.—Where the President has paid out of the Fund for any response costs or any costs specified under section 111(c) (1) or (2), no other claim may be paid out of the Fund for the same costs.

[42 U.S.C. 9612]

LITIGATION, JURISDICTION AND VENUE

SEC. 113. (a) Review of any regulation promulgated under this Act may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia. Any such application shall be made within ninety days from the date of promulgation of such regulations. Any matter with respect to which review could have been obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or to obtain damages or recovery of response costs.

(b) Except as provided in subsections (a) and (h) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this Act, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office. For the purposes of this section, the Fund shall reside in the District of Columbia.

(c) The provisions of subsections (a) and (b) of this section shall not apply to any controversy or other matter resulting from the assessment of collection of any tax, as provided by title II of this Act, or to the review of any regulation promulgated under the Internal Revenue Code of 1954.

(d) No provision of this Act shall be deemed or held to moot any litigation concerning any release of any hazardous substance, or any damages associated therewith, commenced prior to enactment of this Act.

(e) NATIONWIDE SERVICE OF PROCESS.—In any action by the United States under this Act, process may be served in any district where the defendant is found, resides, transacts business, or has appointed an agent for the service of process.

(f) CONTRIBUTION.—

(1) CONTRIBUTION.—Any person may seek contribution from any other person who is liable or potentially liable under section 107(a), during or following any civil action under section 106 or under section 107(a). 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 106 or section 107.

(2) SETTLEMENT.—A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(3) PERSONS NOT PARTY TO SETTLEMENT.—(A) If the United States or a State has obtained less than complete relief from a person who has resolved its liability to the United States or the State in an administrative or judicially approved settlement, the United States or the State may bring an action against any person who has not so resolved its liability.

(B) A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph (2).

(C) In any action under this paragraph, the rights of any person who has resolved its liability to the United States or a State shall be subordinate to the rights of the United States or the State. Any contribution action brought under this paragraph shall be governed by Federal law.

(g) PERIOD IN WHICH ACTION MAY BE BROUGHT.—

(1) ACTIONS FOR NATURAL RESOURCE DAMAGES.—Except as provided in paragraphs (3) and (4), no action may be commenced for damages (as defined in section 101(6)) under this

Act, unless that action is commenced within 3 years after the later of the following:

(A) The date of the discovery of the loss and its connection with the release in question.

(B) The date on which regulations are promulgated under section 301(c).

With respect to any facility listed on the National Priorities List (NPL), any Federal facility identified under section 120 (relating to Federal facilities), or any vessel or facility at which a remedial action under this Act is otherwise scheduled, an action for damages under this Act must be commenced within 3 years after the completion of the remedial action (excluding operation and maintenance activities) in lieu of the dates referred to in subparagraph (A) or (B). In no event may an action for damages under this Act with respect to such a vessel or facility be commenced (i) prior to 60 days after the Federal or State natural resource trustee provides to the President and the potentially responsible party a notice of intent to file suit, or (ii) before selection of the remedial action if the President is diligently proceeding with a remedial investigation and feasibility study under section 104(b) or section 120 (relating to Federal facilities). The limitation in the preceding sentence on commencing an action before giving notice or before selection of the remedial action does not apply to actions filed on or before the enactment of the Superfund Amendments and Reauthorization Act of 1986.

(2) ACTIONS FOR RECOVERY OF COSTS.—An initial action for recovery of the costs referred to in section 107 must be commenced—

(A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 104(c)(1)(C) for continued response action; and

(B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.

In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages. A subsequent action or actions under section 107 for further response costs at the vessel or facility may be maintained at any time during the response action, but must be commenced no later than 3 years after the date of completion of all response action. Except as otherwise provided in this paragraph, an action may be commenced under section 107 for recovery of costs at any time after such costs have been incurred.

(3) CONTRIBUTION.—No action for contribution for any response costs or damages may be commenced more than 3 years after—

(A) the date of judgment in any action under this Act for recovery of such costs or damages, or

(B) the date of an administrative order under section 122(g) (relating to de minimis settlements) or 122(h) (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

(4) SUBROGATION.—No action based on rights subrogated pursuant to this section by reason of payment of a claim may be commenced under this title more than 3 years after the date of payment of such claim.

(5) ACTIONS TO RECOVER INDEMNIFICATION PAYMENTS.—Notwithstanding any other provision of this subsection, where a payment pursuant to an indemnification agreement with a response action contractor is made under section 119, an action under section 107 for recovery of such indemnification payment from a potentially responsible party may be brought at any time before the expiration of 3 years from the date on which such payment is made.

(6) MINORS AND INCOMPETENTS.—The time limitations contained herein shall not begin to run—

(A) against a minor until the earlier of the date when such minor reaches 18 years of age or the date on which a legal representative is duly appointed for such minor, or

(B) against an incompetent person until the earlier of the date on which such incompetent's incompetency ends or the date on which a legal representative is duly appointed for such incompetent.

(h) TIMING OF REVIEW.—No Federal court shall have jurisdiction under Federal law other than under section 1332 of title 28 of the United States Code (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 121 (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 104, or to review any order issued under section 106(a), in any action except one of the following:

(1) An action under section 107 to recover response costs or damages or for contribution.

(2) An action to enforce an order issued under section 106(a) or to recover a penalty for violation of such order.

(3) An action for reimbursement under section 106(b)(2).

(4) An action under section 310 (relating to citizens suits) alleging that the removal or remedial action taken under section 104 or secured under section 106 was in violation of any requirement of this Act. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.

(5) An action under section 106 in which the United States has moved to compel a remedial action.

(i) INTERVENTION.—In any action commenced under this Act or under the Solid Waste Disposal Act in a court of the United States, any person may intervene as a matter of right when such person claims an interest relating to the subject of the action and is so situated that the disposition of the action may, as a practical matter, impair or impede the person's ability to protect that interest, un-

less the President or the State shows that the person's interest is adequately represented by existing parties.

(j) JUDICIAL REVIEW.—

(1) LIMITATION.—In any judicial action under this Act, judicial review of any issues concerning the adequacy of any response action taken or ordered by the President shall be limited to the administrative record. Otherwise applicable principles of administrative law shall govern whether any supplemental materials may be considered by the court.

(2) STANDARD.—In considering objections raised in any judicial action under this Act, the court shall uphold the President's decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law.

(3) REMEDY.—If the court finds that the selection of the response action was arbitrary and capricious or otherwise not in accordance with law, the court shall award (A) only the response costs or damages that are not inconsistent with the national contingency plan, and (B) such other relief as is consistent with the National Contingency Plan.

(4) PROCEDURAL ERRORS.—In reviewing alleged procedural errors, the court may disallow costs or damages only if the errors were so serious and related to matters of such central relevance to the action that the action would have been significantly changed had such errors not been made.

(k) ADMINISTRATIVE RECORD AND PARTICIPATION PROCEDURES.—

(1) ADMINISTRATIVE RECORD.—The President shall establish an administrative record upon which the President shall base the selection of a response action. The administrative record shall be available to the public at or near the facility at issue. The President also may place duplicates of the administrative record at any other location.

(2) PARTICIPATION PROCEDURES.—

(A) REMOVAL ACTION.—The President shall promulgate regulations in accordance with chapter 5 of title 5 of the United States Code establishing procedures for the appropriate participation of interested persons in the development of the administrative record on which the President will base the selection of removal actions and on which judicial review of removal actions will be based.

(B) REMEDIAL ACTION.—The President shall provide for the participation of interested persons, including potentially responsible parties, in the development of the administrative record on which the President will base the selection of remedial actions and on which judicial review of remedial actions will be based. The procedures developed under this subparagraph shall include, at a minimum, each of the following:

(i) Notice to potentially affected persons and the public, which shall be accompanied by a brief analysis of the plan and alternative plans that were considered.

(ii) A reasonable opportunity to comment and provide information regarding the plan.

(iii) An opportunity for a public meeting in the affected area, in accordance with section 117(a)(2) (relating to public participation).

(iv) A response to each of the significant comments, criticisms, and new data submitted in written or oral presentations.

(v) A statement of the basis and purpose of the selected action.

For purposes of this subparagraph, the administrative record shall include all items developed and received under this subparagraph and all items described in the second sentence of section 117(d). The President shall promulgate regulations in accordance with chapter 5 of title 5 of the United States Code to carry out the requirements of this subparagraph.

(C) INTERIM RECORD.—Until such regulations under subparagraphs (A) and (B) are promulgated, the administrative record shall consist of all items developed and received pursuant to current procedures for selection of the response action, including procedures for the participation of interested parties and the public. The development of an administrative record and the selection of response action under this Act shall not include an adjudicatory hearing.

(D) POTENTIALLY RESPONSIBLE PARTIES.—The President shall make reasonable efforts to identify and notify potentially responsible parties as early as possible before selection of a response action. Nothing in this paragraph shall be construed to be a defense to liability.

(l) NOTICE OF ACTIONS.—Whenever any action is brought under this Act in a court of the United States by a plaintiff other than the United States, the plaintiff shall provide a copy of the complaint to the Attorney General of the United States and to the Administrator of the Environmental Protection Agency.

[42 U.S.C. 9613]

RELATIONSHIP TO OTHER LAW

SEC. 114. (a) Nothing in this Act shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State.

(b) Any person who receives compensation for removal costs or damages or claims pursuant to this Act shall be precluded from recovering compensation for the same removal costs or damages or claims pursuant to any other State or Federal law. Any person who receives compensation for removal costs or damages or claims pursuant to any other Federal or State law shall be precluded from receiving compensation for the same removal costs or damages or claims as provided in this Act.

(c) RECYCLED OIL.—

(1) SERVICE STATION DEALERS, ETC.—No person (including the United States or any State) may recover, under the author-

ity of subsection (a)(3) or (a)(4) of section 107, from a service station dealer for any response costs or damages resulting from a release or threatened release of recycled oil, or use the authority of section 106 against a service station dealer other than a person described in subsection (a)(1) or (a)(2) of section 107, if such recycled oil—

(A) is not mixed with any other hazardous substance, and

(B) is stored, treated, transported, or otherwise managed in compliance with regulations or standards promulgated pursuant to section 3014 of the Solid Waste Disposal Act and other applicable authorities.

Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a release or threatened release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action.

(2) PRESUMPTION.—Solely for the purposes of this subsection, a service station dealer may presume that a small quantity of used oil is not mixed with other hazardous substances if it—

(A) has been removed from the engine of a light duty motor vehicle or household appliances by the owner of such vehicle or appliances, and

(B) is presented, by such owner, to the dealer for collection, accumulation, and delivery to an oil recycling facility.

(3) DEFINITION.—For purposes of this subsection, the terms "used oil" and "recycled oil" have the same meanings as set forth in sections 1004(36) and 1004(37) of the Solid Waste Disposal Act and regulations promulgated pursuant to that Act.

(4) EFFECTIVE DATE.—The effective date of paragraphs (1) and (2) of this subsection shall be the effective date of regulations or standards promulgated under section 3014 of the Solid Waste Disposal Act that include, among other provisions, a requirement to conduct corrective action to respond to any releases of recycled oil under subtitle C or subtitle I of such Act.

(d) Except as provided in this title, no owner or operator of a vessel or facility who establishes and maintains evidence of financial responsibility in accordance with this title shall be required under any State or local law, rule, or regulation to establish or maintain any other evidence of financial responsibility in connection with liability for the release of a hazardous substance from such vessel or facility. Evidence of compliance with the financial responsibility requirements of this title shall be accepted by a State in lieu of any other requirement of financial responsibility imposed by such State in connection with liability for the release of a hazardous substance from such vessel or facility.

[42 U.S.C. 9614]

AUTHORITY TO DELEGATE, ISSUE REGULATIONS

SEC. 115. The President is authorized to delegate and assign any duties or powers imposed upon or assigned to him and to promulgate any regulations necessary to carry out the provisions of this title.

[42 U.S.C. 9615]

SEC. 116. SCHEDULES.

(a) ASSESSMENT AND LISTING OF FACILITIES.—It shall be a goal of this Act that, to the maximum extent practicable—

(1) not later than January 1, 1988, the President shall complete preliminary assessments of all facilities that are contained (as of the date of enactment of the Superfund Amendments and Reauthorization Act of 1986) on the Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS) including in each assessment a statement as to whether a site inspection is necessary and by whom it should be carried out; and

(2) not later than January 1, 1989, the President shall assure the completion of site inspections at all facilities for which the President has stated a site inspection is necessary pursuant to paragraph (1).

(b) EVALUATION.—Within 4 years after enactment of the Superfund Amendments and Reauthorization Act of 1986, each facility listed (as of the date of such enactment) in the CERCLIS shall be evaluated if the President determines that such evaluation is warranted on the basis of a site inspection or preliminary assessment. The evaluation shall be in accordance with the criteria established in section 105 under the National Contingency Plan for determining priorities among release for inclusion on the National Priorities List. In the case of a facility listed in the CERCLIS after the enactment of the Superfund Amendments and Reauthorization Act of 1986, the facility shall be evaluated within 4 years after the date of such listing if the President determines that such evaluation is warranted on the basis of a site inspection or preliminary assessment.

(c) EXPLANATIONS.—If any of the goals established by subsection (a) or (b) are not achieved, the President shall publish an explanation of why such action could not be completed by the specified date.

(d) COMMENCEMENT OF RI/FS.—The President shall assure that remedial investigations and feasibility studies (RI/FS) are commenced for facilities listed on the National Priorities List, in addition to those commenced prior to the date of enactment of the Superfund Amendments and Reauthorization Act of 1986, in accordance with the following schedule:

(1) not fewer than 275 by the date 36 months after the date of enactment of the Superfund Amendments and Reauthorization Act of 1986, and

(2) if the requirement of paragraph (1) is not met, not fewer than an additional 175 by the date 4 years after such date of enactment, an additional 200 by the date 5 years after such date of enactment, and a total of 650 by the date 5 years after such date of enactment.

(e) COMMENCEMENT OF REMEDIAL ACTION.—The President shall assure that substantial and continuous physical on-site remedial action commences at facilities on the National Priorities List, in addition to those facilities on which remedial action has commenced prior to the date of enactment of the Superfund Amendments and Reauthorization Act of 1986, at a rate not fewer than:

(1) 175 facilities during the first 36-month period after enactment of this subsection; and

(2) 200 additional facilities during the following 24 months after such 36-month period.

[42 U.S.C. 9616]

SEC. 117. PUBLIC PARTICIPATION.

(a) PROPOSED PLAN.—Before adoption of any plan for remedial action to be undertaken by the President, by a State, or by any other person, under section 104, 106, 120, or 122, the President or State, as appropriate, shall take both of the following actions:

(1) Publish a notice and brief analysis of the proposed plan and make such plan available to the public.

(2) Provide a reasonable opportunity for submission of written and oral comments and an opportunity for a public meeting at or near the facility at issue regarding the proposed plan and regarding any proposed findings under section 121(d)(4) (relating to cleanup standards). The President or the State shall keep a transcript of the meeting and make such transcript available to the public.

The notice and analysis published under paragraph (1) shall include sufficient information as may be necessary to provide a reasonable explanation of the proposed plan and alternative proposals considered.

(b) FINAL PLAN.—Notice of the final remedial action plan adopted shall be published and the plan shall be made available to the public before commencement of any remedial action. Such final plan shall be accompanied by a discussion of any significant changes (and the reasons for such changes) in the proposed plan and a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations under subsection (a).

(c) EXPLANATION OF DIFFERENCES.—After adoption of a final remedial action plan—

(1) if any remedial action is taken,

(2) if any enforcement action under section 106 is taken, or

(3) if any settlement or consent decree under section 106 or section 122 is entered into,

and if such action, settlement, or decree differs in any significant respects from the final plan, the President or the State shall publish an explanation of the significant differences and the reasons such changes were made.

(d) PUBLICATION.—For the purposes of this section, publication shall include, at a minimum, publication in a major local newspaper of general circulation. In addition, each item developed, received, published, or made available to the public under this sec-

tion shall be available for public inspection and copying at or near the facility at issue.

(e) GRANTS FOR TECHNICAL ASSISTANCE.—

(1) AUTHORITY.—Subject to such amounts as are provided in appropriations Acts and in accordance with rules promulgated by the President, the President may make grants available to any group of individuals which may be affected by a release or threatened release at any facility which is listed on the National Priorities List under the National Contingency Plan. Such grants may be used to obtain technical assistance in interpreting information with regard to the nature of the hazard, remedial investigation and feasibility study, record of decision, remedial design, selection and construction of remedial action, operation and maintenance, or removal action at such facility.

(2) AMOUNT.—The amount of any grant under this subsection may not exceed $50,000 for a single grant recipient. The President may waive the $50,000 limitation in any case where such waiver is necessary to carry out the purposes of this subsection. Each grant recipient shall be required, as a condition of the grant, to contribute at least 20 percent of the total of costs of the technical assistance for which such grant is made. The President may waive the 20 percent contribution requirement if the grant recipient demonstrates financial need and such waiver is necessary to facilitate public participation in the selection of remedial action at the facility. Not more than one grant may be made under this subsection with respect to a single facility, but the grant may be renewed to facilitate public participation at all stages of remedial action.

[42 U.S.C. 9617]

SEC. 118. HIGH PRIORITY FOR DRINKING WATER SUPPLIES.

For purposes of taking action under section 104 or 106 and listing facilities on the National Priorities List, the President shall give a high priority to facilities where the release of hazardous substances or pollutants or contaminants has resulted in the closing of drinking water wells or has contaminated a principal drinking water supply.

[42 U.S.C. 9618]

SEC. 119. RESPONSE ACTION CONTRACTORS.

(a) LIABILITY OF RESPONSE ACTION CONTRACTORS.—

(1) RESPONSE ACTION CONTRACTORS.—A person who is a response action contractor with respect to any release or threatened release of a hazardous substance or pollutant or contaminant from a vessel or facility shall not be liable under this title or under any other Federal law to any person for injuries, costs, damages, expenses, or other liability (including but not limited to claims for indemnification or contribution and claims by third parties for death, personal injury, illness or loss of or damage to property or economic loss) which results from such release or threatened release.

(2) NEGLIGENCE, ETC.—Paragraph (1) shall not apply in the case of a release that is caused by conduct of the response

action contractor which is negligent, grossly negligent, or which constitutes intentional misconduct.

(3) EFFECT ON WARRANTIES; EMPLOYER LIABILITY.—Nothing in this subsection shall affect the liability of any person under any warranty under Federal, State, or common law. Nothing in this subsection shall affect the liability of an employer who is a response action contractor to any employee of such employer under any provision of law, including any provision of any law relating to worker's compensation.

(4) GOVERNMENTAL EMPLOYEES.—A state employee or an employee of a political subdivision who provides services relating to response action while acting within the scope of his authority as a governmental employee shall have the same exemption from liability (subject to the other provisions of this section) as is provided to the response action contractor under this section.

(b) SAVINGS PROVISIONS.—

(1) LIABILITY OF OTHER PERSONS.—The defense provided by section 107(b)(3) shall not be available to any potentially responsible party with respect to any costs or damages caused by any act or omission of a response action contractor. Except as provided in subsection (a)(4) and the preceding sentence, nothing in this section shall affect the liability under this Act or under any other Federal or State law of any person, other than a response action contractor.

(2) BURDEN OF PLAINTIFF.—Nothing in this section shall affect the plaintiff's burden of establishing liability under this title.

(c) INDEMNIFICATION.—

(1) IN GENERAL.—The President may agree to hold harmless and indemnify any response action contractor meeting the requirements of this subsection against any liability (including the expenses of litigation or settlement) for negligence arising out of the contractor's performance in carrying out response action activities under this title, unless such liability was caused by conduct of the contractor which was grossly negligent or which constituted intentional misconduct.

(2) APPLICABILITY.—This subsection shall apply only with respect to a response action carried out under written agreement with—

(A) the President;

(B) any Federal agency;

(C) a State or political subdivision which has entered into a contract or cooperative agreement in accordance with section 104(d)(1) of this title; or

(D) any potentially responsible party carrying out any agreement under section 122 (relating to settlements) or section 106 (relating to abatement).

(3) SOURCE OF FUNDING.—This subsection shall not be subject to section 1301 or 1341 of title 31 of the United States Code or section 3732 of the Revised Statutes (41 U.S.C. 11) or to section 3 of the Superfund Amendments and Reauthorization Act of 1986. For purposes of section 111, amounts expended pursuant to this subsection for indemnification of any

response action contractor (except with respect to federally owned or operated facilities) shall be considered governmental response costs incurred pursuant to section 104. If sufficient funds are unavailable in the Hazardous Substance Superfund established under subchapter A of chapter 98 of the Internal Revenue Code of 1954 to make payments pursuant to such indemnification or if the Fund is repealed, there are authorized to be appropriated such amounts as may be necessary to make such payments.

(4) REQUIREMENTS.—An indemnification agreement may be provided under this subsection only if the President determines that each of the following requirements are met:

(A) The liability covered by the indemnification agreement exceeds or is not covered by insurance available, at a fair and reasonable price, to the contractor at the time the contractor enters into the contract to provide response action, and adequate insurance to cover such liability is not generally available at the time the response action contract is entered into.

(B) The response action contractor has made diligent efforts to obtain insurance coverage from non-Federal sources to cover such liability.

(C) In the case of a response action contract covering more than one facility, the response action contractor agrees to continue to make such diligent efforts each time the contractor begins work under the contract at a new facility.

(5) LIMITATIONS.—

(A) LIABILITY COVERED.—Indemnification under this subsection shall apply only to response action contractor liability which results from a release of any hazardous substance or pollutant or contaminant if such release arises out of response action activities.

(B) DEDUCTIBLES AND LIMITS.—An indemnification agreement under this subsection shall include deductibles and shall place limits on the amount of indemnification to be made available.

(C) CONTRACTS WITH POTENTIALLY RESPONSIBLE PARTIES.—

(i) DECISION TO INDEMNIFY.—In deciding whether to enter into an indemnification agreement with a response action contractor carrying out a written contract or agreement with any potentially responsible party, the President shall determine an amount which the potentially responsible party is able to indemnify the contractor. The President may enter into such an indemnification agreement only if the President determines that such amount of indemnification is inadequate to cover any reasonable potential liability of the contractor arising out of the contractor"s negligence in performing the contract or agreement with such party. The President shall make the determinations in the preceding sentences (with respect to the amount and the adequacy of the amount) taking into

account the total net assets and resources of potentially responsible parties with respect to the facility at the time of such determinations.

(ii) CONDITIONS.—The President may pay a claim under an indemnification agreement referred to in clause (i) for the amount determined under clause (i) only if the contractor has exhausted all administrative, judicial, and common law claims for indemnification against all potentially responsible parties participating in the clean-up of the facility with respect to the liability of the contractor arising out of the contractor's negligence in performing the contract or agreement with such party. Such indemnification agreement shall require such contractor to pay any deductible established under subparagraph (B) before the contractor may recover any amount from the potentially responsible party or under the indemnification agreement.

(D) RCRA FACILITIES.—No owner or operator of a facility regulated under the Solid Waste Disposal Act may be indemnified under this subsection with respect to such facility.

(E) PERSONS RETAINED OR HIRED.—A person retained or hired by a person described in subsection (e)(2)(B) shall be eligible for indemnification under this subsection only if the President specifically approves of the retaining or hiring of such person.

(6) COST RECOVERY.—For purposes of section 107, amounts expended pursuant to this subsection for indemnification of any person who is a response action contractor with respect to any release or threatened release shall be considered a cost of response incurred by the United States Government with respect to such release.

(7) REGULATIONS.—The President shall promulgate regulations for carrying out the provisions of this subsection. Before promulgation of the regulations, the President shall develop guidelines to carry out this section. Development of such guidelines shall include reasonable opportunity for public comment.

(8) STUDY.—The Comptroller General shall conduct a study in the fiscal year ending September 30, 1989, on the application of this subsection, including whether indemnification agreements under this subsection are being used, the number of claims that have been filed under such agreements, and the need for this subsection. The Comptroller General shall report the findings of the study to Congress no later than September 30, 1989.

(d) EXCEPTION.—The exemption provided under subsection (a) and the authority of the President to offer indemnification under subsection (c) shall not apply to any person covered by the provisions of paragraph (1), (2), (3), or (4) of section 107(a) with respect to the release or threatened release concerned if such person would be covered by such provisions even if such person had not carried out any actions referred to in subsection (e) of this section.

(e) DEFINITIONS.—For purposes of this section—

(1) RESPONSE ACTION CONTRACT.—The term "response action contract" means any written contract or agreement entered into by a response action contractor (as defined in paragraph (2)(A) of this subsection) with—

(A) the President;

(B) any Federal agency;

(C) a State or political subdivision which has entered into a contract or cooperative agreement in accordance with section 104(d)(1) of this Act; or

(D) any potentially responsible party carrying out an agreement under section 106 or 122;

to provide any remedial action under this Act at a facility listed on the National Priorities List, or any removal under this Act, with respect to any release or threatened release of a hazardous substance or pollutant or contaminant from the facility or to provide any evaluation, planning, engineering, surveying and mapping, design, construction, equipment, or any ancillary services thereto for such facility.

(2) RESPONSE ACTION CONTRACTOR.—The term "response action contractor" means—

(A) any—

(i) person who enters into a response action contract with respect to any release or threatened release of a hazardous substance or pollutant or contaminant from a facility and is carrying out such contract; and [1]

(ii) person, public or nonprofit private entity, conducting a field demonstration pursuant to section 311(b); and

(iii) Recipients [2] of grants (including sub-grantees) under section 126 [3] for the training and education of workers who are or may be engaged in activities related to hazardous waste removal, containment, or emergency response under this Act; and [4]

(B) any person who is retained or hired by a person described in subparagraph (A) to provide any services relating to a response action; and

(C) any surety who after October 16, 1990, provides a bid, performance or payment bond to a response action contractor, and begins activities to meet its obligations under such bond, but only in connection with such activities or obligations.

(3) INSURANCE.—The term "insurance" means liability insurance which is fair and reasonably priced, as determined by the President, and which is made available at the time the contractor enters into the response action contract to provide response action.

(f) COMPETITION.—Response action contractors and subcontractors for program management, construction management, architec-

[1] So in law. Clause (iii) was added by section 101(f) of Public Law 100–202 without striking out the "and" at the end of clause (i).

[2] So in law. "Recipients of grants" probably should be "recipient of a grant".

[3] So in law. Should probably be "section 126 of the Superfund Amendments and Reauthorization Act of 1986 (42 U.S.C. 9660a)".

[4] So in law. The word "and" probably should not appear.

tural and engineering, surveying and mapping, and related services shall be selected in accordance with title IX of the Federal Property and Administrative Services Act of 1949. The Federal selection procedures shall apply to appropriate contracts negotiated by all Federal governmental agencies involved in carrying out this Act. Such procedures shall be followed by response action contractors and subcontractors.

(g) SURETY BONDS.—

(1) If under the Act of August 24, 1935 (40 U.S.C. 270a–270d), commonly referred to as the "Miller Act", surety bonds are required for any direct Federal procurement of any response action contract and are not waived pursuant to the Act of April 29, 1941 (40 U.S.C. 270e–270f), they shall be issued in accordance with such Act of August 24, 1935.

(2) If under applicable Federal law surety bonds are required for any direct Federal procurement of any response action contract, no right of action shall accrue on the performance bond issued on such response action contract to or for the use of any person other than the obligee named in the bond.

(3) If under applicable Federal law surety bonds are required for any direct Federal procurement of any response action contract, unless otherwise provided for by the procuring agency in the bond, in the event of a default, the surety's liability on a performance bond shall be only for the cost of completion of the contract work in accordance with the plans and specifications less the balance of funds remaining to be paid under the contract, up to the penal sum of the bond. The surety shall in no event be liable on bonds to indemnify or compensate the obligee for loss or liability arising from personal injury or property damage whether or not caused by a breach of the bonded contract.

(4) Nothing in this subsection shall be construed as preempting, limiting, superseding, affecting, applying to, or modifying any State laws, regulations, requirements, rules, practices or procedures. Nothing in this subsection shall be construed as affecting, applying to, modifying, limiting, superseding, or preempting any rights, authorities, liabilities, demands, actions, causes of action, losses, judgments, claims, statutes of limitation, or obligations under Federal or State law, which do not arise on or under the bond.

(5) This subsection shall not apply to bonds executed before October 17, 1990.

[42 U.S.C. 9619]

SEC. 120. FEDERAL FACILITIES.[1]

(a) APPLICATION OF ACT TO FEDERAL GOVERNMENT.—

[1] Section 120(b) of the Superfund Amendments and Reauthorization Act of 1986 (P.L. 99–499) provides:

(b) LIMITED GRANDFATHER.—Section 120 of CERCLA shall not apply to any response action or remedial action for which a plan is under development by the Department of Energy on the date of enactment of this Act [October 17, 1986] with respect to facilities—

(1) owned or operated by the United States and subject to the jurisdiction of such Department;

(2) located in St. Charles and St. Louis counties, Missouri, or the city of St. Louis, Missouri; and

Continued

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

(2) APPLICATION OF REQUIREMENTS TO FEDERAL FACILITIES.—All guidelines, rules, regulations, and criteria which are applicable to preliminary assessments carried out under this Act for facilities at which hazardous substances are located, applicable to evaluations of such facilities under the National Contingency Plan, applicable to inclusion on the National Priorities List, or applicable to remedial actions at such facilities shall also be applicable to facilities which are owned or operated by a department, agency, or instrumentality of the United States in the same manner and to the extent as such guidelines, rules, regulations, and criteria are applicable to other facilities. No department, agency, or instrumentality of the United States may adopt or utilize any such guidelines, rules, regulations, or criteria which are inconsistent with the guidelines, rules, regulations, and criteria established by the Administrator under this Act.

(3) EXCEPTIONS.—This subsection shall not apply to the extent otherwise provided in this section with respect to applicable time periods. This subsection shall also not apply to any requirements relating to bonding, insurance, or financial responsibility. Nothing in this Act shall be construed to require a State to comply with section 104(c)(3) in the case of a facility which is owned or operated by any department, agency, or instrumentality of the United States.

(4) STATE LAWS.—State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States or facilities that are the subject of a deferral under subsection (h)(3)(C) when such facilities are not included on the National Priorities List. The preceding sentence shall not apply to the extent a State law would apply any standard or requirement to such facilities which is more stringent than the standards and requirements applicable to facilities which are not owned or operated by any such department, agency, or instrumentality.

(b) NOTICE.—Each department, agency, and instrumentality of the United States shall add to the inventory of Federal agency hazardous waste facilities required to be submitted under section 3016 of the Solid Waste Disposal Act (in addition to the information required under section 3016(a)(3) of such Act) information on contamination from each facility owned or operated by the department, agency, or instrumentality if such contamination affects con-

(3) published in the National Priorities List.
In preparing such plans, the Secretary of Energy shall consult with the Administrator of the Environmental Protection Agency.

tiguous or adjacent property owned by the department, agency, or instrumentality or by any other person, including a description of the monitoring data obtained.

(c) FEDERAL AGENCY HAZARDOUS WASTE COMPLIANCE DOCKET.—The Administrator shall establish a special Federal Agency Hazardous Waste Compliance Docket (hereinafter in this section referred to as the "docket") which shall contain each of the following:

(1) All information submitted under section 3016 of the Solid Waste Disposal Act and subsection (b) of this section regarding any Federal facility and notice of each subsequent action taken under this Act with respect to the facility.

(2) Information submitted by each department, agency, or instrumentality of the United States under section 3005 or 3010 of such Act.

(3) Information submitted by the department, agency, or instrumentality under section 103 of this Act.

The docket shall be available for public inspection at reasonable times. Six months after establishment of the docket and every 6 months thereafter, the Administrator shall publish in the Federal Register a list of the Federal facilities which have been included in the docket during the immediately preceding 6-month period. Such publication shall also indicate where in the appropriate regional office of the Environmental Protection Agency additional information may be obtained with respect to any facility on the docket. The Administrator shall establish a program to provide information to the public with respect to facilities which are included in the docket under this subsection.

(d) ASSESSMENT AND EVALUATION.—

(1) IN GENERAL.—The Administrator shall take steps to assure that a preliminary assessment is conducted for each facility on the docket. Following such preliminary assessment, the Administrator shall, where appropriate—

(A) evaluate such facilities in accordance with the criteria established in accordance with section 105 under the National Contingency Plan for determining priorities among releases; and

(B) include such facilities on the National Priorities List maintained under such plan if the facility meets such criteria.

(2) APPLICATION OF CRITERIA.—

(A) IN GENERAL.—Subject to subparagraph (B), the criteria referred to in paragraph (1) shall be applied in the same manner as the criteria are applied to facilities that are owned or operated by persons other than the United States.

(B) RESPONSE UNDER OTHER LAW.—It shall be an appropriate factor to be taken into consideration for the purposes of section 105(a)(8)(A) that the head of the department, agency, or instrumentality that owns or operates a facility has arranged with the Administrator or appropriate State authorities to respond appropriately, under authority of a law other than this Act, to a release or threatened release of a hazardous substance.

(3) COMPLETION.—Evaluation and listing under this subsection shall be completed in accordance with a reasonable schedule established by the Administrator.

(e) REQUIRED ACTION BY DEPARTMENT.—

(1) RIFS.—Not later than 6 months after the inclusion of any facility on the National Priorities List, the department, agency, or instrumentality which owns or operates such facility shall, in consultation with the Administrator and appropriate State authorities, commence a remedial investigation and feasibility study for such facility. In the case of any facility which is listed on such list before the date of the enactment of this section, the department, agency, or instrumentality which owns or operates such facility shall, in consultation with the Administrator and appropriate State authorities, commence such an investigation and study for such facility within one year after such date of enactment. The Administrator and appropriate State authorities shall publish a timetable and deadlines for expeditious completion of such investigation and study.

(2) COMMENCEMENT OF REMEDIAL ACTION; INTERAGENCY AGREEMENT.—The Administrator shall review the results of each investigation and study conducted as provided in paragraph (1). Within 180 days thereafter, the head of the department, agency, or instrumentality concerned shall enter into an interagency agreement with the Administrator for the expeditious completion by such department, agency, or instrumentality of all necessary remedial action at such facility. Substantial continuous physical onsite remedial action shall be commenced at each facility not later than 15 months after completion of the investigation and study. All such interagency agreements, including review of alternative remedial action plans and selection of remedial action, shall comply with the public participation requirements of section 117.

(3) COMPLETION OF REMEDIAL ACTIONS.—Remedial actions at facilities subject to interagency agreements under this section shall be completed as expeditiously as practicable. Each agency shall include in its annual budget submissions to the Congress a review of alternative agency funding which could be used to provide for the costs of remedial action. The budget submission shall also include a statement of the hazard posed by the facility to human health, welfare, and the environment and identify the specific consequences of failure to begin and complete remedial action.

(4) CONTENTS OF AGREEMENT.—Each interagency agreement under this subsection shall include, but shall not be limited to, each of the following:

(A) A review of alternative remedial actions and selection of a remedial action by the head of the relevant department, agency, or instrumentality and the Administrator or, if unable to reach agreement on selection of a remedial action, selection by the Administrator.

(B) A schedule for the completion of each such remedial action.

(C) Arrangements for long-term operation and maintenance of the facility.

(5) ANNUAL REPORT.—Each department, agency, or instrumentality responsible for compliance with this section shall furnish an annual report to the Congress concerning its progress in implementing the requirements of this section. Such reports shall include, but shall not be limited to, each of the following items:

(A) A report on the progress in reaching interagency agreements under this section.

(B) The specific cost estimates and budgetary proposals involved in each interagency agreement.

(C) A brief summary of the public comments regarding each proposed interagency agreement.

(D) A description of the instances in which no agreement was reached.

(E) A report on progress in conducting investigations and studies under paragraph (1).

(F) A report on progress in conducting remedial actions.

(G) A report on progress in conducting remedial action at facilities which are not listed on the National Priorities List.

With respect to instances in which no agreement was reached within the required time period, the department, agency, or instrumentality filing the report under this paragraph shall include in such report an explanation of the reasons why no agreement was reached. The annual report required by this paragraph shall also contain a detailed description on a State-by-State basis of the status of each facility subject to this section, including a description of the hazard presented by each facility, plans and schedules for initiating and completing response action, enforcement status (where appropriate), and an explanation of any postponements or failure to complete response action. Such reports shall also be submitted to the affected States.

(6) SETTLEMENTS WITH OTHER PARTIES.—If the Administrator, in consultation with the head of the relevant department, agency, or instrumentality of the United States, determines that remedial investigations and feasibility studies or remedial action will be done properly at the Federal facility by another potentially responsible party within the deadlines provided in paragraphs (1), (2), and (3) of this subsection, the Administrator may enter into an agreement with such party under section 122 (relating to settlements). Following approval by the Attorney General of any such agreement relating to a remedial action, the agreement shall be entered in the appropriate United States district court as a consent decree under section 106 of this Act.

(f) STATE AND LOCAL PARTICIPATION.—The Administrator and each department, agency, or instrumentality responsible for compliance with this section shall afford to relevant State and local officials the opportunity to participate in the planning and selection of the remedial action, including but not limited to the review of all

applicable data as it becomes available and the development of studies, reports, and action plans. In the case of State officials, the opportunity to participate shall be provided in accordance with section 121.

(g) TRANSFER OF AUTHORITIES.—Except for authorities which are delegated by the Administrator to an officer or employee of the Environmental Protection Agency, no authority vested in the Administrator under this section may be transferred, by executive order of the President or otherwise, to any other officer or employee of the United States or to any other person.

(h) PROPERTY TRANSFERRED BY FEDERAL AGENCIES.—

(1) NOTICE.—After the last day of the 6-month period beginning on the effective date of regulations under paragraph (2) of this subsection, whenever any department, agency, or instrumentality of the United States enters into any contract for the sale or other transfer of real property which is owned by the United States and on which any hazardous substance was stored for one year or more, known to have been released, or disposed of, the head of such department, agency, or instrumentality shall include in such contract notice of the type and quantity of such hazardous substance and notice of the time at which such storage, release, or disposal took place, to the extent such information is available on the basis of a complete search of agency files.

(2) FORM OF NOTICE; REGULATIONS.—Notice under this subsection shall be provided in such form and manner as may be provided in regulations promulgated by the Administrator. As promptly as practicable after the enactment of this subsection but not later than 18 months after the date of such enactment, and after consultation with the Administrator of the General Services Administration, the Administrator shall promulgate regulations regarding the notice required to be provided under this subsection.

(3) CONTENTS OF CERTAIN DEEDS.—

(A) IN GENERAL.—After the last day of the 6-month period beginning on the effective date of regulations under paragraph (2) of this subsection, in the case of any real property owned by the United States on which any hazardous substance was stored for one year or more, known to have been released, or disposed of, each deed entered into for the transfer of such property by the United States to any other person or entity shall contain—

(i) to the extent such information is available on the basis of a complete search of agency files—

(I) a notice of the type and quantity of such hazardous substances,

(II) notice of the time at which such storage, release, or disposal took place, and

(III) a description of the remedial action taken, if any;

(ii) a covenant warranting that—

(I) all remedial action necessary to protect human health and the environment with respect to any such substance remaining on the property

has been taken before the date of such transfer, and

(II) any additional remedial action found to be necessary after the date of such transfer shall be conducted by the United States; and

(iii) a clause granting the United States access to the property in any case in which remedial action or corrective action is found to be necessary after the date of such transfer.

(B) COVENANT REQUIREMENTS.—For purposes of subparagraphs (A)(ii)(I) and (C)(iii), all remedial action described in such subparagraph has been taken if the construction and installation of an approved remedial design has been completed, and the remedy has been demonstrated to the Administrator to be operating properly and successfully. The carrying out of long-term pumping and treating, or operation and maintenance, after the remedy has been demonstrated to the Administrator to be operating properly and successfully does not preclude the transfer of the property. The requirements of subparagraph (A)(ii) shall not apply in any case in which the person or entity to whom the real property is transferred is a potentially responsible party with respect to such property. The requirements of subparagraph (A)(ii) shall not apply in any case in which the transfer of the property occurs or has occurred by means of a lease, without regard to whether the lessee has agreed to purchase the property or whether the duration of the lease is longer than 55 years. In the case of a lease entered into after September 30, 1995, with respect to real property located at an installation approved for closure or realignment under a base closure law, the agency leasing the property, in consultation with the Administrator, shall determine before leasing the property that the property is suitable for lease, that the uses contemplated for the lease are consistent with protection of human health and the environment, and that there are adequate assurances that the United States will take all remedial action referred to in subparagraph (A)(ii) that has not been taken on the date of the lease.

(C) DEFERRAL.—

(i) IN GENERAL.—The Administrator, with the concurrence of the Governor of the State in which the facility is located (in the case of real property at a Federal facility that is listed on the National Priorities List), or the Governor of the State in which the facility is located (in the case of real property at a Federal facility not listed on the National Priorities List) may defer the requirement of subparagraph (A)(ii)(I) with respect to the property if the Administrator or the Governor, as the case may be, determines that the property is suitable for transfer, based on a finding that—

(I) the property is suitable for transfer for the use intended by the transferee, and the intended

use is consistent with protection of human health and the environment;

(II) the deed or other agreement proposed to govern the transfer between the United States and the transferee of the property contains the assurances set forth in clause (ii);

(III) the Federal agency requesting deferral has provided notice, by publication in a newspaper of general circulation in the vicinity of the property, of the proposed transfer and of the opportunity for the public to submit, within a period of not less than 30 days after the date of the notice, written comments on the suitability of the property for transfer; and

(IV) the deferral and the transfer of the property will not substantially delay any necessary response action at the property.

(ii) RESPONSE ACTION ASSURANCES.—With regard to a release or threatened release of a hazardous substance for which a Federal agency is potentially responsible under this section, the deed or other agreement proposed to govern the transfer shall contain assurances that—

(I) provide for any necessary restrictions on the use of the property to ensure the protection of human health and the environment;

(II) provide that there will be restrictions on use necessary to ensure that required remedial investigations, response action, and oversight activities will not be disrupted;

(III) provide that all necessary response action will be taken and identify the schedules for investigation and completion of all necessary response action as approved by the appropriate regulatory agency; and

(IV) provide that the Federal agency responsible for the property subject to transfer will submit a budget request to the Director of the Office of Management and Budget that adequately addresses schedules for investigation and completion of all necessary response action, subject to congressional authorizations and appropriations.

(iii) WARRANTY.—When all response action necessary to protect human health and the environment with respect to any substance remaining on the property on the date of transfer has been taken, the United States shall execute and deliver to the transferee an appropriate document containing a warranty that all such response action has been taken, and the making of the warranty shall be considered to satisfy the requirement of subparagraph (A)(ii)(I).

(iv) FEDERAL RESPONSIBILITY.—A deferral under this subparagraph shall not increase, diminish, or affect in any manner any rights or obligations of a Fed-

eral agency (including any rights or obligations under sections 106, 107, and 120 existing prior to transfer) with respect to a property transferred under this subparagraph.

(4) IDENTIFICATION OF UNCONTAMINATED PROPERTY.—(A) In the case of real property to which this paragraph applies (as set forth in subparagraph (E)), the head of the department, agency, or instrumentality of the United States with jurisdiction over the property shall identify the real property on which no hazardous substances and no petroleum products or their derivatives were known to have been released or disposed of. Such identification shall be based on an investigation of the real property to determine or discover the obviousness of the presence or likely presence of a release or threatened release of any hazardous substance or any petroleum product or its derivatives, including aviation fuel and motor oil, on the real property. The identification shall consist, at a minimum, of a review of each of the following sources of information concerning the current and previous uses of the real property:

(i) A detailed search of Federal Government records pertaining to the property.

(ii) Recorded chain of title documents regarding the real property.

(iii) Aerial photographs that may reflect prior uses of the real property and that are reasonably obtainable through State or local government agencies.

(iv) A visual inspection of the real property and any buildings, structures, equipment, pipe, pipeline, or other improvements on the real property, and a visual inspection of properties immediately adjacent to the real property.

(v) A physical inspection of property adjacent to the real property, to the extent permitted by owners or operators of such property.

(vi) Reasonably obtainable Federal, State, and local government records of each adjacent facility where there has been a release of any hazardous substance or any petroleum product or its derivatives, including aviation fuel and motor oil, and which is likely to cause or contribute to a release or threatened release of any hazardous substance or any petroleum product or its derivatives, including aviation fuel and motor oil, on the real property.

(vii) Interviews with current or former employees involved in operations on the real property.

Such identification shall also be based on sampling, if appropriate under the circumstances. The results of the identification shall be provided immediately to the Administrator and State and local government officials and made available to the public.

(B) The identification required under subparagraph (A) is not complete until concurrence in the results of the identification is obtained, in the case of real property that is part of a facility on the National Priorities List, from the Administrator, or, in the case of real property that is not part of a facility on the National Priorities List, from the appropriate State official.

In the case of a concurrence which is required from a State official, the concurrence is deemed to be obtained if, within 90 days after receiving a request for the concurrence, the State official has not acted (by either concurring or declining to concur) on the request for concurrence.

(C)(i) Except as provided in clauses (ii), (iii), and (iv), the identification and concurrence required under subparagraphs (A) and (B), respectively, shall be made at least 6 months before the termination of operations on the real property.

(ii) In the case of real property described in subparagraph (E)(i)(II) on which operations have been closed or realigned or scheduled for closure or realignment pursuant to a base closure law described in subparagraph (E)(ii)(I) or (E)(ii)(II) by the date of the enactment of the Community Environmental Response Facilitation Act, the identification and concurrence required under subparagraphs (A) and (B), respectively, shall be made not later than 18 months after such date of enactment.

(iii) In the case of real property described in subparagraph (E)(i)(II) on which operations are closed or realigned or become scheduled for closure or realignment pursuant to the base closure law described in subparagraph (E)(ii)(II) after the date of the enactment of the Community Environmental Response Facilitation Act, the identification and concurrence required under subparagraphs (A) and (B), respectively, shall be made not later than 18 months after the date by which a joint resolution disapproving the closure or realignment of the real property under section 2904(b) of such base closure law must be enacted, and such a joint resolution has not been enacted.

(iv) In the case of real property described in subparagraphs (E)(i)(II) on which operations are closed or realigned pursuant to a base closure law described in subparagraph (E)(ii)(III) or (E)(ii)(IV), the identification and concurrence required under subparagraphs (A) and (B), respectively, shall be made not later than 18 months after the date on which the real property is selected for closure or realignment pursuant to such a base closure law.

(D) In the case of the sale or other transfer of any parcel of real property identified under subparagraph (A), the deed entered into for the sale or transfer of such property by the United States to any other person or entity shall contain—

(i) a covenant warranting that any response action or corrective action found to be necessary after the date of such sale or transfer shall be conducted by the United States; and

(ii) a clause granting the United States access to the property in any case in which a response action or corrective action is found to be necessary after such date at such property, or such access is necessary to carry out a response action or corrective action on adjoining property.

(E)(i) This paragraph applies to—

(I) real property owned by the United States and on which the United States plans to terminate Federal Government operations, other than real property described in subclause (II); and

(II) real property that is or has been used as a military installation and on which the United States plans to close or realign military operations pursuant to a base closure law.

(ii) For purposes of this paragraph, the term "base closure law" includes the following:

(I) Title II of the Defense Authorization Amendments and Base Closure and Realignment Act (Public Law 100–526; 10 U.S.C. 2687 note).

(II) The Defense Base Closure and Realignment Act of 1990 (part A of title XXIX of Public Law 101–510; 10 U.S.C. 2687 note).

(III) Section 2687 of title 10, United States Code.

(IV) Any provision of law authorizing the closure or realignment of a military installation enacted on or after the date of enactment of the Community Environmental Response Facilitation Act.

(F) Nothing in this paragraph shall affect, preclude, or otherwise impair the termination of Federal Government operations on real property owned by the United States.

(5) NOTIFICATION OF STATES REGARDING CERTAIN LEASES.—In the case of real property owned by the United States, on which any hazardous substance or any petroleum product or its derivatives (including aviation fuel and motor oil) was stored for one year or more, known to have been released, or disposed of, and on which the United States plans to terminate Federal Government operations, the head of the department, agency, or instrumentality of the United States with jurisdiction over the property shall notify the State in which the property is located of any lease entered into by the United States that will encumber the property beyond the date of termination of operations on the property. Such notification shall be made before entering into the lease and shall include the length of the lease, the name of person to whom the property is leased, and a description of the uses that will be allowed under the lease of the property and buildings and other structures on the property.

(i) OBLIGATIONS UNDER SOLID WASTE DISPOSAL ACT.—Nothing in this section shall affect or impair the obligation of any department, agency, or instrumentality of the United States to comply with any requirement of the Solid Waste Disposal Act (including corrective action requirements).

(j) NATIONAL SECURITY.—

(1) SITE SPECIFIC PRESIDENTIAL ORDERS.—The President may issue such orders regarding response actions at any specified site or facility of the Department of Energy or the Department of Defense as may be necessary to protect the national security interests of the United States at that site or facility. Such orders may include, where necessary to protect such interests, an exemption from any requirement contained in this title or under title III of the Superfund Amendments and Reauthorization Act of 1986 with respect to the site or facility concerned. The President shall notify the Congress within 30 days of the issuance of an order under this paragraph pro-

viding for any such exemption. Such notification shall include a statement of the reasons for the granting of the exemption. An exemption under this paragraph shall be for a specified period which may not exceed one year. Additional exemptions may be granted, each upon the President's issuance of a new order under this paragraph for the site or facility concerned. Each such additional exemption shall be for a specified period which may not exceed one year. It is the intention of the Congress that whenever an exemption is issued under this paragraph the response action shall proceed as expeditiously as practicable. The Congress shall be notified periodically of the progress of any response action with respect to which an exemption has been issued under this paragraph. No exemption shall be granted under this paragraph due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation.

(2) CLASSIFIED INFORMATION.—Notwithstanding any other provision of law, all requirements of the Atomic Energy Act and all Executive orders concerning the handling of restricted data and national security information, including "need to know" requirements, shall be applicable to any grant of access to classified information under the provisions of this Act or under title III of the Superfund Amendments and Reauthorization Act of 1986.

[42 U.S.C. 9620]

SEC. 121. CLEANUP STANDARDS.[1]

(a) SELECTION OF REMEDIAL ACTION.—The President shall select appropriate remedial actions determined to be necessary to be carried out under section 104 or secured under section 106 which are in accordance with this section and, to the extent practicable, the national contingency plan, and which provide for cost-effective response. In evaluating the cost effectiveness of proposed alternative remedial actions, the President shall take into account the total short- and long-term costs of such actions, including the costs of operation and maintenance for the entire period during which such activities will be required.

(b) GENERAL RULES.—(1) Remedial actions in which treatment which permanently and significantly reduces the volume, toxicity or mobility of the hazardous substances, pollutants, and contaminants is a principal element, are to be preferred over remedial actions not involving such treatment. The offsite transport and dis-

[1] Section 121(b) of the Superfund Amendments and Reauthorization Act of 1986 (P.L. 99–499) provides:

(b) EFFECTIVE DATE.—With respect to section 121 of CERCLA, as added by this section—

(1) The requirements of section 121 of CERCLA shall not apply to any remedial action for which the Record of Decision (hereinafter in this section referred to as the "ROD") was signed, or the consent decree was lodged, before date of enactment [October 17, 1986].

(2) If the ROD was signed, or the consent decree lodged, within the 30-day period immediately following enactment of the Act, the Administrator shall certify in writing that the portion of the remedial action covered by the ROD or consent decree complies to the maximum extent practicable with section 121 of CERCLA.

Any ROD signed before enactment of this Act and reopened after enactment of this Act to modify or supplement the selection of remedy shall be subject to the requirements of section 121 of CERCLA.

posal of hazardous substances or contaminated materials without such treatment should be the least favored alternative remedial action where practicable treatment technologies are available. The President shall conduct an assessment of permanent solutions and alternative treatment technologies or resource recovery technologies that, in whole or in part, will result in a permanent and significant decrease in the toxicity, mobility, or volume of the hazardous substance, pollutant, or contaminant. In making such assessment, the President shall specifically address the long-term effectiveness of various alternatives. In assessing alternative remedial actions, the President shall, at a minimum, take into account:

(A) the long-term uncertainties associated with land disposal;

(B) the goals, objectives, and requirements of the Solid Waste Disposal Act;

(C) the persistence, toxicity, mobility, and propensity to bioaccumulate of such hazardous substances and their constituents;

(D) short- and long-term potential for adverse health effects from human exposure;

(E) long-term maintenance costs;

(F) the potential for future remedial action costs if the alternative remedial action in question were to fail; and

(G) the potential threat to human health and the environment associated with excavation, transportation, and redisposal, or containment.

The President shall select a remedial action that is protective of human health and the environment, that is cost effective, and that utilizes permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable. If the President selects a remedial action not appropriate for a preference under this subsection, the President shall publish an explanation as to why a remedial action involving such reductions was not selected.

(2) The President may select an alternative remedial action meeting the objectives of this subsection whether or not such action has been achieved in practice at any other facility or site that has similar characteristics. In making such a selection, the President may take into account the degree of support for such remedial action by parties interested in such site.

(c) REVIEW.—If the President selects a remedial action that results in any hazardous substances, pollutants, or contaminants remaining at the site, the President shall review such remedial action no less often than each 5 years after the initiation of such remedial action to assure that human health and the environment are being protected by the remedial action being implemented. In addition, if upon such review it is the judgment of the President that action is appropriate at such site in accordance with section 104 or 106, the President shall take or require such action. The President shall report to the Congress a list of facilities for which such review is required, the results of all such reviews, and any actions taken as a result of such reviews.

(d) DEGREE OF CLEANUP.—(1) Remedial actions selected under this section or otherwise required or agreed to by the President

under this Act shall attain a degree of cleanup of hazardous substances, pollutants, and contaminants released into the environment and of control of further release at a minimum which assures protection of human health and the environment. Such remedial actions shall be relevant and appropriate under the circumstances presented by the release or threatened release of such substance, pollutant, or contaminant.

(2)(A) With respect to any hazardous substance, pollutant or contaminant that will remain onsite, if—

(i) any standard, requirement, criteria, or limitation under any Federal environmental law, including, but not limited to, the Toxic Substances Control Act, the Safe Drinking Water Act, the Clean Air Act, the Clean Water Act, the Marine Protection, Research and Sanctuaries Act, or the Solid Waste Disposal Act; or

(ii) any promulgated standard, requirement, criteria, or limitation under a State environmental or facility siting law that is more stringent than any Federal standard, requirement, criteria, or limitation, including each such State standard, requirement, criteria, or limitation contained in a program approved, authorized or delegated by the Administrator under a statute cited in subparagraph (A), and that has been identified to the President by the State in a timely manner,

is legally applicable to the hazardous substance or pollutant or contaminant concerned or is relevant and appropriate under the circumstances of the release or threatened release of such hazardous substance or pollutant or contaminant, the remedial action selected under section 104 or secured under section 106 shall require, at the completion of the remedial action, a level or standard of control for such hazardous substance or pollutant or contaminant which at least attains such legally applicable or relevant and appropriate standard, requirement, criteria, or limitation. Such remedial action shall require a level or standard of control which at least attains Maximum Contaminant Level Goals established under the Safe Drinking Water Act and water quality criteria established under section 304 or 303 of the Clean Water Act, where such goals or criteria are relevant and appropriate under the circumstances of the release or threatened release.

(B)(i) In determining whether or not any water quality criteria under the Clean Water Act is relevant and appropriate under the circumstances of the release or threatened release, the President shall consider the designated or potential use of the surface or groundwater, the environmental media affected, the purposes for which such criteria were developed, and the latest information available.

(ii) For the purposes of this section, a process for establishing alternate concentration limits to those otherwise applicable for hazardous constituents in groundwater under subparagraph (A) may not be used to establish applicable standards under this paragraph if the process assumes a point of human exposure beyond the boundary of the facility, as defined at the conclusion of the remedial investigation and feasibility study, except where—

(I) there are known and projected points of entry of such groundwater into surface water; and

(II) on the basis of measurements or projections, there is or will be no statistically significant increase of such constituents from such groundwater in such surface water at the point of entry or at any point where there is reason to believe accumulation of constituents may occur downstream; and

(III) the remedial action includes enforceable measures that will preclude human exposure to the contaminated groundwater at any point between the facility boundary and all known and projected points of entry of such groundwater into surface water

then the assumed point of human exposure may be at such known and projected points of entry.

(C)(i) Clause (ii) of this subparagraph shall be applicable only in cases where, due to the President's selection, in compliance with subsection (b)(1), of a proposed remedial action which does not permanently and significantly reduce the volume, toxicity, or mobility of hazardous substances, pollutants, or contaminants, the proposed disposition of waste generated by or associated with the remedial action selected by the President is land disposal in a State referred to in clause (ii).

(ii) Except as provided in clauses (iii) and (iv), a State standard, requirement, criteria, or limitation (including any State siting standard or requirement) which could effectively result in the statewide prohibition of land disposal of hazardous substances, pollutants, or contaminants shall not apply.

(iii) Any State standard, requirement, criteria, or limitation referred to in clause (ii) shall apply where each of the following conditions is met:

(I) The State standard, requirement, criteria, or limitation is of general applicability and was adopted by formal means.

(II) The State standard, requirement, criteria, or limitation was adopted on the basis of hydrologic, geologic, or other relevant considerations and was not adopted for the purpose of precluding onsite remedial actions or other land disposal for reasons unrelated to protection of human health and the environment.

(III) The State arranges for, and assures payment of the incremental costs of utilizing, a facility for disposition of the hazardous substances, pollutants, or contaminants concerned.

(iv) Where the remedial action selected by the President does not conform to a State standard and the State has initiated a law suit against the Environmental Protection Agency prior to May 1, 1986, to seek to have the remedial action conform to such standard, the President shall conform the remedial action to the State standard. The State shall assure the availability of an offsite facility for such remedial action.

(3) In the case of any removal or remedial action involving the transfer of any hazardous substance or pollutant or contaminant offsite, such hazardous substance or pollutant or contaminant shall only be transferred to a facility which is operating in compliance with section 3004 and 3005 of the Solid Waste Disposal Act (or, where applicable, in compliance with the Toxic Substances Control Act or other applicable Federal law) and all applicable State requirements. Such substance or pollutant or contaminant may be

transferred to a land disposal facility only if the President determines that both of the following requirements are met:

(A) The unit to which the hazardous substance or pollutant or contaminant is transferred is not releasing any hazardous waste, or constituent thereof, into the groundwater or surface water or soil.

(B) All such releases from other units at the facility are being controlled by a corrective action program approved by the Administrator under subtitle C of the Solid Waste Disposal Act.

The President shall notify the owner or operator of such facility of determinations under this paragraph.

(4) The President may select a remedial action meeting the requirements of paragraph (1) that does not attain a level or standard of control at least equivalent to a legally applicable or relevant and appropriate standard, requirement, criteria, or limitation as required by paragraph (2) (including subparagraph (B) thereof), if the President finds that—

(A) the remedial action selected is only part of a total remedial action that will attain such level or standard of control when completed;

(B) compliance with such requirement at that facility will result in greater risk to human health and the environment than alternative options;

(C) compliance with such requirements is technically impracticable from an engineering perspective;

(D) the remedial action selected will attain a standard of performance that is equivalent to that required under the otherwise applicable standard, requirement, criteria, or limitation, through use of another method or approach;

(E) with respect to a State standard, requirement, criteria, or limitation, the State has not consistently applied (or demonstrated the intention to consistently apply) the standard, requirement, criteria, or limitation in similar circumstances at other remedial actions within the State; or

(F) in the case of a remedial action to be undertaken solely under section 104 using the Fund, selection of a remedial action that attains such level or standard of control will not provide a balance between the need for protection of public health and welfare and the environment at the facility under consideration, and the availability of amounts from the Fund to respond to other sites which present or may present a threat to public health or welfare or the environment, taking into consideration the relative immediacy of such threats.

The President shall publish such findings, together with an explanation and appropriate documentation.

(e) PERMITS AND ENFORCEMENT.—(1) No Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite, where such remedial action is selected and carried out in compliance with this section.

(2) A State may enforce any Federal or State standard, requirement, criteria, or limitation to which the remedial action is required to conform under this Act in the United States district court for the district in which the facility is located. Any consent decree

shall require the parties to attempt expeditiously to resolve disagreements concerning implementation of the remedial action informally with the appropriate Federal and State agencies. Where the parties agree, the consent decree may provide for administrative enforcement. Each consent decree shall also contain stipulated penalties for violations of the decree in an amount not to exceed $25,000 per day, which may be enforced by either the President or the State. Such stipulated penalties shall not be construed to impair or affect the authority of the court to order compliance with the specific terms of any such decree.

(f) STATE INVOLVEMENT.—(1) The President shall promulgate regulations providing for substantial and meaningful involvement by each State in initiation, development, and selection of remedial actions to be undertaken in that State. The regulations, at a minimum, shall include each of the following:

(A) State involvement in decisions whether to perform a preliminary assessment and site inspection.

(B) Allocation of responsibility for hazard ranking system scoring.

(C) State concurrence in deleting sites from the National Priorities List.

(D) State participation in the long-term planning process for all remedial sites within the State.

(E) A reasonable opportunity for States to review and comment on each of the following:

(i) The remedial investigation and feasibility study and all data and technical documents leading to its issuance.

(ii) The planned remedial action identified in the remedial investigation and feasibility study.

(iii) The engineering design following selection of the final remedial action.

(iv) Other technical data and reports relating to implementation of the remedy.

(v) Any proposed finding or decision by the President to exercise the authority of subsection (d)(4).

(F) Notice to the State of negotiations with potentially responsible parties regarding the scope of any response action at a facility in the State and an opportunity to participate in such negotiations and, subject to paragraph (2), be a party to any settlement.

(G) Notice to the State and an opportunity to comment on the President's proposed plan for remedial action as well as on alternative plans under consideration. The President's proposed decision regarding the selection of remedial action shall be accompanied by a response to the comments submitted by the State, including an explanation regarding any decision under subsection (d)(4) on compliance with promulgated State standards. A copy of such response shall also be provided to the State.

(H) Prompt notice and explanation of each proposed action to the State in which the facility is located.

Prior to the promulgation of such regulations, the President shall provide notice to the State of negotiations with potentially respon-

sible parties regarding the scope of any response action at a facility in the State, and such State may participate in such negotiations and, subject to paragraph (2), any settlements.

(2)(A) This paragraph shall apply to remedial actions secured under section 106. At least 30 days prior to the entering of any consent decree, if the President proposes to select a remedial action that does not attain a legally applicable or relevant and appropriate standard, requirement, criteria, or limitation, under the authority of subsection (d)(4), the President shall provide an opportunity for the State to concur or not concur in such selection. If the State concurs, the State may become a signatory to the consent decree.

(B) If the State does not concur in such selection, and the State desires to have the remedial action conform to such standard, requirement, criteria, or limitation, the State shall intervene in the action under section 106 before entry of the consent decree, to seek to have the remedial action so conform. Such intervention shall be a matter of right. The remedial action shall conform to such standard, requirement, criteria, or limitation if the State establishes, on the administrative record, that the finding of the President was not supported by substantial evidence. If the court determines that the remedial action shall conform to such standard, requirement, criteria, or limitation, the remedial action shall be so modified and the State may become a signatory to the decree. If the court determines that the remedial action need not conform to such standard, requirement, criteria, or limitation, and the State pays or assures the payment of the additional costs attributable to meeting such standard, requirement, criteria, or limitation, the remedial action shall be so modified and the State shall become a signatory to the decree.

(C) The President may conclude settlement negotiations with potentially responsible parties without State concurrence.

(3)(A) This paragraph shall apply to remedial actions at facilities owned or operated by a department, agency, or instrumentality of the United States. At least 30 days prior to the publication of the President's final remedial action plan, if the President proposes to select a remedial action that does not attain a legally applicable or relevant and appropriate standard, requirement, criteria, or limitation, under the authority of subsection (d)(4), the President shall provide an opportunity for the State to concur or not concur in such selection. If the State concurs, or does not act within 30 days, the remedial action may proceed.

(B) If the State does not concur in such selection as provided in subparagraph (A), and desires to have the remedial action conform to such standard, requirement, criteria, or limitation, the State may maintain an action as follows:

(i) If the President has notified the State of selection of such a remedial action, the State may bring an action within 30 days of such notification for the sole purpose of determining whether the finding of the President is supported by substantial evidence. Such action shall be brought in the United States district court for the district in which the facility is located.

(ii) If the State establishes, on the administrative record, that the President's finding is not supported by substantial evi-

dence, the remedial action shall be modified to conform to such standard, requirement, criteria, or limitation.

(iii) If the State fails to establish that the President's finding was not supported by substantial evidence and if the State pays, within 60 days of judgment, the additional costs attributable to meeting such standard, requirement, criteria, or limitation, the remedial action shall be selected to meet such standard, requirement, criteria, or limitation. If the State fails to pay within 60 days, the remedial action selected by the President shall proceed through completion.

(C) Nothing in this section precludes, and the court shall not enjoin, the Federal agency from taking any remedial action unrelated to or not inconsistent with such standard, requirement, criteria, or limitation.

[42 U.S.C. 9621]

SEC. 122. SETTLEMENTS.

(a) AUTHORITY TO ENTER INTO AGREEMENTS.—The President, in his discretion, may enter into an agreement with any person (including the owner or operator of the facility from which a release or substantial threat of release emanates, or any other potentially responsible person), to perform any response action (including any action described in section 104(b)) if the President determines that such action will be done properly by such person. Whenever practicable and in the public interest, as determined by the President, the President shall act to facilitate agreements under this section that are in the public interest and consistent with the National Contingency Plan in order to expedite effective remedial actions and minimize litigation. If the President decides not to use the procedures in this section, the President shall notify in writing potentially responsible parties at the facility of such decision and the reasons why use of the procedures is inappropriate. A decision of the President to use or not to use the procedures in this section is not subject to judicial review.

(b) AGREEMENTS WITH POTENTIALLY RESPONSIBLE PARTIES.—

(1) MIXED FUNDING.—An agreement under this section may provide that the President will reimburse the parties to the agreement from the Fund, with interest, for certain costs of actions under the agreement that the parties have agreed to perform but which the President has agreed to finance. In any case in which the President provides such reimbursement, the President shall make all reasonable efforts to recover the amount of such reimbursement under section 107 or under other relevant authorities.

(2) REVIEWABILITY.—The President's decisions regarding the availability of fund financing under this subsection shall not be subject to judicial review under subsection (d).

(3) RETENTION OF FUNDS.—If, as part of any agreement, the President will be carrying out any action and the parties will be paying amounts to the President, the President may, notwithstanding any other provision of law, retain and use such amounts for purposes of carrying out the agreement.

(4) FUTURE OBLIGATION OF FUND.—In the case of a completed remedial action pursuant to an agreement described in

paragraph (1), the Fund shall be subject to an obligation for subsequent remedial actions at the same facility but only to the extent that such subsequent actions are necessary by reason of the failure of the original remedial action. Such obligation shall be in a proportion equal to, but not exceeding, the proportion contributed by the Fund for the original remedial action. The Fund's obligation for such future remedial action may be met through Fund expenditures or through payment, following settlement or enforcement action, by parties who were not signatories to the original agreement.

(c) EFFECT OF AGREEMENT.—

(1) LIABILITY.—Whenever the President has entered into an agreement under this section, the liability to the United States under this Act of each party to the agreement, including any future liability to the United States, arising from the release or threatened release that is the subject of the agreement shall be limited as provided in the agreement pursuant to a covenant not to sue in accordance with subsection (f). A covenant not to sue may provide that future liability to the United States of a settling potentially responsible party under the agreement may be limited to the same proportion as that established in the original settlement agreement. Nothing in this section shall limit or otherwise affect the authority of any court to review in the consent decree process under subsection (d) any covenant not to sue contained in an agreement under this section. In determining the extent to which the liability of parties to an agreement shall be limited pursuant to a covenant not to sue, the President shall be guided by the principle that a more complete covenant not to sue shall be provided for a more permanent remedy undertaken by such parties.

(2) ACTIONS AGAINST OTHER PERSONS.—If an agreement has been entered into under this section, the President may take any action under section 106 against any person who is not a party to the agreement, once the period for submitting a proposal under subsection (e)(2)(B) has expired. Nothing in this section shall be construed to affect either of the following:

(A) The liability of any person under section 106 or 107 with respect to any costs or damages which are not included in the agreement.

(B) The authority of the President to maintain an action under this Act against any person who is not a party to the agreement.

(d) ENFORCEMENT.—

(1) CLEANUP AGREEMENTS.—

(A) CONSENT DECREE.—Whenever the President enters into an agreement under this section with any potentially responsible party with respect to remedial action under section 106, following approval of the agreement by the Attorney General, except as otherwise provided in the case of certain administrative settlements referred to in subsection (g), the agreement shall be entered in the appropriate United States district court as a consent decree. The President need not make any finding regarding an imminent and substantial endangerment to the public health or

the environment in connection with any such agreement or consent decree.

(B) EFFECT.—The entry of any consent decree under this subsection shall not be construed to be an acknowledgment by the parties that the release or threatened release concerned constitutes an imminent and substantial endangerment to the public health or welfare or the environment. Except as otherwise provided in the Federal Rules of Evidence, the participation by any party in the process under this section shall not be considered an admission of liability for any purpose, and the fact of such participation shall not be admissible in any judicial or administrative proceeding, including a subsequent proceeding under this section.

(C) STRUCTURE.—The President may fashion a consent decree so that the entering of such decree and compliance with such decree or with any determination or agreement made pursuant to this section shall not be considered an admission of liability for any purpose.

(2) PUBLIC PARTICIPATION.—

(A) FILING OF PROPOSED JUDGMENT.—At least 30 days before a final judgment is entered under paragraph (1), the proposed judgment shall be filed with the court.

(B) OPPORTUNITY FOR COMMENT.—The Attorney General shall provide an opportunity to persons who are not named as parties to the action to comment on the proposed judgment before its entry by the court as a final judgment. The Attorney General shall consider, and file with the court, any written comments, views, or allegations relating to the proposed judgment. The Attorney General may withdraw or withhold its consent to the proposed judgment if the comments, views, and allegations concerning the judgment disclose facts or considerations which indicate that the proposed judgment is inappropriate, improper, or inadequate.

(3) 104(b) AGREEMENTS.—Whenever the President enters into an agreement under this section with any potentially responsible party with respect to action under section 104(b), the President shall issue an order or enter into a decree setting forth the obligations of such party. The United States district court for the district in which the release or threatened release occurs may enforce such order or decree.

(e) SPECIAL NOTICE PROCEDURES.—

(1) NOTICE.—Whenever the President determines that a period of negotiation under this subsection would facilitate an agreement with potentially responsible parties for taking response action (including any action described in section 104(b)) and would expedite remedial action, the President shall so notify all such parties and shall provide them with information concerning each of the following:

(A) The names and addresses of potentially responsible parties (including owners and operators and other persons referred to in section 107(a)), to the extent such information is available.

(B) To the extent such information is available, the volume and nature of substances contributed by each potentially responsible party identified at the facility.

(C) A ranking by volume of the substances at the facility, to the extent such information is available.

The President shall make the information referred to in this paragraph available in advance of notice under this paragraph upon the request of a potentially responsible party in accordance with procedures provided by the President. The provisions of subsection (e) of section 104 regarding protection of confidential information apply to information provided under this paragraph. Disclosure of information generated by the President under this section to persons other than the Congress, or any duly authorized Committee thereof, is subject to other privileges or protections provided by law, including (but not limited to) those applicable to attorney work product. Nothing contained in this paragraph or in other provisions of this Act shall be construed, interpreted, or applied to diminish the required disclosure of information under other provisions of this or other Federal or State laws.

(2) NEGOTIATION.—

(A) MORATORIUM.—Except as provided in this subsection, the President may not commence action under section 104(a) or take any action under section 106 for 120 days after providing notice and information under this subsection with respect to such action. Except as provided in this subsection, the President may not commence a remedial investigation and feasibility study under section 104(b) for 90 days after providing notice and information under this subsection with respect to such action. The President may commence any additional studies or investigations authorized under section 104(b), including remedial design, during the negotiation period.

(B) PROPOSALS.—Persons receiving notice and information under paragraph (1) of this subsection with respect to action under section 106 shall have 60 days from the date of receipt of such notice to make a proposal to the President for undertaking or financing the action under section 106. Persons receiving notice and information under paragraph (1) of this subsection with respect to action under section 104(b) shall have 60 days from the date of receipt of such notice to make a proposal to the President for undertaking or financing the action under section 104(b).

(C) ADDITIONAL PARTIES.—If an additional potentially responsible party is identified during the negotiation period or after an agreement has been entered into under this subsection concerning a release or threatened release, the President may bring the additional party into the negotiation or enter into a separate agreement with such party.

(3) PRELIMINARY ALLOCATION OF RESPONSIBILITY.—

(A) IN GENERAL.—The President shall develop guidelines for preparing nonbinding preliminary allocations of responsibility. In developing these guidelines the President

may include such factors as the President considers relevant, such as: volume, toxicity, mobility, strength of evidence, ability to pay, litigative risks, public interest considerations, precedential value, and inequities and aggravating factors. When it would expedite settlements under this section and remedial action, the President may, after completion of the remedial investigation and feasibility study, provide a nonbinding preliminary allocation of responsibility which allocates percentages of the total cost of response among potentially responsible parties at the facility.

(B) COLLECTION OF INFORMATION.—To collect information necessary or appropriate for performing the allocation under subparagraph (A) or for otherwise implementing this section, the President may by subpoena require the attendance and testimony of witnesses and the production of reports, papers, documents, answers to questions, and other information that the President deems necessary. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In the event of contumacy or failure or refusal of any person to obey any such subpoena, any district court of the United States in which venue is proper shall have jurisdiction to order any such person to comply with such subpoena. Any failure to obey such an order of the court is punishable by the court as a contempt thereof.

(C) EFFECT.—The nonbinding preliminary allocation of responsibility shall not be admissible as evidence in any proceeding, and no court shall have jurisdiction to review the nonbinding preliminary allocation of responsibility. The nonbinding preliminary allocation of responsibility shall not constitute an apportionment or other statement on the divisibility of harm or causation.

(D) COSTS.—The costs incurred by the President in producing the nonbinding preliminary allocation of responsibility shall be reimbursed by the potentially responsible parties whose offer is accepted by the President. Where an offer under this section is not accepted, such costs shall be considered costs of response.

(E) DECISION TO REJECT OFFER.—Where the President, in his discretion, has provided a nonbinding preliminary allocation of responsibility and the potentially responsible parties have made a substantial offer providing for response to the President which he rejects, the reasons for the rejection shall be provided in a written explanation. The President's decision to reject such an offer shall not be subject to judicial review.

(4) FAILURE TO PROPOSE.—If the President determines that a good faith proposal for undertaking or financing action under section 106 has not been submitted within 60 days of the provision of notice pursuant to this subsection, the President may thereafter commence action under section 104(a) or take an action against any person under section 106 of this Act. If the President determines that a good faith proposal for under-

taking or financing action under section 104(b) has not been submitted within 60 days after the provision of notice pursuant to this subsection, the President may thereafter commence action under section 104(b).

(5) SIGNIFICANT THREATS.—Nothing in this subsection shall limit the President's authority to undertake response or enforcement action regarding a significant threat to public health or the environment within the negotiation period established by this subsection.

(6) INCONSISTENT RESPONSE ACTION.—When either the President, or a potentially responsible party pursuant to an administrative order or consent decree under this Act, has initiated a remedial investigation and feasibility study for a particular facility under this Act, no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by the President.

(f) COVENANT NOT TO SUE.—

(1) DISCRETIONARY COVENANTS.—The President may, in his discretion, provide any person with a covenant not to sue concerning any liability to the United States under this Act, including future liability, resulting from a release or threatened release of a hazardous substance addressed by a remedial action, whether that action is onsite or offsite, if each of the following conditions is met:

(A) The covenant not to sue is in the public interest.

(B) The covenant not to sue would expedite response action consistent with the National Contingency Plan under section 105 of this Act.

(C) The person is in full compliance with a consent decree under section 106 (including a consent decree entered into in accordance with this section) for response to the release or threatened release concerned.

(D) The response action has been approved by the President.

(2) SPECIAL COVENANTS NOT TO SUE.—In the case of any person to whom the President is authorized under paragraph (1) of this subsection to provide a covenant not to sue, for the portion of remedial action—

(A) which involves the transport and secure disposition offsite of hazardous substances in a facility meeting the requirements of sections 3004 (c), (d), (e), (f), (g), (m), (o), (p), (u), and (v) and 3005(c) of the Solid Waste Disposal Act, where the President has rejected a proposed remedial action that is consistent with the National Contingency Plan that does not include such offsite disposition and has thereafter required offsite disposition; or

(B) which involves the treatment of hazardous substances so as to destroy, eliminate, or permanently immobilize the hazardous constituents of such substances, such that, in the judgment of the President, the substances no longer present any current or currently foreseeable future significant risk to public health, welfare or the environment, no byproduct of the treatment or destruction process presents any significant hazard to public health, welfare or

the environment, and all byproducts are themselves treated, destroyed, or contained in a manner which assures that such byproducts do not present any current or currently foreseeable future significant risk to public health, welfare or the environment,

the President shall provide such person with a covenant not to sue with respect to future liability to the United States under this Act for a future release or threatened release of hazardous substances from such facility, and a person provided such covenant not to sue shall not be liable to the United States under section 106 or 107 with respect to such release or threatened release at a future time.

(3) REQUIREMENT THAT REMEDIAL ACTION BE COMPLETED.—A covenant not to sue concerning future liability to the United States shall not take effect until the President certifies that remedial action has been completed in accordance with the requirements of this Act at the facility that is the subject of such covenant.

(4) FACTORS.—In assessing the appropriateness of a covenant not to sue under paragraph (1) and any condition to be included in a covenant not to sue under paragraph (1) or (2), the President shall consider whether the covenant or condition is in the public interest on the basis of such factors as the following:

(A) The effectiveness and reliability of the remedy, in light of the other alternative remedies considered for the facility concerned.

(B) The nature of the risks remaining at the facility.

(C) The extent to which performance standards are included in the order or decree.

(D) The extent to which the response action provides a complete remedy for the facility, including a reduction in the hazardous nature of the substances at the facility.

(E) The extent to which the technology used in the response action is demonstrated to be effective.

(F) Whether the Fund or other sources of funding would be available for any additional remedial actions that might eventually be necessary at the facility.

(G) Whether the remedial action will be carried out, in whole or in significant part, by the responsible parties themselves.

(5) SATISFACTORY PERFORMANCE.—Any covenant not to sue under this subsection shall be subject to the satisfactory performance by such party of its obligations under the agreement concerned.

(6) ADDITIONAL CONDITION FOR FUTURE LIABILITY.—(A) Except for the portion of the remedial action which is subject to a covenant not to sue under paragraph (2) or under subsection (g) (relating to de minimis settlements), a covenant not to sue a person concerning future liability to the United States shall include an exception to the covenant that allows the President to sue such person concerning future liability resulting from the release or threatened release that is the subject of the covenant where such liability arises out of conditions which are

unknown at the time the President certifies under paragraph (3) that remedial action has been completed at the facility concerned.

(B) In extraordinary circumstances, the President may determine, after assessment of relevant factors such as those referred to in paragraph (4) and volume, toxicity, mobility, strength of evidence, ability to pay, litigative risks, public interest considerations, precedential value, and inequities and aggravating factors, not to include the exception referred to in subparagraph (A) if other terms, conditions, or requirements of the agreement containing the covenant not to sue are sufficient to provide all reasonable assurances that public health and the environment will be protected from any future releases at or from the facility.

(C) The President is authorized to include any provisions allowing future enforcement action under section 106 or 107 that in the discretion of the President are necessary and appropriate to assure protection of public health, welfare, and the environment.

(g) DE MINIMIS SETTLEMENTS.—

(1) EXPEDITED FINAL SETTLEMENT.—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 106 or 107 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) COVENANT NOT TO SUE.—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 as determined under subsection (f).

(3) EXPEDITED AGREEMENT.—The President shall reach any such settlement or grant any such covenant not to sue as soon as possible after the President has available the information necessary to reach such a settlement or grant such a covenant.

(4) CONSENT DECREE OR ADMINISTRATIVE ORDER.—A settlement under this subsection shall be entered as a consent decree or embodied in an administrative order setting forth the terms of the settlement. In the case of any facility where the total response costs exceed $500,000 (excluding interest), if the settlement is embodied as an administrative order, the order may be issued only with the prior written approval of the Attorney General. If the Attorney General or his designee has not approved or disapproved the order within 30 days of this referral, the order shall be deemed to be approved unless the Attorney General and the Administrator have agreed to extend the time. The district court for the district in which the release or threatened release occurs may enforce any such administrative order.

(5) EFFECT OF AGREEMENT.—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.

(6) SETTLEMENTS WITH OTHER POTENTIALLY RESPONSIBLE PARTIES.—Nothing in this subsection shall be construed to affect the authority of the President to reach settlements with other potentially responsible parties under this Act.

(7) REDUCTION IN SETTLEMENT AMOUNT BASED ON LIMITED ABILITY TO PAY.—

(A) IN GENERAL.—The condition for settlement under this paragraph is that the potentially responsible party is a person who demonstrates to the President an inability or a limited ability to pay response costs.

(B) CONSIDERATIONS.—In determining whether or not a demonstration is made under subparagraph (A) by a person, the President shall take into consideration the ability of the person to pay response costs and still maintain its basic business operations, including consideration of the overall financial condition of the person and demonstrable constraints on the ability of the person to raise revenues.

(C) INFORMATION.—A person requesting settlement under this paragraph shall promptly provide the President with all relevant information needed to determine the ability of the person to pay response costs.

(D) ALTERNATIVE PAYMENT METHODS.—If the President determines that a person is unable to pay its total settlement amount at the time of settlement, the President shall consider such alternative payment methods as may be necessary or appropriate.

(8) ADDITIONAL CONDITIONS FOR EXPEDITED SETTLEMENTS.—

(A) WAIVER OF CLAIMS.—The President shall require, as a condition for settlement under this subsection, that a potentially responsible party waive all of the claims (including a claim for contribution under this Act) that the party may have against other potentially responsible parties for response costs incurred with respect to the facility, unless the President determines that requiring a waiver would be unjust.

(B) FAILURE TO COMPLY.—The President may decline to offer a settlement to a potentially responsible party under this subsection if the President determines that the potentially responsible party has failed to comply with any request for access or information or an administrative subpoena issued by the President under this Act or has impeded or is impeding, through action or inaction, the performance of a response action with respect to the facility.

(C) RESPONSIBILITY TO PROVIDE INFORMATION AND ACCESS.—A potentially responsible party that enters into a settlement under this subsection shall not be relieved of the responsibility to provide any information or access requested in accordance with subsection (e)(3)(B) or section 104(e).

(9) BASIS OF DETERMINATION.—If the President determines that a potentially responsible party is not eligible for settlement under this subsection, the President shall provide the reasons for the determination in writing to the potentially responsible party that requested a settlement under this subsection.

(10) NOTIFICATION.—As soon as practicable after receipt of sufficient information to make a determination, the President shall notify any person that the President determines is eligible under paragraph (1) of the person's eligibility for an expedited settlement.

(11) NO JUDICIAL REVIEW.—A determination by the President under paragraph (7), (8), (9), or (10) shall not be subject to judicial review.

(12) NOTICE OF SETTLEMENT.—After a settlement under this subsection becomes final with respect to a facility, the President shall promptly notify potentially responsible parties at the facility that have not resolved their liability to the United States of the settlement.

(h) COST RECOVERY SETTLEMENT AUTHORITY.—

(1) AUTHORITY TO SETTLE.—The head of any department or agency with authority to undertake a response action under this Act pursuant to the national contingency plan may consider, compromise, and settle a claim under section 107 for costs incurred by the United States Government if the claim has not been referred to the Department of Justice for further action. In the case of any facility where the total response costs exceed $500,000 (excluding interest), any claim referred to in the preceding sentence may be compromised and settled only with the prior written approval of the Attorney General.

(2) USE OF ARBITRATION.—Arbitration in accordance with regulations promulgated under this subsection may be used as

a method of settling claims of the United States where the total response costs for the facility concerned do not exceed $500,000 (excluding interest). After consultation with the Attorney General, the department or agency head may establish and publish regulations for the use of arbitration or settlement under this subsection.

(3) RECOVERY OF CLAIMS.—If any person fails to pay a claim that has been settled under this subsection, the department or agency head shall request the Attorney General to bring a civil action in an appropriate district court to recover the amount of such claim, plus costs, attorneys' fees, and interest from the date of the settlement. In such an action, the terms of the settlement shall not be subject to review.

(4) CLAIMS FOR CONTRIBUTION.—A person 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 shall not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(i) SETTLEMENT PROCEDURES.—

(1) PUBLICATION IN FEDERAL REGISTER.—At least 30 days before any settlement (including any settlement arrived at through arbitration) may become final under subsection (h), or under subsection (g) in the case of a settlement embodied in an administrative order, the head of the department or agency which has jurisdiction over the proposed settlement shall publish in the Federal Register notice of the proposed settlement. The notice shall identify the facility concerned and the parties to the proposed settlement.

(2) COMMENT PERIOD.—For a 30-day period beginning on the date of publication of notice under paragraph (1) of a proposed settlement, the head of the department or agency which has jurisdiction over the proposed settlement shall provide an opportunity for persons who are not parties to the proposed settlement to file written comments relating to the proposed settlement.

(3) CONSIDERATION OF COMMENTS.—The head of the department or agency shall consider any comments filed under paragraph (2) in determining whether or not to consent to the proposed settlement and may withdraw or withhold consent to the proposed settlement if such comments disclose facts or considerations which indicate the proposed settlement is inappropriate, improper, or inadequate.

(j) NATURAL RESOURCES.—

(1) NOTIFICATION OF TRUSTEE.—Where a release or threatened release of any hazardous substance that is the subject of negotiations under this section may have resulted in damages to natural resources under the trusteeship of the United States, the President shall notify the Federal natural resource trustee of the negotiations and shall encourage the participation of such trustee in the negotiations.

(2) COVENANT NOT TO SUE.—An agreement under this section may contain a covenant not to sue under section

107(a)(4)(C) for damages to natural resources under the trusteeship of the United States resulting from the release or threatened release of hazardous substances that is the subject of the agreement, but only if the Federal natural resource trustee has agreed in writing to such covenant. The Federal natural resource trustee may agree to such covenant if the potentially responsible party agrees to undertake appropriate actions necessary to protect and restore the natural resources damaged by such release or threatened release of hazardous substances.

(k) SECTION NOT APPLICABLE TO VESSELS.—The provisions of this section shall not apply to releases from a vessel.

(l) CIVIL PENALTIES.—A potentially responsible party which is a party to an administrative order or consent decree entered pursuant to an agreement under this section or section 120 (relating to Federal facilities) or which is a party to an agreement under section 120 and which fails or refuses to comply with any term or condition of the order, decree or agreement shall be subject to a civil penalty in accordance with section 109.

(m) APPLICABILITY OF GENERAL PRINCIPLES OF LAW.—In the case of consent decrees and other settlements under this section (including covenants not to sue), no provision of this Act shall be construed to preclude or otherwise affect the applicability of general principles of law regarding the setting aside or modification of consent decrees or other settlements.

[42 U.S.C. 9622]

SEC. 123. REIMBURSEMENT TO LOCAL GOVERNMENTS.

(a) APPLICATION.—Any general purpose unit of local government for a political subdivision which is affected by a release or threatened release at any facility may apply to the President for reimbursement under this section.

(b) REIMBURSEMENT.—

(1) TEMPORARY EMERGENCY MEASURES.—The President is authorized to reimburse local community authorities for expenses incurred (before or after the enactment of the Superfund Amendments and Reauthorization Act of 1986) in carrying out temporary emergency measures necessary to prevent or mitigate injury to human health or the environment associated with the release or threatened release of any hazardous substance or pollutant or contaminant. Such measures may include, where appropriate, security fencing to limit access, response to fires and explosions, and other measures which require immediate response at the local level.

(2) LOCAL FUNDS NOT SUPPLANTED.—Reimbursement under this section shall not supplant local funds normally provided for response.

(c) AMOUNT.—The amount of any reimbursement to any local authority under subsection (b)(1) may not exceed $25,000 for a single response. The reimbursement under this section with respect to a single facility shall be limited to the units of local government having jurisdiction over the political subdivision in which the facility is located.

(d) PROCEDURE.—Reimbursements authorized pursuant to this section shall be in accordance with rules promulgated by the Administrator within one year after the enactment of the Superfund Amendments and Reauthorization Act of 1986.

[42 U.S.C. 9623]

SEC. 124. METHANE RECOVERY.

(a) IN GENERAL.—In the case of a facility at which equipment for the recovery or processing (including recirculation of condensate) of methane has been installed, for purposes of this Act:

(1) The owner or operator of such equipment shall not be considered an "owner or operator", as defined in section 101(20), with respect to such facility.

(2) The owner or operator of such equipment shall not be considered to have arranged for disposal or treatment of any hazardous substance at such facility pursuant to section 107 of this Act.

(3) The owner or operator of such equipment shall not be subject to any action under section 106 with respect to such facility.

(b) EXCEPTIONS.—Subsection (a) does not apply with respect to a release or threatened release of a hazardous substance from a facility described in subsection (a) if either of the following circumstances exist:

(1) The release or threatened release was primarily caused by activities of the owner or operator of the equipment described in subsection (a).

(2) The owner or operator of such equipment would be covered by paragraph (1), (2), (3), or (4) of subsection (a) of section 107 with respect to such release or threatened release if he were not the owner or operator of such equipment.

In the case of any release or threatened release referred to in paragraph (1), the owner or operator of the equipment described in subsection (a) shall be liable under this Act only for costs or damages primarily caused by the activities of such owner or operator.

[42 U.S.C. 9624]

SEC. 125. SECTION 3001(b)(3)(A)(i) WASTE.

(a) REVISION OF HAZARD RANKING SYSTEM.—This section shall apply only to facilities which are not included or proposed for inclusion on the National Priorities List and which contain substantial volumes of waste described in section 3001(b)(3)(A)(i) of the Solid Waste Disposal Act. As expeditiously as practicable, the President shall revise the hazard ranking system in effect under the National Contingency Plan with respect to such facilities in a manner which assures appropriate consideration of each of the following site-specific characteristics of such facilities:

(1) The quantity, toxicity, and concentrations of hazardous constituents which are present in such waste and a comparison thereof with other wastes.

(2) The extent of, and potential for, release of such hazardous constituents into the environment.

(3) The degree of risk to human health and the environment posed by such constituents.

(b) INCLUSION PROHIBITED.—Until the hazard ranking system is revised as required by this section, the President may not include on the National Priorities List any facility which contains substantial volumes of waste described in section 3001(b)(3)(A)(i) of the Solid Waste Disposal Act on the basis of an evaluation made principally on the volume of such waste and not on the concentrations of the hazardous constituents of such waste. Nothing in this section shall be construed to affect the President's authority to include any such facility on the National Priorities List based on the presence of other substances at such facility or to exercise any other authority of this Act with respect to such other substances.

[42 U.S.C. 9625]

SEC. 126. INDIAN TRIBES.

(a) TREATMENT GENERALLY.—The governing body of an Indian tribe shall be afforded substantially the same treatment as a State with respect to the provisions of section 103(a) (regarding notification of releases), section 104(c)(2) (regarding consultation on remedial actions), section 104(e) (regarding access to information), section 104(i) (regarding health authorities) and section 105 (regarding roles and responsibilities under the national contingency plan and submittal of priorities for remedial action, but not including the provision regarding the inclusion of at least one facility per State on the National Priorities List).

(b) COMMUNITY RELOCATION.—Should the President determine that proper remedial action is the permanent relocation of tribal members away from a contaminated site because it is cost effective and necessary to protect their health and welfare, such finding must be concurred in by the affected tribal government before relocation shall occur. The President, in cooperation with the Secretary of the Interior, shall also assure that all benefits of the relocation program are provided to the affected tribe and that alternative land of equivalent value is available and satisfactory to the tribe. Any lands acquired for relocation of tribal members shall be held in trust by the United States for the benefit of the tribe.

(c) STUDY.—The President shall conduct a survey, in consultation with the Indian tribes, to determine the extent of hazardous waste sites on Indian lands. Such survey shall be included within a report which shall make recommendations on the program needs of tribes under this Act, with particular emphasis on how tribal participation in the administration of such programs can be maximized. Such report shall be submitted to Congress along with the President's budget request for fiscal year 1988.

(d) LIMITATION.—Notwithstanding any other provision of this Act, no action under this Act by an Indian tribe shall be barred until the later of the following:

(1) The applicable period of limitations has expired.

(2) 2 years after the United States, in its capacity as trustee for the tribe, gives written notice to the governing body of the tribe that it will not present a claim or commence an action on behalf of the tribe or fails to present a claim or commence an action within the time limitations specified in this Act.

[42 U.S.C. 9626]

SEC. 127. RECYCLING TRANSACTIONS.

(a) LIABILITY CLARIFICATION.—

(1) As provided in subsections (b), (c), (d), and (e), a person who arranged for recycling of recyclable material shall not be liable under sections 107(a)(3) and 107(a)(4) with respect to such material.

(2) A determination whether or not any person shall be liable under section 107(a)(3) or section 107(a)(4) for any material that is not a recyclable material as that term is used in subsections (b) and (c), (d), or (e) of this section shall be made, without regard to subsections (b), (c), (d), or (e) of this section.

(b) RECYCLABLE MATERIAL DEFINED.—For purposes of this section, the term "recyclable material" means scrap paper, scrap plastic, scrap glass, scrap textiles, scrap rubber (other than whole tires), scrap metal, or spent lead-acid, spent nickel-cadmium, and other spent batteries, as well as minor amounts of material incident to or adhering to the scrap material as a result of its normal and customary use prior to becoming scrap; except that such term shall not include—

(1) shipping containers of a capacity from 30 liters to 3,000 liters, whether intact or not, having any hazardous substance (but not metal bits and pieces or hazardous substance that form an integral part of the container) contained in or adhering thereto; or

(2) any item of material that contained polychlorinated biphenyls at a concentration in excess of 50 parts per million or any new standard promulgated pursuant to applicable Federal laws.

(c) TRANSACTIONS INVOLVING SCRAP PAPER, PLASTIC, GLASS, TEXTILES, OR RUBBER.—Transactions involving scrap paper, scrap plastic, scrap glass, scrap textiles, or scrap rubber (other than whole tires) shall be deemed to be arranging for recycling if the person who arranged for the transaction (by selling recyclable material or otherwise arranging for the recycling of recyclable material) can demonstrate by a preponderance of the evidence that all of the following criteria were met at the time of the transaction:

(1) The recyclable material met a commercial specification grade.

(2) A market existed for the recyclable material.

(3) A substantial portion of the recyclable material was made available for use as feedstock for the manufacture of a new saleable product.

(4) The recyclable material could have been a replacement or substitute for a virgin raw material, or the product to be made from the recyclable material could have been a replacement or substitute for a product made, in whole or in part, from a virgin raw material.

(5) For transactions occurring 90 days or more after the date of enactment of this section, the person exercised reasonable care to determine that the facility where the recyclable material was handled, processed, reclaimed, or otherwise managed by another person (hereinafter in this section referred to as a "consuming facility") was in compliance with substantive (not procedural or administrative) provisions of any Federal,

State, or local environmental law or regulation, or compliance order or decree issued pursuant thereto, applicable to the handling, processing, reclamation, storage, or other management activities associated with recyclable material.

(6) For purposes of this subsection, "reasonable care" shall be determined using criteria that include (but are not limited to)—

(A) the price paid in the recycling transaction;

(B) the ability of the person to detect the nature of the consuming facility's operations concerning its handling, processing, reclamation, or other management activities associated with recyclable material; and

(C) the result of inquiries made to the appropriate Federal, State, or local environmental agency (or agencies) regarding the consuming facility's past and current compliance with substantive (not procedural or administrative) provisions of any Federal, State, or local environmental law or regulation, or compliance order or decree issued pursuant thereto, applicable to the handling, processing, reclamation, storage, or other management activities associated with the recyclable material. For the purposes of this paragraph, a requirement to obtain a permit applicable to the handling, processing, reclamation, or other management activity associated with the recyclable materials shall be deemed to be a substantive provision.

(d) TRANSACTIONS INVOLVING SCRAP METAL.—

(1) Transactions involving scrap metal shall be deemed to be arranging for recycling if the person who arranged for the transaction (by selling recyclable material or otherwise arranging for the recycling of recyclable material) can demonstrate by a preponderance of the evidence that at the time of the transaction—

(A) the person met the criteria set forth in subsection (c) with respect to the scrap metal;

(B) the person was in compliance with any applicable regulations or standards regarding the storage, transport, management, or other activities associated with the recycling of scrap metal that the Administrator promulgates under the Solid Waste Disposal Act subsequent to the enactment of this section and with regard to transactions occurring after the effective date of such regulations or standards; and

(C) the person did not melt the scrap metal prior to the transaction.

(2) For purposes of paragraph (1)(C), melting of scrap metal does not include the thermal separation of 2 or more materials due to differences in their melting points (referred to as "sweating").

(3) For purposes of this subsection, the term "scrap metal" means bits and pieces of metal parts (e.g., bars, turnings, rods, sheets, wire) or metal pieces that may be combined together with bolts or soldering (e.g., radiators, scrap automobiles, railroad box cars), which when worn or superfluous can be recy-

cled, except for scrap metals that the Administrator excludes from this definition by regulation.

(e) TRANSACTIONS INVOLVING BATTERIES.—Transactions involving spent lead-acid batteries, spent nickel-cadmium batteries, or other spent batteries shall be deemed to be arranging for recycling if the person who arranged for the transaction (by selling recyclable material or otherwise arranging for the recycling of recyclable material) can demonstrate by a preponderance of the evidence that at the time of the transaction—

(1) the person met the criteria set forth in subsection (c) with respect to the spent lead-acid batteries, spent nickel-cadmium batteries, or other spent batteries, but the person did not recover the valuable components of such batteries; and

(2)(A) with respect to transactions involving lead-acid batteries, the person was in compliance with applicable Federal environmental regulations or standards, and any amendments thereto, regarding the storage, transport, management, or other activities associated with the recycling of spent lead-acid batteries;

(B) with respect to transactions involving nickel-cadmium batteries, Federal environmental regulations or standards are in effect regarding the storage, transport, management, or other activities associated with the recycling of spent nickel-cadmium batteries, and the person was in compliance with applicable regulations or standards or any amendments thereto; or

(C) with respect to transactions involving other spent batteries, Federal environmental regulations or standards are in effect regarding the storage, transport, management, or other activities associated with the recycling of such batteries, and the person was in compliance with applicable regulations or standards or any amendments thereto.

(f) EXCLUSIONS.—

(1) The exemptions set forth in subsections (c), (d), and (e) shall not apply if—

(A) the person had an objectively reasonable basis to believe at the time of the recycling transaction—

(i) that the recyclable material would not be recycled;

(ii) that the recyclable material would be burned as fuel, or for energy recovery or incineration; or

(iii) for transactions occurring before 90 days after the date of the enactment of this section, that the consuming facility was not in compliance with a substantive (not procedural or administrative) provision of any Federal, State, or local environmental law or regulation, or compliance order or decree issued pursuant thereto, applicable to the handling, processing, reclamation, or other management activities associated with the recyclable material;

(B) the person had reason to believe that hazardous substances had been added to the recyclable material for purposes other than processing for recycling; or

(C) the person failed to exercise reasonable care with respect to the management and handling of the recyclable material (including adhering to customary industry practices current at the time of the recycling transaction designed to minimize, through source control, contamination of the recyclable material by hazardous substances).

(2) For purposes of this subsection, an objectively reasonable basis for belief shall be determined using criteria that include (but are not limited to) the size of the person's business, customary industry practices (including customary industry practices current at the time of the recycling transaction designed to minimize, through source control, contamination of the recyclable material by hazardous substances), the price paid in the recycling transaction, and the ability of the person to detect the nature of the consuming facility's operations concerning its handling, processing, reclamation, or other management activities associated with the recyclable material.

(3) For purposes of this subsection, a requirement to obtain a permit applicable to the handling, processing, reclamation, or other management activities associated with recyclable material shall be deemed to be a substantive provision.

(g) EFFECT ON OTHER LIABILITY.—Nothing in this section shall be deemed to affect the liability of a person under paragraph (1) or (2) of section 107(a).

(h) REGULATIONS.—The Administrator has the authority, under section 115, to promulgate additional regulations concerning this section.

(i) EFFECT ON PENDING OR CONCLUDED ACTIONS.—The exemptions provided in this section shall not affect any concluded judicial or administrative action or any pending judicial action initiated by the United States prior to enactment of this section.

(j) LIABILITY FOR ATTORNEY'S FEES FOR CERTAIN ACTIONS.—Any person who commences an action in contribution against a person who is not liable by operation of this section shall be liable to that person for all reasonable costs of defending that action, including all reasonable attorney's and expert witness fees.

(k) RELATIONSHIP TO LIABILITY UNDER OTHER LAWS.—Nothing in this section shall affect—

(1) liability under any other Federal, State, or local statute or regulation promulgated pursuant to any such statute, including any requirements promulgated by the Administrator under the Solid Waste Disposal Act; or

(2) the ability of the Administrator to promulgate regulations under any other statute, including the Solid Waste Disposal Act.

(l) LIMITATION ON STATUTORY CONSTRUCTION.—Nothing in this section shall be construed to—

(1) affect any defenses or liabilities of any person to whom subsection (a)(1) does not apply; or

(2) create any presumption of liability against any person to whom subsection (a)(1) does not apply.

[42 U.S.C. 9627]

December 31, 2002

SEC. 128. STATE RESPONSE PROGRAMS.

(a) ASSISTANCE TO STATES.—

(1) IN GENERAL.—

(A) STATES.—The Administrator may award a grant to a State or Indian tribe that—

(i) has a response program that includes each of the elements, or is taking reasonable steps to include each of the elements, listed in paragraph (2); or

(ii) is a party to a memorandum of agreement with the Administrator for voluntary response programs.

(B) USE OF GRANTS BY STATES.—

(i) IN GENERAL.—A State or Indian tribe may use a grant under this subsection to establish or enhance the response program of the State or Indian tribe.

(ii) ADDITIONAL USES.—In addition to the uses under clause (i), a State or Indian tribe may use a grant under this subsection to—

(I) capitalize a revolving loan fund for brownfield remediation under section 104(k)(3); or

(II) purchase insurance or develop a risk sharing pool, an indemnity pool, or insurance mechanism to provide financing for response actions under a State response program.

(2) ELEMENTS.—The elements of a State or Indian tribe response program referred to in paragraph (1)(A)(i) are the following:

(A) Timely survey and inventory of brownfield sites in the State.

(B) Oversight and enforcement authorities or other mechanisms, and resources, that are adequate to ensure that—

(i) a response action will—

(I) protect human health and the environment; and

(II) be conducted in accordance with applicable Federal and State law; and

(ii) if the person conducting the response action fails to complete the necessary response activities, including operation and maintenance or long-term monitoring activities, the necessary response activities are completed.

(C) Mechanisms and resources to provide meaningful opportunities for public participation, including—

(i) public access to documents that the State, Indian tribe, or party conducting the cleanup is relying on or developing in making cleanup decisions or conducting site activities;

(ii) prior notice and opportunity for comment on proposed cleanup plans and site activities; and

(iii) a mechanism by which—

(I) a person that is or may be affected by a release or threatened release of a hazardous substance, pollutant, or contaminant at a brownfield

site located in the community in which the person works or resides may request the conduct of a site assessment; and

(II) an appropriate State official shall consider and appropriately respond to a request under subclause (I).

(D) Mechanisms for approval of a cleanup plan, and a requirement for verification by and certification or similar documentation from the State, an Indian tribe, or a licensed site professional to the person conducting a response action indicating that the response is complete.

(3) FUNDING.—There is authorized to be appropriated to carry out this subsection $50,000,000 for each of fiscal years 2002 through 2006.

(b) ENFORCEMENT IN CASES OF A RELEASE SUBJECT TO STATE PROGRAM.—

(1) ENFORCEMENT.—

(A) IN GENERAL.— Except as provided in subparagraph (B) and subject to subparagraph (C), in the case of an eligible response site at which—

(i) there is a release or threatened release of a hazardous substance, pollutant, or contaminant; and

(ii) a person is conducting or has completed a response action regarding the specific release that is addressed by the response action that is in compliance with the State program that specifically governs response actions for the protection of public health and the environment,

the President may not use authority under this Act to take an administrative or judicial enforcement action under section 106(a) or to take a judicial enforcement action to recover response costs under section 107(a) against the person regarding the specific release that is addressed by the response action.

(B) EXCEPTIONS.—The President may bring an administrative or judicial enforcement action under this Act during or after completion of a response action described in subparagraph (A) with respect to a release or threatened release at an eligible response site described in that subparagraph if—

(i) the State requests that the President provide assistance in the performance of a response action;

(ii) the Administrator determines that contamination has migrated or will migrate across a State line, resulting in the need for further response action to protect human health or the environment, or the President determines that contamination has migrated or is likely to migrate onto property subject to the jurisdiction, custody, or control of a department, agency, or instrumentality of the United States and may impact the authorized purposes of the Federal property;

(iii) after taking into consideration the response activities already taken, the Administrator determines that—

(I) a release or threatened release may present an imminent and substantial endangerment to public health or welfare or the environment; and

(II) additional response actions are likely to be necessary to address, prevent, limit, or mitigate the release or threatened release; or

(iv) the Administrator, after consultation with the State, determines that information, that on the earlier of the date on which cleanup was approved or completed, was not known by the State, as recorded in documents prepared or relied on in selecting or conducting the cleanup, has been discovered regarding the contamination or conditions at a facility such that the contamination or conditions at the facility present a threat requiring further remediation to protect public health or welfare or the environment. Consultation with the State shall not limit the ability of the Administrator to make this determination.

(C) PUBLIC RECORD.—The limitations on the authority of the President under subparagraph (A) apply only at sites in States that maintain, update not less than annually, and make available to the public a record of sites, by name and location, at which response actions have been completed in the previous year and are planned to be addressed under the State program that specifically governs response actions for the protection of public health and the environment in the upcoming year. The public record shall identify whether or not the site, on completion of the response action, will be suitable for unrestricted use and, if not, shall identify the institutional controls relied on in the remedy. Each State and tribe receiving financial assistance under subsection (a) shall maintain and make available to the public a record of sites as provided in this paragraph.

(D) EPA NOTIFICATION.—

(i) IN GENERAL.—In the case of an eligible response site at which there is a release or threatened release of a hazardous substance, pollutant, or contaminant and for which the Administrator intends to carry out an action that may be barred under subparagraph (A), the Administrator shall—

(I) notify the State of the action the Administrator intends to take; and

(II)(aa) wait 48 hours for a reply from the State under clause (ii); or

(bb) if the State fails to reply to the notification or if the Administrator makes a determination under clause (iii), take immediate action under that clause.

(ii) STATE REPLY.—Not later than 48 hours after a State receives notice from the Administrator under clause (i), the State shall notify the Administrator if—

(I) the release at the eligible response site is or has been subject to a cleanup conducted under a State program; and

(II) the State is planning to abate the release or threatened release, any actions that are planned.

(iii) IMMEDIATE FEDERAL ACTION.—The Administrator may take action immediately after giving notification under clause (i) without waiting for a State reply under clause (ii) if the Administrator determines that one or more exceptions under subparagraph (B) are met.

(E) REPORT TO CONGRESS.—Not later than 90 days after the date of initiation of any enforcement action by the President under clause (ii), (iii), or (iv) of subparagraph (B), the President shall submit to Congress a report describing the basis for the enforcement action, including specific references to the facts demonstrating that enforcement action is permitted under subparagraph (B).

(2) SAVINGS PROVISION.—

(A) COSTS INCURRED PRIOR TO LIMITATIONS.—Nothing in paragraph (1) precludes the President from seeking to recover costs incurred prior to the date of the enactment of this section or during a period in which the limitations of paragraph (1)(A) were not applicable.

(B) EFFECT ON AGREEMENTS BETWEEN STATES AND EPA.—Nothing in paragraph (1)—

(i) modifies or otherwise affects a memorandum of agreement, memorandum of understanding, or any similar agreement relating to this Act between a State agency or an Indian tribe and the Administrator that is in effect on or before the date of the enactment of this section (which agreement shall remain in effect, subject to the terms of the agreement); or

(ii) limits the discretionary authority of the President to enter into or modify an agreement with a State, an Indian tribe, or any other person relating to the implementation by the President of statutory authorities.

(3) EFFECTIVE DATE.—This subsection applies only to response actions conducted after February 15, 2001.

(c) EFFECT ON FEDERAL LAWS.—Nothing in this section affects any liability or response authority under any Federal law, including—

(1) this Act, except as provided in subsection (b);

(2) the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.);

(3) the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.);

(4) the Toxic Substances Control Act (15 U.S.C. 2601 et seq.); and

(5) the Safe Drinking Water Act (42 U.S.C. 300f et seq.).

[42 U.S.C. 9628]

December 31, 2002

TITLE II—HAZARDOUS SUBSTANCE RESPONSE REVENUE ACT OF 1980

SEC. 201. SHORT TITLE; AMENDMENT OF 1954 CODE.

(a) SHORT TITLE.—This title may be cited as the "Hazardous Substance Response Revenue Act of 1980".

(b) AMENDMENT OF 1954 CODE.—Except as otherwise expressly provided, whenever in this title an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Internal Revenue Code of 1954.

Subtitle A—Imposition of Taxes on Petroleum and Certain Chemicals [1]

* * * * * * *

Subtitle B—Establishment of Hazardous Substance Response Trust Fund

[Repealed by section 517(c)(1) of SARA of 1986 (P.L. 99–499)]

Subtitle C—Post-Closure Tax and Trust Fund

[Section 231 provided a new subchapter C of chapter 38 of the Internal Revenue Code of 1954.]

[Section 232 repealed by section 514(b) of SARA of 1986 (P.L. 99–499)]

TITLE III—MISCELLANEOUS PROVISIONS

REPORTS AND STUDIES

SEC. 301. (a)(1) The President shall submit to the Congress, within four years after enactment of this Act, a comprehensive report on experience with the implementation of this Act, including, but not limited to—

(A) the extent to which the Act and Fund are effective in enabling Government to respond to and mitigate the effects of releases of hazardous substances;

(B) a summary of past receipts and disbursements from the Fund;

(C) a projection of any future funding needs remaining after the expiration of authority to collect taxes, and of the threat to public health, welfare, and the environment posed by the projected releases which create any such needs;

[1] Subtitle A inserted a new chapter 38 (relating to environmental taxes) in the Internal Revenue Code, consisting of a subchapter A (tax on petroleum) and subchapter B (tax on certain chemicals). However, since the enactment of CERLCA, chapter 38 has been amended extensively, most notably by title V of the Superfund Amendments and Reauthorization Act of 1986 (P.L. 99–499) and by section 8032 of the Omnibus Budget Reconciliation Act of 1986 (P.L. 99–509). See the Internal Revenue Code of 1986 for the current text of chapter 38.

(D) the record and experience of the Fund in recovering Fund disbursements from liable parties;

(E) the record of State participation in the system of response, liability, and compensation established by this Act;

(F) the impact of the taxes imposed by title II of this Act on the Nation's balance of trade with other countries;

(G) an assessment of the feasibility and desirability of a schedule of taxes which would take into account one or more of the following: the likelihood of a release of a hazardous substance, the degree of hazard and risk of harm to public health, welfare, and the environment resulting from any such release, incentives to proper handling, recycling, incineration, and neutralization of hazardous wastes, and disincentives to improper or illegal handling or disposal of hazardous materials, administrative and reporting burdens on Government and industry, and the extent to which the tax burden falls on the substances and parties which create the problems addressed by this Act. In preparing the report, the President shall consult with appropriate Federal, State, and local agencies, affected industries and claimants, and such other interested parties as he may find useful. Based upon the analyses and consultation required by this subsection, the President shall also include in the report any recommendations for legislative changes he may deem necessary for the better effectuation of the purposes of this Act, including but not limited to recommendations concerning authorization levels, taxes, State participation, liability and liability limits, and financial responsibility provisions for the Response Trust Fund and the Post-closure Liability Trust Fund;

(H) an exemption from or an increase in the substances or the amount of taxes imposed by section 4661 of the Internal Revenue Code of 1954 for copper, lead, and zinc oxide, and for feedstocks when used in the manufacture and production of fertilizers, based upon the expenditure experience of the Response Trust Fund; [1]

(I) the economic impact of taxing coal-derived substances and recycled metals.

(2) The Administrator of the Environmental Protection Agency (in consultation with the Secretary of the Treasury) shall submit to the Congress (i) within four years after enactment of this Act, a report identifying additional wastes designated by rule as hazardous after the effective date of this Act and pursuant to section 3001 of the Solid Waste Disposal Act and recommendations on appropriate tax rates for such wastes for the Post-closure Liability Trust Fund. The report shall, in addition, recommend a tax rate, considering the quantity and potential danger to human health and the environment posed by the disposal of any wastes which the Administrator, pursuant to subsection 3001(b)(2)(B) and subsection 3001(b)(3)(A) of the Solid Waste Disposal Act of 1980, has determined should be subject to regulation under subtitle C of such Act, (ii) within three years after enactment of this Act, a report on the necessity for and the adequacy of the revenue raised, in relation to

[1] So in law. Should probably have the word "and" after the semicolon.

estimated future requirements, of the Post-closure Liability Trust Fund.

(b) The President shall conduct a study to determine (1) whether adequate private insurance protection is available on reasonable terms and conditions to the owners and operators of vessels and facilities subject to liability under section 107 of this Act, and (2) whether the market for such insurance is sufficiently competitive to assure purchasers of features such as a reasonable range of deductibles, coinsurance provisions, and exclusions. The President shall submit the results of his study, together with his recommendations, within two years of the date of enactment of this Act, and shall submit an interim report on his study within one year of the date of enactment of this Act.

(c)(1) The President, acting through Federal officials designated by the National Contingency Plan published under section 105 of this Act, shall study and, not later than two years after the enactment of this Act, shall promulgate regulations for the assessment of damages for injury to, destruction of, or loss of natural resources resulting from a release of oil or a hazardous substance for the purposes of this Act and section 311(f) (4) and (5) of the Federal Water Pollution Control Act. Notwithstanding the failure of the President to promulgate the regulations required under this subsection on the required date, the President shall promulgate such regulations not later than 6 months after the enactment of the Superfund Amendments and Reauthorization Act of 1986.

(2) Such regulations shall specify (A) standard procedures for simplified assessments requiring minimal field observation, including establishing measures of damages based on units of discharge or release or units of affected area, and (B) alternative protocols for conducting assessments in individual cases to determine the type and extent of short- and long-term injury, destruction, or loss. Such regulations shall identify the best available procedures to determine such damages, including both direct and indirect injury, destruction, or loss and shall take into consideration factors including, but not limited to, replacement value, use value, and ability of the ecosystem or resource to recover.

(3) Such regulations shall be reviewed and revised as appropriate every two years.

(d) The Administrator of the Environmental Protection Agency shall, in consultation with other Federal agencies and appropriate representatives of State and local governments and nongovernmental agencies, conduct a study and report to the Congress within two years of the date of enactment of this Act on the issues, alternatives, and policy considerations involved in the selection of locations for hazardous waste treatment, storage, and disposal facilities. This study shall include—

(A) an assessment of current and projected treatment, storage, and disposal capacity needs and shortfalls for hazardous waste by management category on a State-by-State basis;

(B) an evaluation of the appropriateness of a regional approach to siting and designing hazardous waste management facilities and the identification of hazardous waste management regions, interstate or intrastate, or both, with similar hazardous waste management needs;

(C) solicitation and analysis of proposals for the construction and operation of hazardous waste management facilities by nongovernmental entities, except that no proposal solicited under terms of this subsection shall be analyzed if it involves cost to the United States Government or fails to comply with the requirements of subtitle C of the Solid Waste Disposal Act and other applicable provisions of law;

(D) recommendations on the appropriate balance between public and private sector involvement in the siting, design, and operation of new hazardous waste management facilities;

(E) documentation of the major reasons for public opposition to new hazardous waste management facilities; and

(F) an evaluation of the various options for overcoming obstacles to siting new facilities, including needed legislation for implementing the most suitable option or options.

(e)(1) In order to determine the adequacy of existing common law and statutory remedies in providing legal redress for harm to man and the environment caused by the release of hazardous substances into the environment, there shall be submitted to the Congress a study within twelve months of enactment of this Act.

(2) This study shall be conducted with the assistance of the American Bar Association, the American Law Institute, the Association of American Trial Lawyers, and the National Association of State Attorneys General with the President of each entity selecting three members from each organization to conduct the study. The study chairman and one reporter shall be elected from among the twelve members of the study group.

(3) As part of their review of the adequacy of existing common law and statutory remedies, the study group shall evaluate the following:

(A) the nature, adequacy, and availability of existing remedies under present law in compensating for harm to man from the release of hazardous substances;

(B) the nature of barriers to recovery (particularly with respect to burdens of going forward and of proof and relevancy) and the role such barriers play in the legal system;

(C) the scope of the evidentiary burdens placed on the plaintiff in proving harm from the release of hazardous substances, particularly in light of the scientific uncertainty over causation with respect to—

(i) carcinogens, mutagens, and teratogens, and

(ii) the human health effects of exposure to low doses of hazardous substances over long periods of time;

(D) the nature and adequacy of existing remedies under present law in providing compensation for damages to natural resources from the release of hazardous substances;

(E) the scope of liability under existing law and the consequences, particularly with respect to obtaining insurance, of any changes in such liability;

(F) barriers to recovery posed by existing statutes of limitations.

(4) The report shall be submitted to the Congress with appropriate recommendations. Such recommendations shall explicitly address—

(A) the need for revisions in existing statutory or common law, and

(B) whether such revisions should take the form of Federal statutes or the development of a model code which is recommended for adoption by the States.

(5) The Fund shall pay administrative expenses incurred for the study. No expenses shall be available to pay compensation, except expenses on a per diem basis for the one reporter, but in no case shall the total expenses of the study exceed $300,000.

(f) The President, acting through the Administrator of the Environmental Protection Agency, the Secretary of Transportation, the Administrator of the Occupational Safety and Health Administration, and the Director of the National Institute for Occupational Safety and Health shall study and, not later than two years after the enactment of this Act, shall modify the national contingency plan to provide for the protection of the health and safety of employees involved in response actions.

(g) INSURABILITY STUDY.—

(1) STUDY BY COMPTROLLER GENERAL.—The Comptroller General of the United States, in consultation with the persons described in paragraph (2), shall undertake a study to determine the insurability, and effects on the standard of care, of the liability of each of the following:

(A) Persons who generate hazardous substances: liability for costs and damages under this Act.

(B) Persons who own or operate facilities: liability for costs and damages under this Act.

(C) Persons liable for injury to persons or property caused by the release of hazardous substances into the environment.

(2) CONSULTATION.—In conducting the study under this subsection, the Comptroller General shall consult with the following:

(A) Representatives of the Administrator.

(B) Representatives of persons described in subparagraphs (A) through (C) of the preceding paragraph.

(C) Representatives (i) of groups or organizations comprised generally of persons adversely affected by releases or threatened releases of hazardous substances and (ii) of groups organized for protecting the interests of consumers.

(D) Representatives of property and casualty insurers.

(E) Representatives of reinsurers.

(F) Persons responsible for the regulation of insurance at the State level.

(3) ITEMS EVALUATED.—The study under this section shall include, among other matters, an evaluation of the following:

(A) Current economic conditions in, and the future outlook for, the commercial market for insurance and reinsurance.

(B) Current trends in statutory and common law remedies.

(C) The impact of possible changes in traditional standards of liability, proof, evidence, and damages on existing statutory and common law remedies.

(D) The effect of the standard of liability and extent of the persons upon whom it is imposed under this Act on the protection of human health and the environment and on the availability, underwriting, and pricing of insurance coverage.

(E) Current trends, if any, in the judicial interpretation and construction of applicable insurance contracts, together with the degree to which amendments in the language of such contracts and the description of the risks assumed, could affect such trends.

(F) The frequency and severity of a representative sample of claims closed during the calendar year immediately preceding the enactment of this subsection.

(G) Impediments to the acquisition of insurance or other means of obtaining liability coverage other than those referred to in the preceding subparagraphs.

(H) The effects of the standards of liability and financial responsibility requirements imposed pursuant to this Act on the cost of, and incentives for, developing and demonstrating alternative and innovative treatment technologies, as well as waste generation minimization.

(4) SUBMISSION.—The Comptroller General shall submit a report on the results of the study to Congress with appropriate recommendations within 12 months after the enactment of this subsection.

(h) REPORT AND OVERSIGHT REQUIREMENTS.—

(1) ANNUAL REPORT BY EPA.—On January 1 of each year the Administrator of the Environmental Protection Agency shall submit an annual report to Congress of such Agency on the progress achieved in implementing this Act during the preceding fiscal year. In addition such report shall specifically include each of the following:

(A) A detailed description of each feasibility study carried out at a facility under title I of this Act.

(B) The status and estimated date of completion of each such study.

(C) Notice of each such study which will not meet a previously published schedule for completion and the new estimated date for completion.

(D) An evaluation of newly developed feasible and achievable permanent treatment technologies.

(E) Progress made in reducing the number of facilities subject to review under section 121(c).

(F) A report on the status of all remedial and enforcement actions undertaken during the prior fiscal year, including a comparison to remedial and enforcement actions undertaken in prior fiscal years.

(G) An estimate of the amount of resources, including the number of work years or personnel, which would be necessary for each department, agency, or instrumentality which is carrying out any activities of this Act to complete the implementation of all duties vested in the department, agency, or instrumentality under this Act.

(2) REVIEW BY INSPECTOR GENERAL.—Consistent with the authorities of the Inspector General Act of 1978 the Inspector General of the Environmental Protection Agency shall review any report submitted under paragraph (1) related to EPA's activities for reasonableness and accuracy and submit to Congress, as a part of such report a report on the results of such review.

(3) CONGRESSIONAL OVERSIGHT.—After receiving the reports under paragraphs (1) and (2) of this subsection in any calendar year, the appropriate authorizing committees of Congress shall conduct oversight hearings to ensure that this Act is being implemented according to the purposes of this Act and congressional intent in enacting this Act.

[42 U.S.C. 9651]

EFFECTIVE DATES, SAVINGS PROVISION

SEC. 302. (a) Unless otherwise provided, all provisions of this Act shall be effective on the date of enactment of this Act.

(b) Any regulation issued pursuant to any provisions of section 311 of the Clean Water Act [1] which is repealed or superseded by this Act and which is in effect on the date immediately preceding the effective date of this Act shall be deemed to be a regulation issued pursuant to the authority of this Act and shall remain in full force and effect unless or until superseded by new regulations issued thereunder.

(c) Any regulation—

(1) respecting financial responsibility,

(2) issued pursuant to any provision of law repealed or superseded by this Act, and

(3) in effect on the date immediately preceding the effective date of this Act shall be deemed to be a regulation issued pursuant to the authority of this Act and shall remain in full force and effect unless or until superseded by new regulations issued thereunder.

(d) Nothing in this Act shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants. The provisions of this Act shall not be considered, interpreted, or construed in any way as reflecting a determination, in part or whole, of policy regarding the inapplicability of strict liability, or strict liability doctrines, to activities relating to hazardous substances, pollutants, or contaminants or other such activities.

[42 U.S.C. 9652]

EXPIRATION, SUNSET PROVISION

SEC. 303. [Repealed by P.L. 99–499.]

[42 U.S.C. 9653]

[1] So in law. Probably should refer to the Federal Water Pollution Control Act.

CONFORMING AMENDMENTS

SEC. 304. (a) [Repealed subsection (b) of section 504 of the Federal Water Pollution Control Act].

(b) One-half of the unobligated balance remaining before the date of the enactment of this Act under subsection (k)[1] of section 311 of the Federal Water Pollution Control Act and all sums appropriated under section 504(b)[2] of the Federal Water Pollution Control Act shall be transferred to the Fund established under title II of this Act.

(c) In any case in which any provision of section 311 of the Federal Water Pollution Control Act is determined to be in conflict with any provisions of this Act, the provisions of this Act shall apply.

[42 U.S.C. 9654]

LEGISLATIVE VETO

SEC. 305. (a) Notwithstanding any other provision of law, simultaneously with promulgation or repromulgation of any rule or regulation under authority of title I of this Act, the head of the department, agency, or instrumentality promulgating such rule or regulation shall transmit a copy thereof to the Secretary of the Senate and the Clerk of the House of Representatives. Except as provided in subsection (b) of this section, the rule or regulation shall not become effective, if—

(1) within ninety calendar days of continuous session of Congress after the date of promulgation, both Houses of Congress adopt a concurrent resolution, the matter after the resolving clause of which is as follows: "That Congress disapproves the rule or regulation promulgated by the dealing with the matter of , which rule or regulation was transmitted to Congress on .", the blank spaces therein being appropriately filled; or

(2) within sixty calendar days of continuous session of Congress after the date of promulgation, one House of Congress adopts such a concurrent resolution and transmits such resolution to the other House, and such resolution is not disapproved by such other House within thirty calendar days of continuous session of Congress after such transmittal.

(b) If, at the end of sixty calendar days of continuous session of Congress after the date of promulgation of a rule or regulation, no committee of either House of Congress has reported or been discharged from further consideration of a concurrent resolution disapproving the rule or regulation and neither House has adopted such a resolution, the rule or regulation may go into effect immediately. If, within such sixty calendar days, such a committee has reported or been discharged from further consideration of such a resolution, or either House has adopted such a resolution, the rule or regulation may go into effect not sooner than ninety calendar days of continuous session of Congress after such rule is prescribed unless disapproved as provided in subsection (a) of this section.

[1] Subsection (k) was repealed by section 2002(b)(2) of Public Law 101–380.
[2] Section 504(b) was repealed by section 304(a) of Public Law 96–510.

(c) For purposes of subsections (a) and (b) of this section—

(1) continuity of session is broken only by an adjournment of Congress sine die; and

(2) the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of thirty, sixty, and ninety calendar days of continuous session of Congress.

(d) Congressional inaction on, or rejection of, a resolution of disapproval shall not be deemed an expression of approval of such rule or regulation.

[42 U.S.C. 9655]

TRANSPORTATION

SEC. 306. (a) Each hazardous substance which is listed or designated as provided in section 101(14) of this Act shall, within 30 days after the enactment of the Superfund Amendments and Reauthorization Act of 1986 or at the time of such listing or designation, whichever is later, be listed and regulated as a hazardous material under the Hazardous Materials Transportation Act. [1]

(b) A common or contract carrier shall be liable under other law in lieu of section 107 of this Act for damages or remedial action resulting from the release of a hazardous substance during the course of transportation which commenced prior to the effective date of the listing and regulation of such substance as a hazardous material under the Hazardous Materials Transportation Act, [1] or for substances listed pursuant to subsection (a) of this section, prior to the effective date of such listing: *Provided, however,* That this subsection shall not apply where such a carrier can demonstrate that he did not have actual knowledge of the identity or nature of the substance released.

(c) [Amended section 11901 of title 49, United States Code.]

[42 U.S.C. 9656]

ASSISTANT ADMINISTRATOR FOR SOLID WASTE

SEC. 307. (a) [Amended section 2001 of the Solid Waste Disposal Act by striking out "a Deputy Assistant" and inserting in lieu thereof "an Assistant".]

(b) The Assistant Administrator of the Environmental Protection Agency appointed to head the Office of Solid Waste shall be in addition to the five Assistant Administrators of the Environmental Protection Agency provided for in section 1(d) of Reorganization Plan Numbered 3 of 1970 and the additional Assistant Administrator provided by the Toxic Substances Control Act, shall be appointed by the President by and with the advice and consent of the Senate, and shall be compensated at the rate provided for Level IV of the Executive Schedule pay rates under section 5315 of title 5, United States Code.

(c) The amendment made by subsection (a) shall become effective ninety days after the date of the enactment of this Act.

[42 U.S.C. 6911a]

[1] Should refer to chapter 51 of title 49, United States Code, pursuant to section 6(b) of Public Law 103–272 (which codified certain transportation laws into title 49, U.S.C.).

SEPARABILITY

SEC. 308. If any provision of this Act, or the application of any provision of this Act to any person or circumstance, is held invalid, the application of such provision to other persons or circumstances and the remainder of this Act shall not be affected thereby. If an administrative settlement under section 122 has the effect of limiting any person's right to obtain contribution from any party to such settlement, and if the effect of such limitation would constitute a taking without just compensation in violation of the fifth amendment of the Constitution of the United States, such person shall not be entitled, under other laws of the United States, to recover compensation from the United States for such taking, but in any such case, such limitation on the right to obtain contribution shall be treated as having no force and effect.

[42 U.S.C. 9657]

SEC. 309. ACTIONS UNDER STATE LAW FOR DAMAGES FROM EXPOSURE TO HAZARDOUS SUBSTANCES.

(a) STATE STATUTES OF LIMITATIONS FOR HAZARDOUS SUBSTANCE CASES.—

(1) EXCEPTION TO STATE STATUTES.—In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute.

(2) STATE LAW GENERALLY APPLICABLE.—Except as provided in paragraph (1), the statute of limitations established under State law shall apply in all actions brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility.

(3) ACTIONS UNDER SECTION 107.—Nothing in this section shall apply with respect to any cause of action brought under section 107 of this Act.

(b) DEFINITIONS.—As used in this section—

(1) TITLE I TERMS.—The terms used in this section shall have the same meaning as when used in title I of this Act.

(2) APPLICABLE LIMITATIONS PERIOD.—The term "applicable limitations period" means the period specified in a statute of limitations during which a civil action referred to in subsection (a)(1) may be brought.

(3) COMMENCEMENT DATE.—The term "commencement date" means the date specified in a statute of limitations as the beginning of the applicable limitations period.

(4) FEDERALLY REQUIRED COMMENCEMENT DATE.—

(A) IN GENERAL.—Except as provided in subparagraph (B), the term "federally required commencement date"

means the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(1) were caused or contributed to by the hazardous substance or pollutant or contaminant concerned.

(B) SPECIAL RULES.—In the case of a minor or incompetent plaintiff, the term "federally required commencement date" means the later of the date referred to in subparagraph (A) or the following:

(i) In the case of a minor, the date on which the minor reaches the age of majority, as determined by State law, or has a legal representative appointed.

(ii) In the case of an incompetent individual, the date on which such individual becomes competent or has had a legal representative appointed.

[42 U.S.C. 9658]

SEC. 310. CITIZENS SUITS.

(a) AUTHORITY TO BRING CIVIL ACTIONS.—Except as provided in subsections (d) and (e) of this section and in section 113(h) (relating to timing of judicial review), any person may commence a civil action on his own behalf—

(1) against any person (including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this Act (including any provision of an agreement under section 120, relating to Federal facilities); or

(2) against the President or any other officer of the United States (including the Administrator of the Environmental Protection Agency and the Administrator of the ATSDR) where there is alleged a failure of the President or of such other officer to perform any act or duty under this Act, including an act or duty under section 120 (relating to Federal facilities), which is not discretionary with the President or such other officer.

Paragraph (2) shall not apply to any act or duty under the provisions of section 311 (relating to research, development, and demonstration).

(b) VENUE.—

(1) ACTIONS UNDER SUBSECTION (A)(1).—Any action under subsection (a)(1) shall be brought in the district court for the district in which the alleged violation occurred.

(2) ACTIONS UNDER SUBSECTION (A)(2).—Any action brought under subsection (a)(2) may be brought in the United States District Court for the District of Columbia.

(c) RELIEF.—The district court shall have jurisdiction in actions brought under subsection (a)(1) to enforce the standard, regulation, condition, requirement, or order concerned (including any provision of an agreement under section 120), to order such action as may be necessary to correct the violation, and to impose any civil penalty provided for the violation. The district court shall have jurisdiction in actions brought under subsection (a)(2) to order the President or other officer to perform the act or duty concerned.

(d) RULES APPLICABLE TO SUBSECTION (a)(1) ACTIONS.—

(1) NOTICE.—No action may be commenced under subsection (a)(1) of this section before 60 days after the plaintiff has given notice of the violation to each of the following:

(A) The President.

(B) The State in which the alleged violation occurs.

(C) Any alleged violator of the standard, regulation, condition, requirement, or order concerned (including any provision of an agreement under section 120).

Notice under this paragraph shall be given in such manner as the President shall prescribe by regulation.

(2) DILIGENT PROSECUTION.—No action may be commenced under paragraph (1) of subsection (a) if the President has commenced and is diligently prosecuting an action under this Act, or under the Solid Waste Disposal Act to require compliance with the standard, regulation, condition, requirement, or order concerned (including any provision of an agreement under section 120).

(e) RULES APPLICABLE TO SUBSECTION (a)(2) ACTIONS.—No action may be commenced under paragraph (2) of subsection (a) before the 60th day following the date on which the plaintiff gives notice to the Administrator or other department, agency, or instrumentality that the plaintiff will commence such action. Notice under this subsection shall be given in such manner as the President shall prescribe by regulation.

(f) COSTS.—The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or the substantially prevailing party whenever the court determines such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(g) INTERVENTION.—In any action under this section, the United States or the State, or both, if not a party may intervene as a matter of right. For other provisions regarding intervention, see section 113.

(h) OTHER RIGHTS.—This Act does not affect or otherwise impair the rights of any person under Federal, State, or common law, except with respect to the timing of review as provided in section 113(h) or as otherwise provided in section 309 (relating to actions under State law).

(i) DEFINITIONS.—The terms used in this section shall have the same meanings as when used in title I.

[42 U.S.C. 9659]

SEC. 311. RESEARCH, DEVELOPMENT, AND DEMONSTRATION.

(a) HAZARDOUS SUBSTANCE RESEARCH AND TRAINING.—

(1) AUTHORITIES OF SECRETARY.—The Secretary of Health and Human Services (hereinafter in this subsection referred to as the Secretary), in consultation with the Administrator, shall establish and support a basic research and training program (through grants, cooperative agreements, and contracts) consisting of the following:

(A) Basic research (including epidemiologic and ecologic studies) which may include each of the following:

(i) Advanced techniques for the detection, assessment, and evaluation of the effects on human health of hazardous substances.

(ii) Methods to assess the risks to human health presented by hazardous substances.

(iii) Methods and technologies to detect hazardous substances in the environment and basic biological, chemical, and physical methods to reduce the amount and toxicity of hazardous substances.

(B) Training, which may include each of the following:

(i) Short courses and continuing education for State and local health and environment agency personnel and other personnel engaged in the handling of hazardous substances, in the management of facilities at which hazardous substances are located, and in the evaluation of the hazards to human health presented by such facilities.

(ii) Graduate or advanced training in environmental and occupational health and safety and in the public health and engineering aspects of hazardous waste control.

(iii) Graduate training in the geosciences, including hydrogeology, geological engineering, geophysics, geochemistry, and related fields necessary to meet professional personnel needs in the public and private sectors and to effectuate the purposes of this Act.

(2) DIRECTOR OF NIEHS.—The Director of the National Institute for Environmental Health Sciences shall cooperate fully with the relevant Federal agencies referred to in subparagraph (A) of paragraph (5) in carrying out the purposes of this section.

(3) RECIPIENTS OF GRANTS, ETC.—A grant, cooperative agreement, or contract may be made or entered into under paragraph (1) with an accredited institution of higher education. The institution may carry out the research or training under the grant, cooperative agreement, or contract through contracts, including contracts with any of the following:

(A) Generators of hazardous wastes.

(B) Persons involved in the detection, assessment, evaluation, and treatment of hazardous substances.

(C) Owners and operators of facilities at which hazardous substances are located.

(D) State and local governments.

(4) PROCEDURES.—In making grants and entering into cooperative agreements and contracts under this subsection, the Secretary shall act through the Director of the National Institute for Environmental Health Sciences. In considering the allocation of funds for training purposes, the Director shall ensure that at least one grant, cooperative agreement, or contract shall be awarded for training described in each of clauses (i), (ii), and (iii) of paragraph (1)(B). Where applicable, the Director may choose to operate training activities in cooperation with

the Director of the National Institute for Occupational Safety and Health. The procedures applicable to grants and contracts under title IV of the Public Health Service Act shall be followed under this subsection.

(5) ADVISORY COUNCIL.—To assist in the implementation of this subsection and to aid in the coordination of research and demonstration and training activities funded from the Fund under this section, the Secretary shall appoint an advisory council (hereinafter in this subsection referred to as the "Advisory Council") which shall consist of representatives of the following:

(A) The relevant Federal agencies.
(B) The chemical industry.
(C) The toxic waste management industry.
(D) Institutions of higher education.
(E) State and local health and environmental agencies.
(F) The general public.

(6) PLANNING.—Within nine months after the date of the enactment of this subsection, the Secretary, acting through the Director of the National Institute for Environmental Health Sciences, shall issue a plan for the implementation of paragraph (1). The plan shall include priorities for actions under paragraph (1) and include research and training relevant to scientific and technological issues resulting from site specific hazardous substance response experience. The Secretary shall, to the maximum extent practicable, take appropriate steps to coordinate program activities under this plan with the activities of other Federal agencies in order to avoid duplication of effort. The plan shall be consistent with the need for the development of new technologies for meeting the goals of response actions in accordance with the provisions of this Act. The Advisory Council shall be provided an opportunity to review and comment on the plan and priorities and assist appropriate coordination among the relevant Federal agencies referred to in subparagraph (A) of paragraph (5).

(b) ALTERNATIVE OR INNOVATIVE TREATMENT TECHNOLOGY RESEARCH AND DEMONSTRATION PROGRAM.—

(1) ESTABLISHMENT.—The Administrator is authorized and directed to carry out a program of research, evaluation, testing, development, and demonstration of alternative or innovative treatment technologies (hereinafter in this subsection referred to as the "program") which may be utilized in response actions to achieve more permanent protection of human health and welfare and the environment.

(2) ADMINISTRATION.—The program shall be administered by the Administrator, acting through an office of technology demonstration and shall be coordinated with programs carried out by the Office of Solid Waste and Emergency Response and the Office of Research and Development.

(3) CONTRACTS AND GRANTS.—In carrying out the program, the Administrator is authorized to enter into contracts and cooperative agreements with, and make grants to, persons, public entities, and nonprofit private entities which are exempt from tax under section 501(c)(3) of the Internal Revenue Code

of 1954. The Administrator shall, to the maximum extent possible, enter into appropriate cost sharing arrangements under this subsection.

(4) USE OF SITES.—In carrying out the program, the Administrator may arrange for the use of sites at which a response may be undertaken under section 104 for the purposes of carrying out research, testing, evaluation, development, and demonstration projects. Each such project shall be carried out under such terms and conditions as the Administrator shall require to assure the protection of human health and the environment and to assure adequate control by the Administrator of the research, testing, evaluation, development, and demonstration activities at the site.

(5) DEMONSTRATION ASSISTANCE.—

(A) PROGRAM COMPONENTS.—The demonstration assistance program shall include the following:

(i) The publication of a solicitation and the evaluation of applications for demonstration projects utilizing alternative or innovative technologies.

(ii) The selection of sites which are suitable for the testing and evaluation of innovative technologies.

(iii) The development of detailed plans for innovative technology demonstration projects.

(iv) The supervision of such demonstration projects and the providing of quality assurance for data obtained.

(v) The evaluation of the results of alternative innovative technology demonstration projects and the determination of whether or not the technologies used are effective and feasible.

(B) SOLICITATION.—Within 90 days after the date of the enactment of this section, and no less often than once every 12 months thereafter, the Administrator shall publish a solicitation for innovative or alternative technologies at a stage of development suitable for full-scale demonstrations at sites at which a response action may be undertaken under section 104. The purpose of any such project shall be to demonstrate the use of an alternative or innovative treatment technology with respect to hazardous substances or pollutants or contaminants which are located at the site or which are to be removed from the site. The solicitation notice shall prescribe information to be included in the application, including technical and economic data derived from the applicant's own research and development efforts, and other information sufficient to permit the Administrator to assess the technology's potential and the types of remedial action to which it may be applicable.

(C) APPLICATIONS.—Any person and any public or private nonprofit entity may submit an application to the Administrator in response to the solicitation. The application shall contain a proposed demonstration plan setting forth how and when the project is to be carried out and such other information as the Administrator may require.

(D) PROJECT SELECTION.—In selecting technologies to be demonstrated, the Administrator shall fully review the applications submitted and shall consider at least the criteria specified in paragraph (7). The Administrator shall select or refuse to select a project for demonstration under this subsection within 90 days of receiving the completed application for such project. In the case of a refusal to select the project, the Administrator shall notify the applicant within such 90-day period of the reasons for his refusal.

(E) SITE SELECTION.—The Administrator shall propose 10 sites at which a response may be undertaken under section 104 to be the location of any demonstration project under this subsection within 60 days after the close of the public comment period. After an opportunity for notice and public comment, the Administrator shall select such sites and projects. In selecting any such site, the Administrator shall take into account the applicant's technical data and preferences either for onsite operation or for utilizing the site as a source of hazardous substances or pollutants or contaminants to be treated offsite.

(F) DEMONSTRATION PLAN.—Within 60 days after the selection of the site under this paragraph to be the location of a demonstration project, the Administrator shall establish a final demonstration plan for the project, based upon the demonstration plan contained in the application for the project. Such plan shall clearly set forth how and when the demonstration project will be carried out.

(G) SUPERVISION AND TESTING.—Each demonstration project under this subsection shall be performed by the applicant, or by a person satisfactory to the applicant, under the supervision of the Administrator. The Administrator shall enter into a written agreement with each applicant granting the Administrator the responsibility and authority for testing procedures, quality control, monitoring, and other measurements necessary to determine and evaluate the results of the demonstration project. The Administrator may pay the costs of testing, monitoring, quality control, and other measurements required by the Administrator to determine and evaluate the results of the demonstration project, and the limitations established by subparagraph (J) shall not apply to such costs.

(H) PROJECT COMPLETION.—Each demonstration project under this subsection shall be completed within such time as is established in the demonstration plan.

(I) EXTENSIONS.—The Administrator may extend any deadline established under this paragraph by mutual agreement with the applicant concerned.

(J) FUNDING RESTRICTIONS.—The Administrator shall not provide any Federal assistance for any part of a full-scale field demonstration project under this subsection to any applicant unless such applicant can demonstrate that it cannot obtain appropriate private financing on reasonable terms and conditions sufficient to carry out such dem-

onstration project without such Federal assistance. The total Federal funds for any full-scale field demonstration project under this subsection shall not exceed 50 percent of the total cost of such project estimated at the time of the award of such assistance. The Administrator shall not expend more than $10,000,000 for assistance under the program in any fiscal year and shall not expend more than $3,000,000 for any single project.

(6) FIELD DEMONSTRATIONS.—In carrying out the program, the Administrator shall initiate or cause to be initiated at least 10 field demonstration projects of alternative or innovative treatment technologies at sites at which a response may be undertaken under section 104, in fiscal year 1987 and each of the succeeding three fiscal years. If the Administrator determines that 10 field demonstration projects under this subsection cannot be initiated consistent with the criteria set forth in paragraph (7) in any of such fiscal years, the Administrator shall transmit to the appropriate committees of Congress a report explaining the reasons for his inability to conduct such demonstration projects.

(7) CRITERIA.—In selecting technologies to be demonstrated under this subsection, the Administrator shall, consistent with the protection of human health and the environment, consider each of the following criteria:

(A) The potential for contributing to solutions to those waste problems which pose the greatest threat to human health, which cannot be adequately controlled under present technologies, or which otherwise pose significant management difficulties.

(B) The availability of technologies which have been sufficiently developed for field demonstration and which are likely to be cost effective and reliable.

(C) The availability and suitability of sites for demonstrating such technologies, taking into account the physical, biological, chemical, and geological characteristics of the sites, the extent and type of contamination found at the site, and the capability to conduct demonstration projects in such a manner as to assure the protection of human health and the environment.

(D) The likelihood that the data to be generated from the demonstration project at the site will be applicable to other sites.

(8) TECHNOLOGY TRANSFER.—In carrying out the program, the Administrator shall conduct a technology transfer program including the development, collection, evaluation, coordination, and dissemination of information relating to the utilization of alternative or innovative treatment technologies for response actions. The Administrator shall establish and maintain a central reference library for such information. The information maintained by the Administrator shall be made available to the public, subject to the provisions of section 552 of title 5 of the United States Code and section 1905 of title 18 of the United States Code, and to other Government agencies in a manner that will facilitate its dissemination; except, that upon

a showing satisfactory to the Administrator by any person that any information or portion thereof obtained under this subsection by the Administrator directly or indirectly from such person, would, if made public, divulge—

(A) trade secrets; or

(B) other proprietary information of such person,

the Administrator shall not disclose such information and disclosure thereof shall be punishable under section 1905 of title 18 of the United States Code. This subsection is not authority to withhold information from Congress or any committee of Congress upon the request of the chairman of such committee.

(9) TRAINING.—The Administrator is authorized and directed to carry out, through the Office of Technology Demonstration, a program of training and an evaluation of training needs for each of the following:

(A) Training in the procedures for the handling and removal of hazardous substances for employees who handle hazardous substances.

(B) Training in the management of facilities at which hazardous substances are located and in the evaluation of the hazards to human health presented by such facilities for State and local health and environment agency personnel.

(10) DEFINITION.—For purposes of this subsection, the term "alternative or innovative treatment technologies" means those technologies, including proprietary or patented methods, which permanently alter the composition of hazardous waste through chemical, biological, or physical means so as to significantly reduce the toxicity, mobility, or volume (or any combination thereof) of the hazardous waste or contaminated materials being treated. The term also includes technologies that characterize or assess the extent of contamination, the chemical and physical character of the contaminants, and the stresses imposed by the contaminants on complex ecosystems at sites.

(c) HAZARDOUS SUBSTANCE RESEARCH.—The Administrator may conduct and support, through grants, cooperative agreements, and contracts, research with respect to the detection, assessment, and evaluation of the effects on and risks to human health of hazardous substances and detection of hazardous substances in the environment. The Administrator shall coordinate such research with the Secretary of Health and Human Services, acting through the advisory council established under this section, in order to avoid duplication of effort.

(d) UNIVERSITY HAZARDOUS SUBSTANCE RESEARCH CENTERS.—

(1) GRANT PROGRAM.—The Administrator shall make grants to institutions of higher learning to establish and operate not fewer than 5 hazardous substance research centers in the United States. In carrying out the program under this subsection, the Administrator should seek to have established and operated 10 hazardous substance research centers in the United States.

(2) RESPONSIBILITIES OF CENTERS.—The responsibilities of each hazardous substance research center established under this subsection shall include, but not be limited to, the conduct

of research and training relating to the manufacture, use, transportation, disposal, and management of hazardous substances and publication and dissemination of the results of such research.

(3) APPLICATIONS.—Any institution of higher learning interested in receiving a grant under this subsection shall submit to the Administrator an application in such form and containing such information as the Administrator may require by regulation.

(4) SELECTION CRITERIA.—The Administrator shall select recipients of grants under this subsection on the basis of the following criteria:

(A) The hazardous substance research center shall be located in a State which is representative of the needs of the region in which such State is located for improved hazardous waste management.

(B) The grant recipient shall be located in an area which has experienced problems with hazardous substance management.

(C) There is available to the grant recipient for carrying out this subsection demonstrated research resources.

(D) The capability of the grant recipient to provide leadership in making national and regional contributions to the solution of both long-range and immediate hazardous substance management problems.

(E) The grant recipient shall make a commitment to support ongoing hazardous substance research programs with budgeted institutional funds of at least $100,000 per year.

(F) The grant recipient shall have an interdisciplinary staff with demonstrated expertise in hazardous substance management and research.

(G) The grant recipient shall have a demonstrated ability to disseminate results of hazardous substance research and educational programs through an interdisciplinary continuing education program.

(H) The projects which the grant recipient proposes to carry out under the grant are necessary and appropriate.

(5) MAINTENANCE OF EFFORT.—No grant may be made under this subsection in any fiscal year unless the recipient of such grant enters into such agreements with the Administrator as the Administrator may require to ensure that such recipient will maintain its aggregate expenditures from all other sources for establishing and operating a regional hazardous substance research center and related research activities at or above the average level of such expenditures in its 2 fiscal years preceding the date of the enactment of this subsection.

(6) FEDERAL SHARE.—The Federal share of a grant under this subsection shall not exceed 80 percent of the costs of establishing and operating the regional hazardous substance research center and related research activities carried out by the grant recipient.

(7) LIMITATION ON USE OF FUNDS.—No funds made available to carry out this subsection shall be used for acquisition

of real property (including buildings) or construction of any building.

(8) ADMINISTRATION THROUGH THE OFFICE OF THE ADMINISTRATOR.—Administrative responsibility for carrying out this subsection shall be in the Office of the Administrator.

(9) EQUITABLE DISTRIBUTION OF FUNDS.—The Administrator shall allocate funds made available to carry out this subsection equitably among the regions of the United States.

(10) TECHNOLOGY TRANSFER ACTIVITIES.—Not less than five percent of the funds made available to carry out this subsection for any fiscal year shall be available to carry out technology transfer activities.

(e) REPORT TO CONGRESS.—At the time of the submission of the annual budget request to Congress, the Administrator shall submit to the appropriate committees of the House of Representatives and the Senate and to the advisory council established under subsection (a), a report on the progress of the research, development, and demonstration program authorized by subsection (b), including an evaluation of each demonstration project completed in the preceding fiscal year, findings with respect to the efficacy of such demonstrated technologies in achieving permanent and significant reductions in risk from hazardous wastes, the costs of such demonstration projects, and the potential applicability of, and projected costs for, such technologies at other hazardous substance sites.

(f) SAVING PROVISION.—Nothing in this section shall be construed to affect the provisions of the Solid Waste Disposal Act.

(g) SMALL BUSINESS PARTICIPATION.—The Administrator shall ensure, to the maximum extent practicable, an adequate opportunity for small business participation in the program established by subsection (b).

[42 U.S.C. 9660]

SEC. 312. LOVE CANAL PROPERTY ACQUISITION. [1]

(a) ACQUISITION OF PROPERTY IN EMERGENCY DECLARATION AREA.—The Administrator of the Environmental Protection Agency (hereinafter referred to as the "Administrator") may make grants not to exceed $2,500,000 to the State of New York (or to any duly constituted public agency or authority thereof) for purposes of acquisition of private property in the Love Canal Emergency Declaration Area. Such acquisition shall include (but shall not be limited to) all private property within the Emergency Declaration Area, including non-owner occupied residential properties, commercial, industrial, public, religious, non-profit, and vacant properties.

(b) PROCEDURES FOR ACQUISITION.—No property shall be acquired pursuant to this section unless the property owner voluntarily agrees to such acquisition. Compensation for any property acquired pursuant to this section shall be based upon the fair market value of the property as it existed prior to the emergency declaration. Valuation procedures for property acquired with funds provided under this section shall be in accordance with those set forth in the agreement entered into between the New York State Dis-

[1] For additional provisions relating to this section, see section 213 of SARA of 1986 in this print.

aster Preparedness Commission and the Love Canal Revitalization Agency on October 9, 1980.

(c) STATE OWNERSHIP.—The Administrator shall not provide any funds under this section for the acquisition of any properties pursuant to this section unless a public agency or authority of the State of New York first enters into a cooperative agreement with the Administrator providing assurances deemed adequate by the Administrator that the State or an agency created under the laws of the State shall take title to the properties to be so acquired.

(d) MAINTENANCE OF PROPERTY.—The Administrator shall enter into a cooperative agreement with an appropriate public agency or authority of the State of New York under which the Administrator shall maintain or arrange for the maintenance of all properties within the Emergency Declaration Area that have been acquired by any public agency or authority of the State. Ninety (90) percent of the costs of such maintenance shall be paid by the Administrator. The remaining portion of such costs shall be paid by the State (unless a credit is available under section 104(c)). The Administrator is authorized, in his discretion, to provide technical assistance to any public agency or authority of the State of New York in order to implement the recommendations of the habitability and land-use study in order to put the land within the Emergency Declaration Area to its best use.

(e) HABITABILITY AND LAND USE STUDY.—The Administrator shall conduct or cause to be conducted a habitability and land-use study. The study shall—

(1) assess the risks associated with inhabiting of the Love Canal Emergency Declaration Area;

(2) compare the level of hazardous waste contamination in that Area to that present in other comparable communities; and

(3) assess the potential uses of the land within the Emergency Declaration Area, including but not limited to residential, industrial, commercial and recreational, and the risks associated with such potential uses.

The Administrator shall publish the findings of such study and shall work with the State of New York to develop recommendations based upon the results of such study.

(f) FUNDING.—For purposes of section 111 and 221(c) of this Act, [1] the expenditures authorized by this section shall be treated as a cost specified in section 111(c).

(g) RESPONSE.—The provisions of this section shall not affect the implementation of other response actions within the Emergency Declaration Area that the Administrator has determined (before enactment of this section) to be necessary to protect the public health or welfare or the environment.

(h) DEFINITIONS.—For purposes of this section:

(1) EMERGENCY DECLARATION AREA.—The terms "Emergency Declaration Area" and "Love Canal Emergency Declaration Area" mean the Emergency Declaration Area as defined in section 950, paragraph (2) of the General Municipal Law of the

[1] So in law. Section 221 of CERCLA was repealed by section 517(c) of title V of SARA of 1986 (Public Law 99–499).

State of New York, Chapter 259, Laws of 1980, as in effect on the date of the enactment of this section.

(2) PRIVATE PROPERTY.—As used in subsection (a), the term "private property" means all property which is not owned by a department, agency, or instrumentality of—

(A) the United States, or

(B) the State of New York (or any public agency or authority thereof).

[42 U.S.C. 9661]

TITLE IV—POLLUTION INSURANCE

SEC. 401. DEFINITIONS.

As used in this title—

(1) INSURANCE.—The term "insurance" means primary insurance, excess insurance, reinsurance, surplus lines insurance, and any other arrangement for shifting and distributing risk which is determined to be insurance under applicable State or Federal law.

(2) POLLUTION LIABILITY.—The term "pollution liability" means liability for injuries arising from the release of hazardous substances or pollutants or contaminants.

(3) RISK RETENTION GROUP.—The term "risk retention group" means any corporation or other limited liability association taxable as a corporation, or as an insurance company, formed under the laws of any State—

(A) whose primary activity consists of assuming and spreading all, or any portion, of the pollution liability of its group members;

(B) which is organized for the primary purpose of conducting the activity described under subparagraph (A);

(C) which is chartered or licensed as an insurance company and authorized to engage in the business of insurance under the laws of any State; and

(D) which does not exclude any person from membership in the group solely to provide for members of such a group a competitive advantage over such a person.

(4) PURCHASING GROUP.—The term "purchasing group" means any group of persons which has as one of its purposes the purchase of pollution liability insurance on a group basis.

(5) STATE.—The term "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Commonwealth of the Northern Marianas, and any other territory or possession over which the United States has jurisdiction.

[42 U.S.C. 9671]

SEC. 402. STATE LAWS; SCOPE OF TITLE.

(a) STATE LAWS.—Nothing in this title shall be construed to affect either the tort law or the law governing the interpretation of insurance contracts of any State. The definitions of pollution liability and pollution liability insurance under any State law shall not be applied for the purposes of this title, including recognition or qualification of risk retention groups or purchasing groups.

(b) SCOPE OF TITLE.—The authority to offer or to provide insurance under this title shall be limited to coverage of pollution liability risks and this title does not authorize a risk retention group or purchasing group to provide coverage of any other line of insurance.

[42 U.S.C. 9672]

SEC. 403. RISK RETENTION GROUPS.

(a) EXEMPTION.—Except as provided in this section, a risk retention group shall be exempt from the following:

(1) A State law, rule, or order which makes unlawful, or regulates, directly or indirectly, the operation of a risk retention group.

(2) A State law, rule, or order which requires or permits a risk retention group to participate in any insurance insolvency guaranty association to which an insurer licensed in the State is required to belong.

(3) A State law, rule, or order which requires any insurance policy issued to a risk retention group or any member of the group to be countersigned by an insurance agent or broker residing in the State.

(4) A State law, rule, or order which otherwise discriminates against a risk retention group or any of its members.

(b) EXCEPTIONS.—

(1) STATE LAWS GENERALLY APPLICABLE.—Nothing in subsection (a) shall be construed to affect the applicability of State laws generally applicable to persons or corporations. The State in which a risk retention group is chartered may regulate the formation and operation of the group.

(2) STATE REGULATIONS NOT SUBJECT TO EXEMPTION.—Subsection (a) shall not apply to any State law which requires a risk retention group to do any of the following:

(A) Comply with the unfair claim settlement practices law of the State.

(B) Pay, on a nondiscriminatory basis, applicable premium and other taxes which are levied on admitted insurers and surplus line insurers, brokers, or policyholders under the laws of the State.

(C) Participate, on a nondiscriminatory basis, in any mechanism established or authorized under the law of the State for the equitable apportionment among insurers of pollution liability insurance losses and expenses incurred on policies written through such mechanism.

(D) Submit to the appropriate authority reports and other information required of licensed insurers under the laws of a State relating solely to pollution liability insurance losses and expenses.

(E) Register with and designate the State insurance commissioner as its agent solely for the purpose of receiving service of legal documents or process.

(F) Furnish, upon request, such commissioner a copy of any financial report submitted by the risk retention group to the commissioner of the chartering or licensing jurisdiction.

(G) Submit to an examination by the State insurance commissioner in any State in which the group is doing business to determine the group's financial condition, if—

(i) the commissioner has reason to believe the risk retention group is in a financially impaired condition; and

(ii) the commissioner of the jurisdiction in which the group is chartered has not begun or has refused to initiate an examination of the group.

(H) Comply with a lawful order issued in a delinquency proceeding commenced by the State insurance commissioner if the commissioner of the jurisdiction in which the group is chartered has failed to initiate such a proceeding after notice of a finding of financial impairment under subparagraph (G).

(c) APPLICATION OF EXEMPTIONS.—The exemptions specified in subsection (a) apply to—

(1) pollution liability insurance coverage provided by a risk retention group for—

(A) such group; or

(B) any person who is a member of such group;

(2) the sale of pollution liability insurance coverage for a risk retention group; and

(3) the provision of insurance related services or management services for a risk retention group or any member of such a group.

(d) AGENTS OR BROKERS.—A State may require that a person acting, or offering to act, as an agent or broker for a risk retention group obtain a license from that State, except that a State may not impose any qualification or requirement which discriminates against a nonresident agent or broker.

[42 U.S.C. 9673]

SEC. 404. PURCHASING GROUPS.

(a) EXEMPTION.—Except as provided in this section, a purchasing group is exempt from the following:

(1) A State law, rule, or order which prohibits the establishment of a purchasing group.

(2) A State law, rule, or order which makes it unlawful for an insurer to provide or offer to provide insurance on a basis providing, to a purchasing group or its member, advantages, based on their loss and expense experience, not afforded to other persons with respect to rates, policy forms, coverages, or other matters.

(3) A State law, rule, or order which prohibits a purchasing group or its members from purchasing insurance on the group basis described in paragraph (2) of this subsection.

(4) A State law, rule, or order which prohibits a purchasing group from obtaining insurance on a group basis because the group has not been in existence for a minimum period of time or because any member has not belonged to the group for a minimum period of time.

(5) A State law, rule, or order which requires that a purchasing group must have a minimum number of members, common ownership or affiliation, or a certain legal form.

(6) A State law, rule, or order which requires that a certain percentage of a purchasing group must obtain insurance on a group basis.

(7) A State law, rule, or order which requires that any insurance policy issued to a purchasing group or any members of the group be countersigned by an insurance agent or broker residing in that State.

(8) A State law, rule, or order which otherwise discriminate [1] against a purchasing group or any of its members.

(b) APPLICATION OF EXEMPTIONS.—The exemptions specified in subsection (a) apply to the following:

(1) Pollution liability insurance, and comprehensive general liability insurance which includes this coverage, provided to—

(A) a purchasing group; or

(B) any person who is a member of a purchasing group.

(2) The sale of any one of the following to a purchasing group or a member of the group:

(A) Pollution liability insurance and comprehensive general liability coverage.

(B) Insurance related services.

(C) Management services.

(c) AGENTS OR BROKERS.—A State may require that a person acting, or offering to act, as an agent or broker for a purchasing group obtain a license from that State, except that a State may not impose any qualification or requirement which discriminates against a nonresident agent or broker.

[42 U.S.C. 9674]

SEC. 405. APPLICABILITY OF SECURITIES LAWS.

(a) OWNERSHIP INTERESTS.—The ownership interests of members of a risk retention group shall be considered to be—

(1) exempted securities for purposes of section 5 of the Securities Act of 1933 and for purposes of section 12 of the Securities Exchange Act of 1934; and

(2) securities for purposes of the provisions of section 17 of the Securities Act of 1933 and the provisions of section 10 of the Securities Exchange Act of 1934.

(b) INVESTMENT COMPANY ACT.—A risk retention group shall not be considered to be an investment company for purposes of the Investment Company Act of 1940 (15 U.S.C. 80a–1 et seq.).

(c) BLUE SKY LAW.—The ownership interests of members in a risk retention group shall not be considered securities for purposes of any State blue sky law.

[42 U.S.C. 9675]

[1] So in law. Probably should be "discriminates".

APPENDIX B

TEXT OF THE SUPERFUND RECYCLING EQUITY ACT (SREA)

Superfund Recycling Equity Act

The following language enacting the Superfund Recycling Equity Act of 1999 (S.1528) was incorporated into S.1948/H.R.3194 which became Public Law 106-113 on November 29, 1999 as copied below:

Public Law 106-113
106th Congress

An Act

Making consolidated appropriations for the fiscal year ending September 30, 2000, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,
...

Page 113 STAT. 1501A-598

TITLE VI--SUPERFUND RECYCLING EQUITY

SEC. 6001. SUPERFUND RECYCLING EQUITY.

(a) Purposes.--The purposes of this section are--
(1) to promote the reuse and recycling of scrap material in furtherance of the goals of waste minimization and natural resource conservation while protecting human health and the environment;
(2) to create greater equity in the statutory treatment of recycled versus virgin materials; and

(3) to remove the disincentives and impediments to recycling created as an unintended consequence of the 1980 Superfund liability provisions.

(b) Clarification of Liability Under CERCLA for Recycling Transactions.--
(1) Clarification.--Title I of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.) is amended by adding at the end the following new section:

``SEC. 127. RECYCLING TRANSACTIONS.

``(a) Liability Clarification.--
``(1) As provided in subsections (b), (c), (d), and (e), a person who arranged for recycling of recyclable material shall not be liable under sections 107(a)(3) and 107(a)(4) with respect to such material.
``(2) A determination whether or not any person shall be liable under section 107(a)(3) or section 107(a)(4) for any material that is not a recyclable material as that term is used in subsections (b) and (c), (d), or (e) of this section shall be

made, without regard to subsections (b), (c), (d), or (e) of this section.

``(b) Recyclable Material Defined.--For purposes of this section, the term `recyclable material' means scrap paper, scrap plastic, scrap glass, scrap textiles, scrap rubber (other than whole tires), scrap metal, or spent lead-acid, spent nickel-cadmium, and other spent batteries, as well as minor amounts of material incident to or adhering to the scrap material as a result of its normal and customary use prior to becoming scrap; except that such term shall not include--

``(1) shipping containers of a capacity from 30 liters to 3,000 liters, whether intact or not, having any hazardous substance (but not metal bits and pieces or hazardous substance that form an integral part of the container) contained in or adhering thereto; or

``(2) any item of material that contained polychlorinated biphenyls at a concentration in excess of 50 parts per million or any new standard promulgated pursuant to applicable Federal laws.

``(c) Transactions Involving Scrap Paper, Plastic, Glass, Textiles, or Rubber.--Transactions involving scrap paper, scrap plastic, scrap glass, scrap textiles, or scrap rubber (other than whole tires) shall be **deemed to be *arranging for recycling*** if the person who arranged for the transaction (by selling recyclable material or otherwise arranging for the recycling of recyclable material) can demonstrate by a preponderance of the evidence that **all of the following criteria were met at the time of the transaction**:

``(1) The recyclable material met a commercial specification grade.

``(2) A market existed for the recyclable material.

``(3) A substantial portion of the recyclable material was made available for use as feedstock for the manufacture of a new saleable product.

``(4) The recyclable material could have been a replacement or substitute for a virgin raw material, or the product to be made from the recyclable material could have been a replacement or substitute for a product made, in whole or in part, from a virgin raw material.

``(5) For transactions occurring 90 days or more after the date of enactment of this section, the person exercised reasonable care to determine that the facility where the recyclable material was handled, processed, reclaimed, or otherwise managed by another person (hereinafter in this section referred to as a `consuming facility') was in compliance with substantive (not procedural or administrative) provisions of any Federal, State, or local environmental law or regulation, or compliance order or decree issued pursuant thereto, applicable to the handling, processing, reclamation, storage, or other management activities associated with recyclable material.

``(6) For purposes of this subsection, `reasonable care' shall be determined using criteria that include (but are not limited to)--

``(A) the price paid in the recycling transaction;

``(B) the ability of the person to detect the nature of the consuming facility's operations concerning its handling, processing, reclamation, or other management

activities associated with recyclable material; and

``(C) the result of inquiries made to the appropriate Federal, State, or local environmental agency (or agencies) regarding the consuming facility's past and current compliance with substantive (not procedural or administrative) provisions of any Federal, State, or local environmental law or regulation, or compliance order or decree issued pursuant thereto, applicable to the handling, processing, reclamation, storage, or other management activities associated with the recyclable material. For the purposes of this paragraph, a requirement to obtain a permit applicable to the handling, processing, reclamation, or other management activity associated with the recyclable materials shall be deemed to be a substantive provision.

``(d) Transactions Involving ***Scrap Metal***.--

``(1) Transactions involving scrap metal shall be deemed to be ***arranging for recycling*** if the person who arranged for the transaction (by selling recyclable material or otherwise arranging for the recycling of recyclable material) can demonstrate by a preponderance of the evidence that at the time of the transaction--

``(A) the person met the criteria set forth in subsection (c) with respect to the scrap metal;

``(B) the person was in compliance with any applicable regulations or standards regarding the storage, transport, management, or other activities associated with the recycling of scrap metal that the Administrator promulgates under the Solid Waste Disposal Act subsequent to the enactment of this section and with regard to transactions occurring after the effective date of such regulations or standards; and

``(C) the person did not melt the scrap metal prior to the transaction.

``(2) For purposes of paragraph (1)(C), melting of scrap metal does not include the thermal separation of 2 or more materials due to differences in their melting points (referred to as `sweating').

``(3) For purposes of this subsection, the term `scrap metal' means bits and pieces of metal parts (e.g., bars, turnings, rods, sheets, wire) or metal pieces that may be combined together with bolts or soldering (e.g., radiators, scrap automobiles, railroad box cars), which when worn or superfluous can be recycled, except for scrap metals that the Administrator excludes from this definition by regulation.

``(e) Transactions Involving ***Batteries***.--Transactions involving spent lead-acid batteries, spent nickel-cadmium batteries, or other spent batteries shall be ***deemed to be arranging for recycling*** if the person who arranged for the transaction (by selling recyclable material or otherwise arranging for the recycling of recyclable material) can demonstrate by a preponderance of the evidence that at the time of the transaction--

``(1) the person met the criteria set forth in subsection (c) with respect to the spent lead-acid batteries, spent nickel-cadmium batteries, or other spent batteries, but the person did

not recover the valuable components of such batteries; and

``(2)(A) with respect to transactions involving lead-acid batteries, the person was in compliance with applicable Federal environmental regulations or standards, and any amendments thereto, regarding the storage, transport, management, or other activities associated with the recycling of spent lead-acid batteries;

``(B) with respect to transactions involving nickel-cadmium batteries, Federal environmental regulations or standards are in effect regarding the storage, transport, management, or other activities associated with the recycling of spent nickel-cadmium batteries, and the person was in compliance with applicable regulations or standards or any amendments thereto; or

``(C) with respect to transactions involving other spent batteries, Federal environmental regulations or standards are in effect regarding the storage, transport, management, or other activities associated with the recycling of such batteries, and the person was in compliance with applicable regulations or standards or any amendments thereto.

``(f) Exclusions.--

``(1) The exemptions set forth in subsections (c), (d), and (e) shall not apply if--

``(A) the person had an objectively reasonable basis to believe at the time of the recycling transaction--

``(i) that the recyclable material would not be recycled;

``(ii) that the recyclable material would be burned as fuel, or for energy recovery or incineration; or

``(iii) for transactions occurring before 90 days after the date of the enactment of this section, that the consuming facility was not in compliance with a substantive (not procedural or administrative) provision of any Federal, State, or local environmental law or regulation, or compliance order or decree issued pursuant thereto, applicable to the handling, processing, reclamation, or other management activities associated with the recyclable material;

``(B) the person had reason to believe that hazardous substances had been added to the recyclable material for purposes other than processing for recycling; or

``(C) the person failed to exercise reasonable care with respect to the management and handling of the recyclable material (including adhering to customary industry practices current at the time of the recycling transaction designed to minimize, through source control, contamination of the recyclable material by hazardous substances).

``(2) For purposes of this subsection, an objectively reasonable basis for belief shall be determined using criteria that include (but are not limited to) the size of the person's business, customary industry practices (including customary industry practices current at the time of the recycling

transaction designed to minimize, through source control, contamination of the recyclable material by hazardous substances), the price paid in the recycling transaction, and the ability of the person to detect the nature of the consuming facility's operations concerning its handling, processing, reclamation, or other management activities associated with the recyclable material.

``(3) For purposes of this subsection, a requirement to obtain a permit applicable to the handling, processing, reclamation, or other management activities associated with recyclable material shall be deemed to be a substantive provision.

``(g) Effect on Other Liability.--Nothing in this section shall be deemed to affect the liability of a person under paragraph (1) or (2) of section 107(a).

``(h) Regulations.--The Administrator has the authority, under section 115, to promulgate additional regulations concerning this section.

``(i) Effect on Pending or Concluded Actions.--The exemptions provided in this section shall not affect any concluded judicial or administrative action or any pending judicial action initiated by the United States prior to enactment of this section.

``(j) Liability for Attorney's Fees for Certain Actions.--Any person who commences an action in contribution against a person who is not liable by operation of this section shall be liable to that person for all reasonable costs of defending that action, including all reasonable attorney's and expert witness fees.

``(k) Relationship to Liability Under Other Laws.--Nothing in this section shall affect--

``(1) liability under any other Federal, State, or local statute or regulation promulgated pursuant to any such statute, including any requirements promulgated by the Administrator under the Solid Waste Disposal Act; or

``(2) the ability of the Administrator to promulgate regulations under any other statute, including the Solid Waste Disposal Act.

``(l) Limitation on Statutory Construction.--Nothing in this section shall be construed to--

``(1) affect any defenses or liabilities of any person to whom subsection (a)(1) does not apply; or

``(2) create any presumption of liability against any person to whom subsection (a)(1) does not apply.''.

(2) Technical amendment.--The table of contents for title I of such Act is amended by adding at the end the following item:

``Sec. 127. Recycling transactions.''.

APPENDIX C

LEGAL CASE SUMMARIES

APPENDIX C
CASE SUMMARIES

The cases summarized in this Appendix appear in the order in which they are referenced in the Manual. These summaries are for reference only and are not a substitute for a full review of relevant case law by a qualified attorney with experience in Superfund laws.

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[1] Full citation not available.

CASE SUMMARIES

1. Del-Ray Battery

Case Citation: *Del-Ray Battery Co. v. Douglas Battery Co.,* No. 6:09-cv-386, 2010 U.S. Dist. LEXIS 149989 (E.D. Tex.), *aff'd*, 635 F. 3d 725 (5th Cir. 2011).[2]

Relevant Facts: These actions involved battery recyclers in the business of sending whole lead acid batteries to a battery recycling facility in Tecula, Texas, prior to EPA designating the facility a Superfund site (the "Tecula Site") and taking over its control and cleanup.

Battery recycler, Douglas Battery Co. ("Douglas"), subsequently sued other battery recycler, Del-Ray Battery Co. ("Del-Ray"), in state court under the Texas Solid Waste Disposal Act ("SWDA") seeking contribution for cleanup costs incurred at the Tecula site. Del-Ray asserted that SREA also exempted them from liability under the SWDA, and entitled them to recover defense costs.

The state court found SREA inapplicable and granted partial summary judgment for Douglas as to each of SWDA's cost recovery elements, but did not order Del-Ray to pay damages on their contribution claims.

Del-Ray later brought a federal court action requesting declaratory judgments on four bases:

- SREA protects plaintiffs from contribution actions brought in state courts
- Plaintiffs are entitled to their attorney and expert witness fees
- SREA is unconstitutional if applied in a manner that precludes equal protection
- The state court's interpretation of SREA was unconstitutional

Issue(s)

- Whether the SREA exemption protects battery recyclers from SWDA liability (or other state hazardous waste cleanup laws).
- Whether SREA entitles a defendant to attorney and expert witness fees in a state court action for contribution to cleanup costs of a hazardous waste site under a state hazardous waste law.

Holding/Rule(s)

SREA does not apply to any state hazardous waste cleanup law or CERCLA analog unless that state amended its law to include the SREA text or to incorporate SREA by reference.

Consequently, a defendant in such a case would not be entitled to recover attorney and expert witness fees unless provided for under state law.

[2] Full citation not available.

Analysis: In a brief decision, the Fifth Circuit dispatched Del-Ray's requests for declaratory judgment and granted Douglas' motion to dismiss all the claims.

Mootness: In their motion to dismiss, Douglas (defendant) argued that the SREA preemption claim was not justiciable insofar as it asked for a declaratory judgment that SREA did not apply to the nonsuited state court case.

The Court found that the nonsuit order dismissed all the defendants in the state court case without prejudice. As a result, a party that brought a lawsuit that was nonsuited could file another lawsuit for the same claims. Because the record did not indicate anything about the nonsuit in the state court case or the defendant's intentions to refile or not, the Court of Appeals found the defendant's claim of mootness unsupported.

The Constitutionality of the State Court's Interpretation of SREA

The defendant argued that the *Rooker-Feldman* doctrine[3] barred the plaintiff from "*relitigating their defenses in federal court*." In its ruling, the Court noted that *Rooker-Feldman* should not be applied to final state court decisions subject to the doctrines of *res judicata* or collateral estoppel. The federal "full faith and credit" statute requires federal courts to give state court decisions the same precedential effect that courts in the same state would give those decisions.

On this basis, the Fifth Circuit analyzed Texas law to determine how *Rooker-Feldman* might apply. The Court found that the state court had granted several orders for summary judgment on each of the claims necessary to establish the elements required by the TSWDA but never addressed the issue of damages. The Court found that, "*a partial summary judgment on the issue of liability alone, without addressing the amount of damages is not a final judgment*." It further held that a nonsuit does not convert a partial summary judgment into a final judgment on the merits if there are remaining outstanding issues.

Because the interlocutory summary judgment orders in the state court case would not enjoy res judicata, the Court found that *Rooker-Feldman* was inapplicable. However, it did affirm the District Court by noting that federal courts are courts of limited jurisdiction and that the plaintiff had not asserted any jurisdictional basis of the claim that the state court's interpretation of SREA was unconstitutional.

Applicability of SREA to State Law/Preemption

The Court noted that CERCLA contains at least four provisions allowing states to have their own hazardous waste statutes and that CERCLA is not intended to preempt those statutes or to upset any court decisions based upon those state statutes.[4]

Furthermore, the Court noted that §§ 127(a) and 127(k)(1) of CERCLA contain specific language limiting the provisions of SREA solely to liability arising from §§ 107(a)(3) and 107(a)(4) and stating clearly that *"[n]othing in this*

[3] The *Rooker-Feldman* doctrine bars "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005). Thus, a losing party may not seek what amounts to appellate review of a final state court judgment in a federal district court. *See Lance v. Dennis*, 546 U.S. 459, 463, 126 S.Ct. 1198, 163 L.Ed.2d 1059 (2006).

[4] *See* §§ 152(d), 107(j), 113(f)(1) and 114(a)

section shall affect . . . liability under any other Federal, State, or local statute or regulation promulgated pursuant to any such statute…"

Therefore, the Court determined that SREA is inapplicable to a hazardous waste cleanup performed under a state hazardous waste law. As a result, no cause of action arose where a state court refused to apply SREA provisions to a state hazardous waste cleanup action.

Once the Court decided that SREA did not apply in this case, nor did it preempt the TSWDA, the issue of § 127(k) was moot. The Court affirmed the District Court's action.

2. N.L. Industries. Inc.

Case Citation: ***United States v. NL Industries***, 936 F. Supp. 545 (S.D. Ill., 1996), *mot. dismiss denied*, 2005 U.S. Dist. LEXIS 10713 (2005), *mot. denied*, and *mot. summ. J. denied*, and *vacating as moot*, 2006 U.S. Dist. LEXIS 5622 (2006).

Relevant Facts: The 16-acre NL Industries Superfund Site[5] (the "Site"), located in Granite City, Illinois, was formerly a battery recycling site and a secondary lead smelter that operated from 1903 to 1983, emitting lead into the environment, including into the surrounding residential properties. The EPA ultimately initiated a response action by removing soil from the residential yards.

The U. S. filed a complaint in 1991, naming the defendants and others as PRPs, seeking (1) to recover past response costs associated with the clean-up of hazardous materials at the site; (2) a declaration of PRP liability for future response costs; (3) injunctive relief to compel the PRPs to undertake response actions at the site; and (4) civil penalties and punitive damages.

The defendants, joined by the city of Granite City, filed motions for a temporary restraining order (TRO) and preliminary injunction against the U.S. seeking to stop the response action and emphasize their unconstitutionality argument that CERCLA interfered with the Commerce Clause.

Thereafter, several large PRPs (the Settling Defendants) entered into a consent decree with the U.S. In May 2004, several of the Settling Defendants (Third-Party Plaintiffs) filed a joint contribution complaint against numerous third-party defendants. Many of those third-party defendants filed motions for a determination that SREA would exempt them from liability in this action.

Issues

- Whether it is appropriate for a federal district court to issue a temporary restraining order or preliminary injunction seeking to halt an ongoing remedial action initiated by the U.S. EPA.
- Whether Congress' regulation of the disposal of hazardous substances under CERCLA is a permissible power under the Commerce Clause[6] of the Constitution.

[5] Also called the Taracorp Site

[6] United States Constitution, Article 1, Section 8, Clause 3:
Section 8.
The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;
* * *
To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

- Whether SREA would apply to an action initiated by the United States in 1991, in which a final judgment had not been issued, even though complaints were served to some of the third-party defendants as late as 2004.

Holding/Rule(s): A federal district court does not have jurisdiction under § 113(h) to issue a TRO or preliminary injunction seeking to halt an ongoing EPA-initiated remedial action.

CERLCA's regulation of the disposal of hazardous waste is a permissible exercise of Congress' power under the Commerce Clause.

SREA cannot provide an exemption from CERCLA liability where there is an action initiated by the United States in 1991 that was still pending final judgment at the time SREA was enacted. This is true even if third-party defendants are served after SREA enactment, so long as the third party complaint is part of the original 1991 action.

Analysis: The court reviewed two primary memorandum and orders in its consideration of this case.

> The 1996 Memorandum and Order: The Court addressed CERCLA's constitutionality by reviewing past cases and determining that Congress's enactment of CERCLA was in response to "midnight dumping" and clandestine waste dumps. Therefore, it acted within the broad scope of its authority to enact legislation to protect the public health, welfare and safety and validly exercised its Commerce Clause power.
>
> 2005 Memorandum and Order: In this Memorandum and Order, the Court examined the scope of SREA applicability, looking first to the Southern District of Ohio, which addressed a similar situation in *United States v. Atlas Lederer*.[7]The *Lederer* Court held that the action constituted "a judicial action" commenced by the United States and therefore, the SREA defense did not apply.[8]

In this case, the Court noted that, according to *Lederer*, a pending judicial action brought by the United States would encompass any later crossclaims and third-party claims of contribution.[9] *Lederer* also held that it would be unfair to allow the United States to pursue a CERCLA action against some defendants, but preclude them from seeking contribution, commenting that "*Such a policy would punish the Respondent Group for accepting responsibility and settling with the Government*."[10]

However, the Movants in the current case[11] argued:

1) That they were never sued by the United States, asserting instead that third-party plaintiffs sued them in an independent action for contribution;
2) Additionally, because they were not brought into the case until May 2004, the action against them was not "pending," and finally,
3) When they were brought into this action, the United States had already settled its claims with the third-party plaintiffs, thus, making the action by the United States no longer "pending."

The court disagreed, indicating that the Movants' arguments ignored the plain meaning of "pending judicial action."

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[7] *United States v. Atlas Lederer Co.*, 97 F.Supp.2d 830 (S.D. Ohio 2000)
[8] *Id*.
[9] *Id*.
[10] *Id*.
[11]The Court in the case at bar refers to the third-party defendants as the Movants, because they brought the various motions under consideration.

The Federal Rules of Civil procedure state that, "There shall be one form of action to be known as 'civil action."[12]The term "civil action" refers to the entire civil proceeding, including all component 'claims' and 'cases' within that proceeding.[13] "In federal practice, the terms 'case' and 'action' refer to the same thing, i.e., the entirety of a civil proceeding, which necessarily includes any third-party claims."[14] The word "pending" is defined as "awaiting an occurrence or conclusion of an action. . ." [15] "Thus, an action or suit is 'pending' from its inception until the rendition of final judgment." [16]

No final judgment was entered as of November 29, 1999, thus, the action was pending at SREA's enactment. Accordingly, the plain meaning of SREA § 127(i)'s language that it "shall not affect any . . . pending judicial action initiated by the United States prior to enactment of this section" is simply that SREA's exemptions shall not affect an ongoing judicial action that was filed by the United States prior to November 29, 1999.

Absent an indication that a contrary definition of "action" or "pending" should be applied, (from either the specific statutory language at issue, the context in which the language is used, or the broader context of the statute as a whole), the Court must refuse to do so. Upon review of the statutory language, its context, and the broader context, the Court finds no such contrary indication. Based upon the plain meaning of § 127(i), the SREA exemptions do not apply to this case."

The Movants tried to argue that the Court should rely upon the decisions in *Gould v. A.M. Battery* [17] and *United States v. Mountain Metal,* [18] however, the Court distinguished *Gould* and *Mountain Metal* by noting the United States initiated the current case, and all crossclaims and third-party claims were initiated as part of the initial action.

The Court did look to SREA's Legislative History for guidance, but found it unreliable due to conflicting statements between Senators Lott and Daschle, both original sponsors of SREA.

Comments: It is important to note that the Court did not allow the SREA exemption to be raised because it decided that the instant case was an action brought by the United States prior to the enactment of SREA, but was still pending at the time of enactment. The Court distinguished the facts in this case from other actions brought by

[12]Fed. R. Civ. Proc. 2.

[13]Baiker-McKee, Federal Civil Rules Handbook 151 (2005)

[14] *Nolan v. Boeing Co*., 919 F.2d 1058, 1066 (5th Cir. 1990). See also *Factory Mutual Insurance Company v. Bobst Group USA, Inc*., 392 F.3d 922, 924 (7th Cir. 2004) ("Contribution claims not only overlap but also depend on the principal claims in the suit. There can be no contribution without established underlying liability); and *Atlas Lederer Co.,* 97 F.Supp.2d at 833 (a civil "action" includes "the entirety of a civil proceeding, which necessarily includes any third-party claims") (citing *Ginett v. Computer TaskGroup, Inc*., 962 F.2d 1085, 1093 (2nd Cir. 1992); and *Nolan v. Boeing Co.*, 919 F.2d 1058, 1066 (5th Cir. 1990), cert. denied, 499 U.S. 962, 113 L. Ed. 2d 651, 111 S. Ct. 1587 (1991))

[15] BLACK'S LAW DICTIONARY,6th Ed., p. 1134 (1990).

[16] *Id*.

[17]*Gould v. A.M. Battery*, 232 F.3d 162 (3rd Cir. 2000) (an action brought by private party plaintiffs).

[18]*United States v. Mountain Metal Company*, 137 F. Supp.2d 1267 (N.D. Ala. 2001). ("The Court rejects the argument by the private plaintiffs that consolidation of their private party action with the action of the United States means the private plaintiffs may benefit from the protection afforded to the United States under the statute. The statute does not allow recovery for a separate and independent private party action simply because that private action is consolidated with an action filed by the United States.")

private parties, and also from a case where a private party action was consolidated with an action brought by the United States.[19]

3. Interstate Non-Ferrous Corp.

Case Citation: *Cal. Dep't of Toxic Substances Control v. Interstate Non-Ferrous Corp*., 99 F. Supp. 2d 1123 E.D. Cal. 2000), *mot. summ. J. granted in part and denied in part*, 298 F. Supp. 2d 930 (Cal. 2003).

Relevant Facts: In January 1997, DTSC filed suit for cost recovery and declaratory relief under CERCLA and RCRA for response, removal, and remediation costs resulting from a release of hazardous substances at a Mojave, California site known as the Mobile Smelting Property (the "Site").

From approximately 1963 until 1995, Mobile Smelting consistently received and burned diverse materials to recover usable metal, including: aluminum and lead scrap, copper wire and parts, batteries, battery parts, rubber, plastic or vinyl, paper, and fiberglass insulation. The Site was contaminated with significant amounts of hazardous elements, including copper, lead and dioxins.

As of March 31, 2001, DTSC incurred costs in responding to the contamination of the Site totaling over $4 million. Forty-seven of the original third-party defendants settled with DTSC. There are only three defendants remaining: Barstow Truck Parts and Equipment Company, Inc. (Barstow), the Estate of Huffman (the Estate), and one liability insurer for the Estate, Great American Insurance Company (GAIC).

Issue: Whether SREA applies to pending judicial actions initiated by a state or one of its departments or agencies?

Holding/Rule(s): The Court held that Congressional intent of the *retrospective* applicability of SREA to pending cases initiated by parties other than the United States, could be gleaned from: [1] SREA's headings indicating that Congress intended to clarify, not change, the law; [2] SREA's stated purpose, which was to exempt eligible recyclers from liability; [3] language throughout SREA, which fixes different requirements based on when the timing of the transaction; [4] and, inter alia, Senator Lott's statement, a chief co-sponsor of SREA, ***which was not legislative history, but was to be accorded substantial weight***.

The Court, however, did not find SREA to be *retroactive* in this case, meaning that it did not find that SREA attaches new legal consequences to prior acts, because: [1] no new liability was created, and the State of California's "rights" were not impaired (it would have cleaned up the site regardless of its chances of recovery); and because [2] SREA did not change, but clarified existing law.

Applying § 127 to currently pending cases not filed by the United States, only alters parties' rights in cases where a recycler engaged in a recycling transaction for which liability was previously found under a misinterpretation or misapplication of pre-November 29, 1999 CERCLA liability principles, with resulting unintended consequences.

Analysis: Following SREA enactment, DTSC submitted a motion for summary judgment, arguing that the recycling exemption did not apply to this pending action. DTSC mistakenly assumed the language, "any pending judicial action initiated by the United States prior to November 29, 1999," was inclusive of state governments and their departments.

[19] *United States v. Mountain Metal Company* at 1279. "The Court rejects the argument by the private plaintiffs that consolidation of their private party action with the action of the United States means the private plaintiffs may benefit from the protection afforded to the United States under the statute."

To address DTSC's misapprehension, the Court extensively reviewed the *Landgraf* [20]case and its progeny to distinguish between a *retrospective* statute and a statute's *retroactive* effects. The Court first considered whether SREA was a retrospective statute and, if so, whether it had a retroactive effect, noting that "*Landgraf teaches that courts should not apply 'retroactive' statutes 'retrospectively' absent clear congressional intent*."[21]

The Court cited Landgraf to set the parameters of its analysis:

> *[W]hen a case implicates a federal statute enacted after the events giving rise to the suit, a court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, there is no need to resort to judicial default rules.*
>
> *Where the statute in question unambiguously applies to preenactment [sic] conduct, there is no conflict between the antiretroactivity [sic] presumption and the principle that a court should apply the law in effect at the time of decision.*
>
> *Even absent specific legislative authorization, application of a new statute to cases arising before its enactment is unquestionably proper in many situations. However, where the new statute would have a genuinely retroactive effect--i.e., where it would impair rights a party possessed when he acted, increase his liability for past conduct, or impose new duties with respect to transactions already completed-- the traditional presumption teaches that the statute does not govern absent clear congressional intent favoring such a result.*[22](emphasis added)

The Court analyzed SREA's temporal reach to determine whether Congress made an express command or an unambiguous directive that the law apply retrospectively. The Court explained that legislative intent can be discerned from a statute's language, structure, legislative history, and the context in which the statute was passed.

The Court next looked at whether SREA clarified or changed the existing law. The Court found that Congress' use of the term 'clarification' three times in the operative liability of the statute's text constituted strong evidence that it intended SREA to have retrospective effect. The Court also noted that an amendment to an existing statute is not an acknowledgment by Congress that the original statute is invalid.

In reviewing SREA's Legislative History, the Court was cautious about relying upon Senators' Lott and Daschle's conflicting statements. Looking at the context in which Congress enacted SREA, the Court quoted the District Court in *Delaware in United States v. New Castle County*:[23]

> "*Congress did not, to say the least, leave the floodlights on to illuminate the trail to the intended meaning of arranger status and liability*."[24]

The Court further stated that,

> *"[r]egardless of the theory utilized to exclude a recycler's liability; i.e., whether dealing in or transporting a useful product or treating recyclable material as not hazardous waste, the pre-Section 127 case law*

[20] *Landgraf v. USI Film Products*, 511 U.S. 244, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1998)
[21] *United States ex rel Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402, 1407 (9th Cir. 1995).
[22] *Landgraf* at 269-70
[23] *United States v. New Castle County*, 727 F. Supp. 854 (D. Del. 1989)
[24] *Id*. at 871.

addressing recycler liability is conflicting and the analysis, case-specific and fact-intensive. The pre-existing law concerning recycler CERCLA liability was uncertain and in conflict."

It then noted,

> *"'[t]he existence of a controversy regarding the proper interpretation of a statute prior to its amendment rebuts the presumption that an amendment is substantive in nature.'*[25] *CERCLA §§ 9607(a)(3) and (a)(4) were ambiguous as applied to recycling transactions, corroborating a finding that congressional intent behind Section 127 is to clarify that recycling is not disposal and shipping for recycling is not arranging for disposal, to achieve the statutory purpose of maintaining a successful, nationwide recycling effort*." (emphasis added)

Summarizing its analysis of whether SREA has a retroactive effect, the Court said:

> "*Prior cases have unintendedly found recyclers liable, based on subjective definitions of recycling and conflicting approaches. Judicial development of a "so-called recycling exemption" has focused on the nature of the material and the activities to which it will be subjected. Stevens Creek, Catellus and their progeny looked to the EPA's administrative definition of "recycling," while other courts use the "useful product" rationale. Yet other courts used non-disposal and non-hazardous materials doctrines; a knowledge- and/or intent-based analysis; and/or a strict liability approach, all of which has produced conflict, ambiguity, and uncertainty in recycling cases. What these pre-127 cases do reveal is that courts have struggled to recognize and apply a recycling exemption to CERCLA liability.*
>
> *Congress, in § 127, creates an express definition for "recycler" and explicit rules for what transactions and activities constitute "recycling." It defines "recyclable material" based on types of product, use, and intended purpose. The statute encourages recyclers' environmental responsibility in conducting business. For materials not listed in § 127, the pre-127 analysis is explicitly left intact. The statute is rationally designed to achieve clarification and consistency in addressing recycler liability under CERCLA to serve the ultimate purpose of protecting the recycling industry and encouraging recycling*."

Finally, the Court was convinced that when Congress said "any pending judicial action initiated by the United States prior to November 29, 1999" it meant just that. The DTSC is not the United States nor is any other department of the State of California or any other state.

Thus, on May 25, 2000, SREA was found retrospectively applicable and was to *be "applied to all parties and all transactions in this pending action brought by the California DTSC"*[26]

4. Gould

Case Citation: ***Gould Inc. v. A & M Battery & Tire Serv.,*** 232 F.3D 162 (3d Cir. 2000), *mot. summ. J. granted*, 176 F. Supp. 2d 324 (M.D. Pa. 2001).

[25]See *Plyler v. Moore*, 129 F.3d 728, 736 (4th Cir. 1997) (citing 1A Norman J. Singer, STATUTES & STATUTORY CONSTRUCTION § 22.31 (5th ed. 1991)).

[26]*Department of Toxic Substances Control v. Interstate Non-Ferrous Corporation*, 99 F. Supp. 2d 1123, 1154 (E.D. Ca. 2000)

Relevant Facts: From 1961 to 1980, the Marjol Battery and Equipment Company (Marjol) operated a battery breaking[27] (i.e., recycling) facility in Throop, Pennsylvania. Each of the defendants-appellants sold spent lead-acid batteries to Marjol that had been manufactured with hard rubber casings. One appellant, Alexandria Scrap Corporation, also sold non-battery, or "soft" lead to Marjol. At least a vast majority of the hard casings were eventually dumped into old mine shafts located on Marjol's property, or otherwise buried on site.

In the late 1970s, battery manufacturers started producing lead-acid batteries with casings made of polypropylene plastic rather than rubber. While developing processes for recycling the plastic casings, Marjol stockpiled innumerable, broken, plastic casings, contaminated with lead and other toxic substances, on its property, making virtually no effort to prevent their migration into the environment.

In the 1960s, when environmental law was largely undeveloped, the Pennsylvania Department of Environmental Resources ("DER") received complaints about Marjol site emissions.

On March 7, 1967, the DER's Bureau of Air Pollution Control entered an order requiring Marjol to reduce emissions from its site to the extent that no emissions would be detectable beyond its property line. Marjol repeatedly violated that order, a cease-operations request, and several other remedial orders between 1975 and 1977.

In 1980, Gould, Inc. acquired Marjol. When the DER learned of the planned acquisition, it conducted further investigations at the Marjol site and ultimately issued an "end of the line" order requiring Marjol's compliance with the DER's remedial demands or cease operations. Gould, aware of Marjol's history with the DER, proceeded with the acquisition, and initiated compliance measures but ultimately agreed to shut down the Marjol site.

Thereafter, the DER advised Gould that it would not require further remediation of the Marjol site or take further enforcement actions, as long as Gould did not conduct battery-breaking operations. Gould then only performed various forms of maintenance and "housekeeping" at the Marjol site. Later, EPA initiated its Marjol site investigations, ultimately determining "that hazardous substances had been released, and that there was an 'imminent and substantial endangerment' to the public health, welfare, or the environment."

In April 1988, Gould entered into a Consent Agreement and Order with the EPA under CERCLA § 106(a) which required Gould to conduct site stabilization activities relating to lead and other hazardous substances at and around the Marjol site. In May 1990, Gould entered into a second consent order under RCRA, this time with both the EPA and the Pennsylvania DER, which required Gould to perform a Facility Investigation and Corrective Measure Study at the Marjol site.

In December 1991, Gould initiated a civil action seeking cost recovery from 240 PRPs pursuant to CERCLA § 107(a)(4)(B), or, alternatively, contribution pursuant to § 113. The defendants moved for partial summary judgment, arguing that because Gould was a responsible party who had entered into a consent agreement resolving its liability to the government, it was limited to asserting a contribution claim only.

The District Court granted partial summary judgment in the defendants' favor. The Court then held a bench trial on the issue of allocating response costs among those defendants held liable to Gould for contribution, and held that

[27] The lead-acid battery recycling process is referred to as "breaking" because it literally requires the recycler to break open the battery and remove its lead plates and other recyclable components. Until the 1970s, the battery casings themselves, which were then made of hard rubber, were not recyclable. Consequently, the casings were simply discarded, often contaminated with various amounts of residual lead and other toxic substances.

Gould should bear 75 percent of the clean-up costs and that defendants should bear the remaining 25 percent. The court then apportioned the defendants' 25 percent share according to the amount of waste each contributed to the Marjol site.

With the exception of four appellants, Gould eventually settled with all defendants. After appellants filed their notice of appeal, Congress passed, and the President signed, SREA (the "Act"). The appellants pursued only their claim that the Act shielded them from contribution liability to Gould. Gould countered that the Act did not apply to materials that contain non-recyclable components, and that it did not apply retroactively to the case, and that if it did apply retroactively, it violated the Fifth Amendment's due process guarantee.

Initial Ruling: The Court of Appeals vacated the District Court's determination of contribution liability and its allocation of costs and remanded the District Court to determine SREA applicability for the four remaining defendants.

Issues

- Whether in 2000, SREA applied retroactively to a judicial action brought by a private party prior to the date of enactment of SREA.
- Whether the retroactive application of SREA violated a plaintiff's rights under the Fifth Amendment.
- Whether "recyclable materials" as defined by SREA excludes materials that contain non-recyclable components.
- ON REMAND:
    - Whether the remaining defendant-appellants met the criteria set forth in the SREA.
    - Whether the remaining defendants-appellants were exempt from contribution liability under SREA.

Holding/Rule(s): Congress intended to apply SREA retroactively to pending judicial actions brought by private parties prior to SREA's enactment. The Act can, and does, apply retroactively without violating an individual's rights under the Fifth Amendment. Congress drafted SREA with the understanding that not every component of a recyclable material will necessarily be recyclable.

On appeal, the Third Circuit court exempted the remaining defendants from contribution liability because Gould stipulated that the defendants had met all of the bona fide recycling criteria and because Gould failed to prove that any of the SREA protection exclusions applied.

The Court then remanded the case to the District Court to determine whether the appellants satisfied the Act's requirements for liability exemption.

Analysis (Third Circuit Ruling)

Retroactivity

Gould argued that its action was "initiated by the United States," claiming that it brought the action because it entered into the EPA consent agreements.

In its analysis of SREA liability exemption applicability, the Court reviewed SREA's extensive Legislative History. While other courts have hesitated to apply the 1999 Legislative History, the Court felt comfortable in doing so on the basis that: the bill had been introduced in three prior Congresses; the language of the bill itself; and because the legislative history of the previously introduced bills remained the same throughout.

Quoting Senator Lott's Legislative History from November 19, 1999, the Court said the Act,

> "*provides for relief from liability for both retroactive and prospective transactions," and "any pending judicial action, whether it was brought in a trial or appellate court, by a private party shall be subject to the grant of relief from liability*."

Constitutionality/Due Process

Regarding Gould's argument that SREA's retroactive application to a private party lawsuit violated its Fifth Amendment rights to due process, the Court determined that the Act only needs to be justifiable on some rational basis to pass muster under the Fifth Amendment.

The Court reasoned that in this case, the distinction between privately and federally initiated judicial actions was rationally related to preserving the public fiscal purse. The distinction ensures that once the United States has expended public funds to initiate a judicial action, the Act does not render that expenditure wasted by exempting an otherwise covered person from liability. In affording such fiscal protection, the Act rationally distinguished between the United States, a non-culpable party, and a party such as Gould who actually contributed to the contamination underlying its contribution claim. That rationale was enough to pass constitutional muster, and thus, the Act did apply retroactively without violating due process.

"Recyclable Material"

Turning to the question of whether "recyclable materials," as defined by SREA, excludes materials containing non-recyclable components, the Court again analyzed the Act's plain meaning.

The Court first asserted that the Act's plain language defines "recyclable material" as including the entire "spent lead-acid battery" and does not distinguish between such batteries that are wholly recyclable and those that are not. Relying again on SREA's Legislative History, the Court emphasized that Congress recognized that not all components of recyclable materials (including spent lead-acid batteries) are recyclable. Quoting from the Legislative History, the Court stated,

> "*for a transaction to be deemed arranging for recycling, a substantial portion, but not all, of the recyclable material [e.g., a spent lead-acid battery] must have been sold with the intention that the material would be used as a raw material, in place of a virgin material, in the manufacture of a new product*."

Based on this language, the Court determined that sending a spent lead-acid battery for recycling meets SREA's requirements because it is specifically included in the definition of recyclable material and also because Congress's acknowledgement of this fact in the Legislative History.

On Remand

Due to the high volume of records and evidence collected before SREA enactment, the Court held a limited evidentiary hearing to gather evidence specifically relevant to the questions at hand.

On remand, Gould stipulated that the remaining Defendants had met each of the bona fide recycling criteria set forth in CERCLA § 127(c)(1)-(4) and §§ 127(e)(1) and (e)(2)(A) thus, the burden of proof shifted to Gould to prove that a SREA exclusions (CERCLA § 127(f)) prevented the defendants from the Act's protection.

Gould argued that Marjol paid above-market prices for the scrap batteries therefore, that fact should have raised a red flag for defendants. Gould also argued that the defendants were large, sophisticated players in the scrap battery market who had knowledge or should have had knowledge of lead's toxicity and Marjol's non-compliance.

In response, the Court first noted that none of the remaining defendants employed more than 20-30 employees and were not major industrial enterprises. Rather, they were small, family run businesses that did not have the resources to conduct extensive investigations.

The Court also noted that had any company called or visited the Marjol site they would have been told that Marjol was a "first-class" operation that was making all efforts to comply with the ever-changing environmental laws and regulations. Had any company called the governmental agencies (EPA or DER), it would have been told that Marjol was operating the battery breaking site and, in fact, that the agencies never closed down the site.

Regarding Gould's claim that Marjol paid above market prices, which should have been a clue that there was a problem, the Court found from testimony that it was not the nominally higher price that convinced sellers to ship batteries to Marjol, but rather Marjol's excellent customer service.

Gould's final effort involved providing the Court with articles from trade magazines and newspapers dealing with Marjol's noncompliance with environmental laws. However, defendants' testimonies that they never saw these articles and had no obligation to read the press, persuaded the Court.

Holding/Rule(s): Even when balancing all of the evidence and testimony in favor of the plaintiff, the Court held that Gould did not meet its burden of proving that any of the five SREA exclusions would prevent the remaining defendants from enjoying the liability exemption, and the Court found for the defendants.

5. Morton Int'l

Case Citation: *Morton Int'l v. A.E. Staley Mfg. Co.*, 106 F. Supp. 2D 737 (D.N.J. 2000).

Relevant facts[28] From 1929 through 1943, F.W. Berk & Company, Inc. ("Berk U.S.A."), owned and operated by F.W. Berk & Company, Limited ("Berk U.K"), leased the Site in question from Carlstadt Development & Trading Co. ("CDTC"). Berk U.S.A. conducted mercury processing and other operations at a manufacturing facility on a 40-acre site. In 1943, title was transferred to Berk U.S.A., which continued to operate the plant. Throughout the 1950s-1970s, the Site had several owners who conducted operations that ultimately saturated the site with approximately 268 tons of toxic waste. The site was eventually designated a Superfund site ("Ventron/Velsicol Superfund Site," named after prior owners) the action at bar was initiated. .

In 1996, the plaintiffs sought contribution for investigation and remediation costs from the defendant under CERCLA, the Resource Conservation and Recovery Act ("RCRA"), the New Jersey Spill Compensation and Control Act ("Spill Act"), the Federal Declaratory Judgment Act, and under common law.

[28] There are no further reported decisions on the SREA issue in this case. There was a stipulation in the Docket dismissing the defendants without prejudice, but a search of the federal court PACER case locator shows no evidence of a new case. It is assumed that there must have been an out-of-court settlement or the plaintiffs realized the defendants had a high likelihood of proving that SREA would protect them from liability.

In December 1999, and again in January 2000, several defendants sought to have the plaintiffs either withdraw their claims or allow the defendants to amend their Answers to assert exemption from liability under SREA. When the plaintiffs refused both requests, the defendants sought the Court's permission.

Issues:

- Whether newly enacted legislation (SREA), exempting from liability under CERCLA 107(a)(3) and (a)(4) certain persons who arranged for recycling of recyclable material, applied retroactively to pending actions between private parties?
- If the site defendants could meet the exemption criteria and the court determined that it was to be applied retroactively, would defendants then not be liable as arrangers for disposal or treatment of hazardous substances?

Holding/Rule(s): SREA should be applied retroactively in pending CERCLA private party actions for contribution. Accordingly, the Court granted the company's motion to amend its defense to encompass the provision. The Court found that Congress provided for the retroactivity of SREA in a manner that was "sufficiently express and unambiguous" and, therefore, a recycler may make a defense under the law. However, this determination is not dispositive as a finding for any party.

Statutes applying to pending cases are labeled retrospective. Not all laws applicable to pending cases are retroactive. When a statute unambiguously applies to conduct that occurred before enactment, there is no conflict because of the presumption against retroactivity and the general rule that courts should apply the law in effect at the time of their decisions.

A retrospective statute is retroactive if it attaches new legal consequences to prior acts so as to justify the presumption against retrospective application. Essentially, a statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to past transactions, will be deemed retrospective. However, because of the strong presumption that new legislation is prospective, it will not have a retroactive effect unless Congress by its language clearly requires a certain result either by express command or by necessary implication.

In *Morton*, the plaintiffs suggested that Congress did not intend to preclude pending private party and state-initiated actions from applicability because it did not expressly preclude them in the language (i.e., Congress used a negative inference to express its intent). Although the general rule is that if Congress intended retrospectivity, it would have expressly stated so, the Supreme Court determined that a negative inference analysis is permissible in support of retroactive intent.

Therefore, based on the plain meaning statute's plain meaning and Congress's omission of pending private party and state-initiated actions in discussing applicability, it appears Congress intended to apply SREA to State-initiated and private party actions. It was unnecessary for Congress to expressly state this in the exemption language. Rather, the omission in the language, purpose, and legislative history of Section 127 support this determination.

Analysis: In finding SREA to be retroactive, the Court cited the recent cases *United States v. Atlas Lederer* Co.[29] and *Department of Toxic Substances Control v. Interstate Non-Ferrous Corp.*[30] The Court also cited the U.S. Supreme

[29] *United States v. Atlas Lederer* Co., 97 F. Supp. 2d 830 (S.D. Ohio 2000

[30] *Department of Toxic Substances Control v. Interstate Non-Ferrous Corp.*, 99 F. Supp. 2d 1123, (E.D. Cal. 2000),

Court decision in *Landgraf v. USI Film Products*,[31]which the said that statutes should not be applied retroactively unless expressly commanded or implied by Congress.

The Court, in assessing statements from Sens. Trent Lott, Blanche Lincoln, and Thomas Daschle, as well as the Act's plain meaning, concluded SREA's congressional intent was for the law to be applied retroactively.[32]

The Court conducted an analysis of SREA's purpose and gave significant consideration to the Act's Legislative History and the bills introduced during the prior six years. The Court justified this on the basis that the earlier bills had been through committees and, because the bill's language remained virtually the same throughout, it was appropriate to give weight to the earlier Legislative History.

The Court reasoned that,

> "*Section 127 does not automatically exempt site defendants from any liability. Rather, site defendants must show that they are entitled to prevail on the exemption. Even if site defendants prevail on their recycling exemption, plaintiffs would need to prove their claims against the remaining defendants. I cannot conclude that plaintiffs automatically lose a cause of action for contribution. Whether plaintiffs will prevail on their Sections 107 and 113 claims is yet to be determined. Nor do I find that there are new duties imposed on any party. Based on this, I cannot conclude that any rights have been impaired or new duties imposed or that liability has been increased based on the imposition of the recycling exemption alone. I am concerned, however, that at this advanced stage of this litigation that plaintiffs' may be penalized by the fee-shifting provision contained within Section 127(j). Taking away the right to certain damages or creating a right to new damages, e.g., compensatory and punitives, where they did not exist "can be seen as creating a new cause of action, and its impact on parties' rights is especially pronounced." … This would be the type of provision that should not apply to events occurring before its enactment "in the absence of clear congressional intent*. *The fee-shifting provision was not in existence at the commencement of the action, nor during discovery, at which times, plaintiffs could have assessed their claims against site defendants more fully with concern for the possibility of proceeding wrongfully against legitimate recyclers."*

In summary, the Court stated:

> "*Section 127 should be applied retrospectively here. The language, purpose, and legislative history of Section 127 support that determination.* ***This determination is not dispositive as a finding for any party. The defendants seeking to add the Section 127 defense must still prove by a preponderance of the evidence that they meet all requirements set forth in this amendment***." (emphasis added)

6. RSR Corp.

Case Citation: ***RSR Corp. v. Avanti Dev., Inc.,*** 1999 U.S. Dist. LEXIS 20424 (S.D. Ind. 1999), *summ. J. granted* (Ace) and *summ. J. denied* (RSR), 68 F. Supp 2nd 1037 (1999), *and summ. J. granted* (Alter Barge), *summ. J denied* (RSR), 69 F. Supp 2nd 1119 (1999), *and mot. granted* (RSR)*, summ. J granted in part*, *summ J. denied*, 2000 U.S. Dist. LEXIS 14190 (2000), *and partial summ. J. granted in part*, *partial summ. J. denied in part* (Vornado), 2000 U.S. Dist. LEXIS 14202

[31] *Landgraf v. USI Film Products*, 511 U.S. 244 (1994),

[32] In statements to Congress in 1999, Sen. Lott asserted that "*Section 127 under CERCLA clarifies liability for recycling transactions and provides relief from liability for both retroactive and prospective transactions*." Sen. Lincoln, in her statements to Congress, stated that she "*first introduced the bill (Section 127) to relieve legitimate recyclers of scrap metal from unintended Superfund liability. The bill was developed in conjunction with the recycling industry, the environmental community and the administration and the Act is both retroactive and prospective*."

(2000), *and partial summ. J. granted in part* (Allied)*, compl. dismissed*, 2000 U.S. Dist. LEXIS 14210 (2000), *and mot. denied* (Winski), 2000 U.S. Dist. LEXIS 14203 (2000), *and summ. J. granted* (Madewell Defendants), 2000 U.S. Dist. LEXIS 14209 (2000).

Relevant Facts: Quemetco, and prior owners, had operated a lead smelter on the Avanti Site (the "Site") from 1964 to 1972. In 1994, the EPA found that the Avanti site and the surrounding residential property were contaminated with lead and directed Quemetco and others to clean up the Site. Quemetco filed this action in 1995 against Ace Battery (Ace) and other defendants, seeking contribution to its clean-up costs pursuant to CERCLA.[33]The Plaintiffs claim that Ace is a PRP under CERCLA because Ace arranged for the treatment or disposal of hazardous substances at the Avanti site.

Ace, an independent battery breaker that contracted with Quemetco to supply lead plates and other lead-containing items from spent lead-acid automotive batteries, sourced its batteries from a variety of suppliers. In particular, Quemetco, under its contract with Ace, supplied spent lead acid batteries (SLABs) to Ace for breaking, after which Ace would sell to Quemetco the lead plates from the very SLABs Quemetco had provided to Ace. Ace's sale of lead plates, regardless of the SLABs's source, were sold to Quemetco at the market price at the time of the transaction. Quemetco derived economic benefit from its contract with Ace because it acquired lead units for its smelter at a lower price than buying virgin lead ore.

This case followed a tortuous path to its ultimate resolution, with the Court initially granting summary judgment on the arranger liability issue for three defendants but ultimately having to vacate those orders because of a procedural technicality. In considering whether to issue a new summary judgment order on the arranger liability issue , the Court assessed whether three additional defendants (J. Solotken & Co., Brody & Brody, and SW Industries), who sold lead plates to Quemetco, should be included.

Issue(s)

- Whether Ace Battery was a Responsible Person under CERCLA?
- Whether Ace's sale of reclaimed lead plates was intended for disposal or treatment, or for further industrial use of a valuable product?
- Whether a scrap recycler that ships SLABs to a battery breaker who then sells lead plates to a smelter can be held liable under CERCLA for cleaning up the smelter site?

Holding/Rule(s): Ace Battery was not a Responsible Party under CERCLA because it sold a useful product and such sale of a useful product cannot be the basis for CERCLA liability.

The Court summarized its decision by stating *"[once] lead plates have been reclaimed from spent batteries, they become a new, reusable product*."[34]

> "*The act of transferring spent batteries to a battery breaker that subsequently delivers a useful product to a smelter at a contaminated site does not subject the transferror [sic] to CERCLA arranger liability*."

Analysis: In its January 20, 1999, Order, the Court scrutinized whether the Ace transactions constituted arrangement for treatment or disposal of a hazardous substance or whether those transactions were sales of "useful products."

[33] 42 U.S.C. §§ 9607 and 9613
[34] 68 F. Supp 2nd 1037, 1048

Noting that there is no bright line test to determine whether a transaction is a sale or for disposal of a hazardous substance, the Court set the following parameters for consideration in making its decision: (1) the type of agreement arranged between the parties; (2) the benefits reaped by the parties as a result of the transaction; and (3) the transaction's purpose or motive.

The Court determined that a reasonable inference would be that Ace intended to carry out a bona fide business transaction. However, the Court felt it had to rule out the possibility that the product was not in fact useful, which can in part be determined by looking at the commercially viability of the product.

Relying heavily on the *Pneumo-Abex* [35]and *Douglas County* [36]cases, and comparing the decisions in cases around the country that deemed the sale of SLABs as arrangements for treatment or disposal versus the sale of lead plates recovered from SLABs, the Court concluded that the sale of lead plates constituted the sale of a commercially-viable product.

The Court further found that a majority of courts refer to the useful product defense without reference to the product's original use, whereas the minority position is that only products that may be used for their originally-intended purpose can qualify for the useful product defense.

Aside from selling lead plates recovered from SLABs, Brody sold other types of lead to Quemetco and argues that those materials were a useful product or should be exempt from CERCLA liability because it was "processed scrap metal," which is excluded from the definition of solid waste under RCRA Subtitle C. Unfortunately, Brody did not provide enough evidence for the Court to make an informed decision as to whether or not his argument can pass muster.

In a June 13, 2000 Order on Motion to Reconsider, filed by one of the defendants previously granted summary judgment on its useful product defense, the Court expressed some exasperation[37]with that defendant for raising SREA as a defense. The Court explained that although it had vacated its previous grant of summary judgment (due to a procedural technicality) it was waiting the remaining useful product defense claims are resolved, at which time the Court will grant summary judgment for all similarly situated defendants.

The final significant point the Court addressed was RSR/Quemetco's effort to dismiss defendant Madewell and Madewell's (and its individual owners) claims without prejudice. The Court stated that RSR, having failed to respond to Madewell's motion for summary judgment, acted inappropriately in that Madewell expended significant time and

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[35] *Pneumo Abex Corp. v. High Point, T & D R.R.*, 142 F.3d 769 (4th Cir. 1998)

[36]*Douglas Cty. v. Gould, Inc.*, 871 F. Supp. 1242 (D. Neb. 1994)

[37]*RSR Corp. v. Avanti Dev., Inc.*, 2000 U.S. Dist. LEXIS 14203 at p. 6 (S.D. Ind. 2000) The Court has already granted summary judgment in favor of Winski in an order issued on July 13, 1999, in which it considered and rejected the useful product defense raised by Winski. Instead, the Court held as follows: No evidence has been presented that would connect Winski to the Avanti site other than through Ace, and that connection does not result in liability for either of these defendants. There is no claim of contamination of, or order to clean up the Ace property where Winski's batteries were delivered. Rather, the only contaminated property in question is the Avanti site. The Court finds that RSR/Quemetco cannot demonstrate the needed link between Winski and any contamination of the Avanti site beyond Ace. Without that link, Winski cannot be found to have arranged for the disposal or treatment of hazardous substances at the Avanti site.

* * *

In other words, the Court found that Winski's connection to the contaminated site was too attenuated to impose CERCLA arranger liability on it, not that it was recycling a useful product. . . In light of its July decision, the Court sees no need to devote its limited resources to determining whether Winski would qualify for the exemption provided to recyclers under the SREA.

money defending against CERCLA liability, and it would be unjust to dismiss them without prejudice, leaving them open to another future lawsuit.

Retroactivity and Contribution Claims

The Court declined to decide whether SREA applied to a pre-enactment contribution action [as the Court had previously decided that the PRP's connection with the site was too attenuated to impose arranger liability; the Court did not reach whether SREA would then exempt the party], but suggested that retroactive imposition of Section 127(j)'s fee-shifting provision would result in manifest injustice.

> The Court noted that the Supreme Court had held in *Key Tronic Corp. v. United States*,[38]that attorney and expert fees were not recoverable in a CERCLA contribution case, and that Section 127 changed that rule for SREA-covered cases. The Court suggested that change might result in manifest injustice, if applied retroactively. The Court reasoned that the plaintiffs made their decision about who to sue at a time when CERCLA did not allow a prevailing party in a contribution action to obtain costs and fees from its opponent.
>
> Further, the Court noted that to burden such a plaintiff's decision now with the imposition of attorney and expert fees of any defendant that prevails under Section 127 is inconsistent with the "familiar considerations of fair notice, reasonable reliance, and settled expectations" identified in the *Key Tronic* case.

Comments: The Court noted in its Order that while this decision discusses the potential liability of Ace Battery specifically, there are other battery-breaking companies brought in by RSR/Quemetco as defendants and that unless distinguished otherwise, the Court's ruling may apply to all defendants whose connection to the Avanti site was solely through delivery of lead plates they had reclaimed from batteries broken at their own facility.

The Court's holding that "*the act of transferring spent batteries to a battery breaker that subsequently delivers a useful product to a smelter at a contaminated site does not subject the transferror [sic] to CERCLA arranger liability*" is important. The question of whether a scrap recycler could be held liable for cleanup at a consuming facility when that scrap recycler shipped blindly through a broker was a contentious point during ISRI and EPA's negotiations for public guidance following enactment of SREA.

7. Mountain Metal

Case Citation: ***United States v. Mountain Metal Co.,*** 137 F. Supp. 2D 1267 (N.D. Ala. 2001), *aff'd sub nom.*, ***United States v. Mt. Metal Co.,*** 91 F. App'x 654 (11th Cir. 2004).

Relevant Facts: Interstate Lead Company (ILCO) operated a battery breaking and lead smelting facility. ILCO purchased spent lead-acid batteries, lead plates and other materials as feedstocks.

As part of its manufacturing process, ILCO broke spent lead-acid batteries in order to remove the lead plates which they then fed into a furnace which created a "furnace slag" that contained contaminants. When they broke the batteries, sulfuric acid also spilled onto the ground. In an effort to neutralize the sulfuric acid, ILCO mixed the sulfuric acid with another substance, thereby contaminating its property with a hazardous waste sludge.

ILCO's practices led to widespread contamination of its facility and other nonrelated properties. Additionally, ILCO buried the battery casings throughout the site. Government officials eventually discovered battery casings on at least six satellite sites not owned by ILCO. Not only did ILCO apparently dump casings on the property of others, but

[38] *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994)

the evidence establishes that ILCO hauled the sludge off its property and dumped it on several satellite properties, including a Gulf/BP gas station and a Church.

ILCO had a string of environmental violations throughout its operating history. Despite the extraordinary number of violations ILCO was cited for over time, ILCO sent “letters of compliance” to suppliers who questioned their compliance with environmental regulations.

Jowers, small battery company in Florida, shipped whole batteries to ILCO. The company owner became concerned when a customer informed him of ILCO’s environmental problems. Jowers contacted ILCO’s president who assured him everything was fine. Further, he sent Jowers a 100+-page report and some news clippings, highlighting just those portions that shed ILCO in a good light. Jowers only read the report’s highlighted portions and glanced at the news clippings. He also subscribed to the *American Metal Market* which he occasionally looked at but only to gather intel on lead and battery prices.

Lion Metals, a small company (less than five employees), located in New Jersey shipped battery plates to ILCO, but never inquired about ILCO’s environmental compliance.

Madewell & Madewell, located in Oklahoma,reclaimed plastic and lead from spent batteries. Madewell first sold battery plates to ILCO in 1972, at which time Madewell used its own trucks for deliveries. Madewell's owner, made a goodwill visit to the ILCO facility in 1972, during which time the ILCO facility was not operating because of ongoing construction. As a result, during his visit, Mr. Madewell did not observe ILCO's processing procedures. The company's final sale of plates to ILCO occurred in November 1980, at which time ILCO picked up the battery plates.

The United States brought an action against Madewell & Madewell and Jowers Battery to recover past and future costs associated with the environmental clean-up of the ILCO site in Leeds, Alabama. Exide Battery & Johnson Controls brought a separate action against the same defendants as well as Lion Metals. The Court consolidated the two cases.

Issue(s)

- Whether the defendants were liable parties as arrangers under § 107 of CERCLA.
- Whether the sale of lead battery plates was considered to be a sale of a useful product.
- Whether the defendants were protected by the SREA exemption from CERCLA liability.

Holding/Rule(s): There are several holdings to this case:

1) Jowers was an "arranger" for CERCLA purposes, meaning that Jowers "arranged for disposal or treatment."
2) Lead plate sellers, Lion Metals and Madewell, did not "arrange" for disposal or treatment.
3) Pursuant to SREA, all defendants were entitled to protection from the CERCLA action filed by the private plaintiffs.
4) Application of the attorney fee-shifting provision in SREA was not appropriate given the facts.

Analysis: The court addressed several issues in this case.

Arranger Liability: Noting Eleventh Circuit rulings, the judge stated:

> "*a liberal judicial interpretation of the term [arrange] is required in order that we achieve CERCLA's ‘overwhelmingly remedial' statutory scheme.” However, in applying a liberal interpretation of CERCLA, Courts must avoid utilizing a bright line test. Rather, Courts must focus on all of the facts in a particular case. It is*

incumbent on a Court to look at whether a sale involved the transfer of a "useful" or "waste" product; whether the party intended to dispose of a substance at the time of the transaction; whether a party decided to place hazardous substances in the hands of a particular facility; whether the party had knowledge of the disposal; and whether the party owned the hazardous substances. Factors such as a party's knowledge (or lack thereof) of the disposal, ownership of the hazardous substances, and intent are relevant to determining whether there has been an `arrangement' for disposal but they are not necessarily determinative of liability in every case."

Useful Products: The Court found that the spent lead-acid batteries Jowers sold were not "useful" products:

"[w]hen a party sells a product incidentally containing a hazardous substance but having value as being ***useful for the purpose for which it was manufactured****, then the transaction is* ***less likely to be an "arrangement" to dispose of a hazardous substance****. In these cases,* ***the party receiving the product will use the product in the manner for which it was manufactured****. On the other hand,* ***if a product has no value for the purpose for which it was manufactured and it contains a hazardous substance, then it is more likely the sale is an "arrangement" to dispose of the substance****."* (emphasis added)

Accordingly, the Court found that Jowers rather arranged for disposal or treatment of the batteries as contemplated under CERCLA.

Citing *Douglass County Neb. v. Gould* and *RSR Corp. v. Avanti*, however, the Court found with respect to Lion and Madewell that, "while the batteries themselves were no longer useful for their original intended purposes, the lead plates were in a form that allowed ILCO to place them directly in the furnace for smelting. As such they constituted a 'complete useful product,' [Douglass cite omitted] or raw material for processing rather than disposal."

The Court responded to U.S. arguments that the lead plates still required treatment, as they contained sulfuric acid, by stating that, "while the testimony at trial indicated that a certain level of residual acid sometimes remained on the plates by necessity, [cite omitted] selling a useful product, albeit hazardous substances 'to serve a particular purpose' does not alone create arranger liability [citing to Douglass County and AM Int'l Inc. v. Int'l Forging Equipment Corp. 982 F. 2d 989 (6th Cir. 1993)].

Pending or Concluded Actions: SREA provides that its protection from CERCLA arranger liability "*shall not affect any concluded judicial or administrative action or any pending judicial action initiated by the United States prior to the enactment of*" SREA. Noting that the United States initiated its action against ILCO on October 8, 1998, and the private plaintiffs initiated their action against ILCO on November 18, 1998, the Court affirmed that all plaintiffs initiated their lawsuits prior to SREA's enactment in 1999 and, accordingly, the Court had to determine what effect, if any, SREA had on the pending actions.

Several other courts had previously examined SREA's plain language, as well as the statute's legislative history, to determine the appropriateness of retroactively applying SREA to actions pending at the time of the statute's enactment. See, e.g., *Department of Toxic Substances Control v. Interstate Non-Ferrous Corp.*, 99 F. Supp. 2d 1123, 1127-54 (E.D. Cal. 2000); *RSR Corp. v. Avanti Dev., Inc.,* No. IP 95-1359-CM/S, 2000 WL 1449859 (S.D. Ind. 2000); *Morton Int'l., Inc. v. A.E. Staley Mfg. Co.*, 106 F. Supp. 2d 737, 749-760 (D. N.J. 2000); *Gould, Inc. v. A M Battery Tire Serv.*, 232 F. 3d 162, 169-70 (3rd Cir. 2000).

Rather than rehash those courts' work, this Court simply found that SREA's substantive provisions had retroactive effect, consistent with the Supreme Court's retroactivity standard established in *Landgraf v. USI Film Products.*[39] In

[39] *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994).

Landgraf, the Court found that even applying the statute retroactively, the action filed by the United States was still viable because SREA does not apply to "*any pending judicial action initiated by the United States prior to the enactment of*" the statute.

"Objectively Reasonable Basis": In perhaps a moment of confusion, the Court said that if lead plates sellers are "arrangers" under CERCLA, both lead plate sellers and sellers of spent lead acid batteries may avoid CERCLA liability under SREA.[40] The Court said it was not persuaded that either Lion Metals or Madewell had an objectively reasonable basis to believe ILCO was not in compliance with the appropriate laws at the time of the transactions at issue, stating that the parties had stipulated that Lion Metals did not have actual knowledge of ILCO's non-compliance. Furthermore, Lion Metals had no reason to know of ILCO's non-compliance because it was a small company, with five employees, located in New Jersey. Lion Metals arranged its last sale to ILCO prior to the EPA placing ILCO on the National Priorities List (NPL).

Further, the Court noted that the plaintiffs presented no evidence that ILCO was on the EPA regional computer data base as a non-complier in 1984, and an EPA representative testified that the regional computer data base information was not available nationally until 1990. The Court found that even if ILCO had been listed on the data base in 1984, logic suggested that a small New Jersey company would not have realized it had to contact the EPA's regional office to obtain comprehensive information about ILCO.

The Court stated that more importantly, the plaintiffs did not present evidence that Lion Metals had reason for concern about ILCO's compliance status in 1984. These factors taken together indicated that Lion Metals had no "objectively reasonable basis" to believe ILCO was in non-compliance.

Similarly, the Court found that Madewell had no objective basis upon which to believe that ILCO was in non-compliance. As with Lion Metals, the parties had stipulated that Madewell had no actual knowledge of ILCO's non-compliance. Additionally, Madewell shipped its last order of plates to ILCO in 1980, prior to any EPA public action with regard to ILCO, and while Mr. Madewell testified that he visited the ILCO site in December 1972, ILCO was undergoing construction and so he did not observe ILCO's processing procedures. Consequently, the Court found that Madewell had no "objectively reasonable basis" to believe that ILCO was non-compliant.

Concerning sellers of lead acid batteries, like Jowers, who seek to avoid arranger liability under CERCLA, the Court said they must "*demonstrate by a preponderance of the evidence that at the time of the transaction*" they (i) met the criteria set forth for all other recyclable materials, (ii) they did not recover the batteries' valuable components, and (iii) that they were in compliance with all applicable federal environmental regulations associated with recycling spent lead acid batteries.

The parties stipulated that Jowers met the above requirements and therefore could claim the SREA exemption.

[40] The Court stated that if lead plates sellers are "arrangers" under CERCLA, both lead plate sellers and sellers of spent lead acid batteries may avoid CERCLA liability under SREA. The Court was viewing the lead plates as if they were scrap metal, neglecting the provision in §127(e)(1) of CERCLA which requires that the recycler did not recover the valuable components of the batteries. It is notable that the Court even addressed this issue since it had already determined that lead plates were useful products. Interestingly, no other cases have addressed the Court's apparent confusion in this case.

The Attorney Fee-Shifting Provision: Finally, the Court analyzed the SREA provision allowing CERCLA defendants to shift attorney fees to the plaintiff if they can avoid arranger liability and found that the defendants were not entitled to shift fees under the presented facts.

Relying on U.S. Supreme Court decisions, the Court said that the retroactivity analysis should be one that is guided by familiar considerations of fair notice, reasonable reliance, and settled expectations. The Court said it "*cannot conclude that plaintiffs here could have relied on prior case law to the extent that they would have been forewarned that possible recyclers would not be contribution candidates and should be penalized with the fee-shifting provision*."

8. Atlas Lederer Co.

Case Citation: ***United States v. Atlas Lederer Co.***, 97 F. Supp. 2d 830 (S.D. Ohio 2000) (Atlas I), *summ. J. denied*, 97 F. Supp. 2d 834 (2000) (Atlas II), *and mot. overruled*, 174 F. Supp. 2d 666 (2001) (Atlas III), *and part. summ. J. granted and denied in part*, 282 F. Supp. 2d 687 (2001) (Atlas IV). [41]

Relevant Facts[42]: United Scrap Lead Company ("SLC") was a battery breaker located in Troy, Ohio. The company recovered lead plates from batteries, dumped the remaining acid from the batteries in an onsite pit, and ground up and buried the plastic cases. The resultant contamination incurred remediation response costs. The plaintiffs in this litigation, the United States and the United Scrap Lead Respondent Group ("PRP Group"), pursued the defendants for a portion of the response costs on the basis that they were "arranging for disposal" of hazardous waste.

> Atlas I - In this action, the defendants filed various claims seeking contribution from the PRP Group and non-settling defendants. The defendants moved for summary judgment, arguing that its prior sales of junk batteries qualified as "arrangements for recycling" under the new SREA legislation, and was therefore not subject to CERCLA liability. The defendants further argued that SREA protection from liability voids the PRP Group claims.
>
> Atlas II - In this action, another defendant argued that it never did business with USLC. Plaintiffs relied on testimony and evidence found at the USLC Site to show that defendant's material had been brokered to USLC. The defendant responded that it had no way of knowing where material went once it was sold to the broker. However, the evidence included a claim from a manager that it would have been a USLC truck that collected the material, so the defendant should have been aware that it was sold to USLC.
>
> Atlas IV – This decision involved a review of the Court's decisions in Atlas I–III, as well as other decisions issued during this action's pendency. The Court did, for the first time in the litigation, address whether summary judgment on the issue of liability under CERCLA can be granted despite the fact that the harm may

[41] The first of the four opinions in this action was issued in February 2000, making it one of the earliest decisions following enactment of SREA. Many in the industry in 2000 may know Atlas I as the *Livingston* case because *Livingston & Co*. was the first to seek summary judgment using the SREA defense.

[42] There were four decisions in which the Southern District of Ohio consistently held that the United States' pending claims, as well as private party cross- and third-party claims for contribution raised in the United States' action, are preserved. These decisions were issued on February 16, 2000 (97 F. Supp. 2d 830, (S.D. Ohio 2000)) (where the Court denied a contribution defendant Livingston's motion for summary judgment); on February 22, 2000 (where the Court denied a motion for partial summary judgment filed by another defendant); February 21, 2001 (which distinguished DTSCA and rejected adherence to the Lott statement because it "muddied" the plain meaning of Section 127(i), particularly in light of Daschle's having distanced himself from such statement); and March 12, 2001 (where the Court denied Livingston's motion to certify the question for immediate appeal).

be divisible. The Court held that, while CERCLA liability is generally viewed as strict, joint and several, case law has developed supporting divisibility where there is appropriate evidence to apportion each PRP's contribution to the site's harm.

Issue(s)

- Whether the "pending judicial action" provision of SREA applies to an action brought by the United States and a cooperating PRP Group prior to enactment of SREA.
- Whether a recycler that arranges for recycling through a broker is subject to CERCLA liability for a cleanup at the consuming facility.
- Whether a Court should issue an order granting summary judgment on the CERCLA liability of PRPs when there are genuine issues of fact about whether liability might be divisible.

Holding/Rule(s): The defendant's motion for summary judgment on the issue of a "pending judicial action" was denied because under § 127(i) of CERCLA, any liability exemption provided by SREA is inapplicable to any pending judicial action initiated by the plaintiffs prior to the enactment of SREA. Summary judgment was denied to the respondent group's crossclaims and third-party claims because the claims were all part of the pending judicial action initiated by the United States.

PRPs cannot escape liability under CERCLA merely because they delivered their hazardous substances to a broker or middleman *"… [P]ersons who generate hazardous substances or arrange for their disposal should not be allowed to shirk their duties under CERCLA by operating blindfolded."*[43]

Analysis: The court addressed several points of law.

Pending Judicial Actions: Shortly after SREA's enactment, Livingston & Co., a defendant in this case, filed a motion for summary judgment claiming that SREA constitutes a "potentially dispositive legislative development," which strengthened its argument for judgment as a matter of law.

In Atlas I, The Court acknowledged that SREA could, in some instances, provide exemption from CERCLA liability for certain recyclers. However, the Court believed that the language of CERCLA § 127(i), regarding pending judicial actions, applied to the instant case. Livingston acknowledged the plain language of § 127(i) but argued that fairness dictated it be applied in this case. In Atlas III, Livingston, sought to have the Court certify the question to the Sixth Circuit Court of Appeals of whether § 127(i) applies to the case. In support of its motion to certify, Livingston noted that the issue was one of first impression, one that has not been addressed by any other court, and thus it is highly likely that § 127(i) will be interpreted differently by each court.

The Court did not accept Livingston's arguments, noting that Livingston failed to cite the Lott/Daschle Legislative History entered into the Congressional Record on November 19, 1999, that reads in part: *"[f]or purposes of this section, Congress intends that any third party action or joinder of defendants brought by a private party shall be considered a private party action, regardless of whether or not the original lawsuit was brought by the United States."* (emphasis added)[44]

Despite noting Livingston's omission, the Court stated that even with the legislative history, Livingston's motion would fail, basing its decision on § 127(i). The Court rejected Livingston's argument, holding that SREA's plain

[43] Quoting from *Chatham Steel Corp. v. Brown*, 858 F. Supp. 1130, 1144 (N.D. Fla. 1994)
[44] 145 Cong. Rec. S14985-03 (daily ed. Nov. 19, 1999)

language did not preclude the contribution claims. The Court found that the present litigation, as a whole, constitutes a "judicial action," initiated by the U.S., and although the cross-claims and counterclaims are "claims," they are not "actions" as the statute contemplates. The Court found that Livingston's argument failed to recognize the distinction between "actions" and "claims;" there is only one action, but there can be numerous claims, and therefore SREA was inapplicable since it was commenced before the exemption passed. Furthermore, the Court could not agree with Livingston's assertion that SREA merely constitutes codification of existing case law on the useful product defense.

Brokered Materials**:** The Court reviewed existing case law and determined that "*Parties cannot escape liability under CERCLA merely because they pawned their hazardous substances off on a broker or middleman … [P]ersons who generate hazardous substances or arrange for their disposal should not be allowed to shirk their duties under CERCLA by operating blindfolded*."

The Court relied upon several other cases with similar holdings, such as a Sixth Circuit Court of Appeals decision holding that a "*party cannot escape liability by claiming that it had no intent to have the waste disposed in a particular manner or at a particular site*" and that the critical inquiry is simply whether the seller "*intended to enter into a transaction that included an 'arrangement for' the disposal of hazardous substances*."

Based upon the above precedents, the Court found that,

> *"[i]n the present case, a trier of fact reasonably could find such intent based upon: (1) Defendant's decision to sell whole, spent batteries to a scrap metal dealer; and (2) the fact that, after the sale, representatives of USLC, a "battery breaker" which operated the Superfund site at issue, traveled to Defendant's place of business to pick up the batteries. Construed most strongly in favor of the Plaintiffs, this evidence supports a reasonable inference that Defendant "arranged for" the disposal of hazardous waste*."

The Court further stated:

> *"Parenthetically, the Court notes that a different result might be reached under a recent amendment to CERCLA, the Superfund Recycling Equity Act, P.L. 106-113. This new legislation exempts from liability many persons who arrange for the recycling of certain materials, including spent batteries. The Act was signed into law by President Clinton on November 29, 1999, but it has no applicability to the present litigation. Section 127(i) of the Superfund Recycling Equity Act specifically provides that it does not affect any pending judicial action initiated by the United States prior to its enactment. In light of that language, the Court finds the Act inapplicable to the present action, which the United States commenced approximately eight years before its enactment."*

Accordingly, the Court did not grant the motion for summary judgment.

Arranger Liability and Divisibility: In opposition to the United States motion for summary judgment, the defendants argued for denial of the motion because there was a genuine issue of material fact as to the defendants' joint and several liability.

- The defendants claimed that the PRP Group's development of a volumetric ranking of more than 300 USLC customers was evidence that the liability may be divisible.
- The plaintiffs countered that divisibility was an affirmative defense, and the defendants could not establish a genuine issue of material fact on this affirmative defense by relying on a volumetric ranking spreadsheet.

The Court took addressed the issue as follows:

"Whether that study is a "reasonable" one cannot be resolved in the context of summary judgment. It identifies the total volume of each Defendant's contributions within one ten-thousandth of one percent. Given the precision of these computations, the volumetric ranking spreadsheet supports a fair inference that each Defendant's contribution to the Site is reasonably ascertainable, particularly in light of the Movants' failure to identify the origin or accuracy of the calculations set forth therein.[45] As a result, based on the evidence before it, the Court finds a genuine issue of material fact on the issue of divisibility."

The Court further explained that the existence of a question of fact regarding divisibility plainly precludes the Court from finding the defendants jointly and severally liable to the United States for response costs. However, the Court noted that a dispute over the nature of the defendants' liability (i.e., divisible, or non-divisible) does not preclude the Court from determining whether any liability had been established. The Court summarized the issue by saying that the divisibility issue need not be resolved prior to the Court determining whether the defendants were liable at all under CERCLA.

Finally, the Court explained that "*in the context of summary judgment, the Court cannot determine the type of liability the Defendants may face under CERCLA. Nevertheless, the Court still may determine whether the United States has established any liability, regardless of whether that liability is joint and several or divisible*."

In other words, the defendants were subject to CERCLA's strict liability one way or the other and therefore it would be appropriate to grant the motion for summary judgment simply holding that the defendants are liable.

9. Mallinckrodt

Case Citation: ***United States v. Mallinckrodt, Inc***., 343 F. Supp. 2D 809 (E.D. Mo. 2004)

Relevant Facts: The Great Lakes Container Corporation Superfund Site (the Site) was a drum reconditioning and reclamation facility in St. Louis, Missouri, that operated between 1952 and 1986. Shell Oil had sent 1000-1,500 drums per day to the drum reconditioner during operation. In this case, the United States claimed that Shell Oil was a PRP liable for the cleanup of lead contaminated soil at the Site because part of the drum reconditioning process involved the removal of lead paint from the drums and the repainting of such drums.

Issue(s)

- Whether the drums sent to the drum reconditioner should be deemed recyclable materials as that term is defined in 42 U.S.C § 9627.
- Whether the SREA exemption from liability should apply to "arrangements for recycling" of used drums.
- Whether the drums were a useful product and not subject to Superfund liability.

Holding/Rule(s): The Court found that 55 gallon drums were not "recyclable material" as that term is defined by SREA. The defendant had not shown that its arrangement with the drum reconditioner qualified under the recycling exemption.

[45] It may be that the spreadsheet represents nothing more than the Movants' "best guess," and that its accuracy cannot be relied upon for purposes of apportioning liability under § 107(a). Absent some explanation from the Movants, however, the Court cannot conclude, as a matter of law, that the spreadsheet's computations are unreasonable or arbitrary. On its face, the spreadsheet purports to establish each Defendant's volumetric contribution with remarkable precision. Consequently, the Court finds a genuine issue of material fact on the question of divisibility.

Analysis: The court addressed several points of law.

Applicability of SREA: The Court noted that the defendant had not presented evidence supporting its claim that its drums "*were specifically chosen for and capable of being recycled*," and that *"[a] substantial portion of the recyclable material was made available for use as feedstock for the manufacture of a new saleable product*."

No evidence existed showing that defendants' old drums were used to make new drums. Further, the Court found that the defendant failed to present any evidence to support its claim that the paint on the outside of its drums was an integral part of the drums, rather than merely adhering to the drums, such that they do not fall into the exception in § 9627(b)(1). Because defendant did not meet its burden of proof, the Court could not issue summary judgment on SREA grounds.

Useful Products not being Disposed: The Court first looked at the defendant's characterization of its transactions with the drum reconditioner as sales of a useful product. It noted that many courts have refused to impose Superfund liability where a useful product has been sold to another party to be incorporated in a product that the second party will sell. Similarly, those who sell a useful product are not deemed to be arranging for disposal and thus, are not faced with CERCLA liability. The sale of a useful, although hazardous substance, to serve a particular purpose, is also not an arrangement for disposal. Finally, selling hazardous substances as part of a complete, useful product does not generally make someone a PRP.

However, the Court stated that the simple characterization of a transaction as a sale cannot insulate a party from CERCLA liability. The judge noted that courts will not hesitate to look beyond a defendants' characterizations to determine whether a transaction does in fact involve the sale of a useful product or is simply an arrangement for the disposal of a hazardous substance.

Regarding the defendant's claim that their transactions with the drum reconditioner were arrangements for recycling, the judge looked at § 127(b)(1) of CERCLA and said it was clear that the drums the defendant sent to the reconditioner were not included in the definition of recyclable materials. It found that, in order to take advantage of the liability exemption, a recycler must meet certain criteria including that the material(s) sent for recycling meet the definition of a "recyclable material" set forth in SREA. Shipping containers ranging in size from 30-3000 liters do not meet the definition of a recyclable material.

The Court ultimately denied the defendant's motion for summary judgement due to the presence of unresolved facts.

10. Pneumo Abex Corp.

Case Citation: ***Pneumo Abex Corp. v. High Point, Thomasville and Denton R. Co.***, 142 F.3d 769 (4th Cir. 1988)

Relevant Facts: Superfund Site owners (due to slag from journal bearings) brought an action to obtain relief from potentially responsible parties who sold used journal bearings for reuse to Plaintiff's predecessor company.

Issue: The extent to which a party who arranges for treatment of hazardous substances is a "covered person" liable under CERCLA whether or not such substances are waste?

Holding/Rule(s): After the plaintiffs interpreted the statute too broadly, the Court held that parties who arrange for treatment of hazardous substances that are not waste (and therefore contained) are not covered persons under the

statute, differentiating sales transactions from disposal transactions. Under the Solid Waste Disposal Act (SWDA) and implied in CERCLA, "treatment" presupposes discard.

The Court held that treatment of hazardous substances as used in CERCLA refers to a party arranging for the processing of discarded hazardous substance or processing resulting in the discard of hazardous substances. Factors used to determine whether a transaction was for discard or for the sale of valuable materials include the parties' intentions to reuse or reclaim and reuse, the sold materials' value and usefulness, and the product's state upon transfer.

However, because there is no bright line to distinguish a sale from a disposal under CERCLA, the Court undertook a fact-specific inquiry into the nature of the transaction, holding that the conversion agreements between the parties were not transactions for disposal, but rather transactions for sale. Further, because the used wheel bearings sometimes arrived dirty and broken, removing the contaminants was not the purpose of the transaction. The hazardous substances were in a contained form when delivered for sale.

Therefore, due to the containment of the hazardous substances, the condition of the batteries upon transfer, and the intention of the parties to enter into a sales transaction (evidenced by the conversion agreements) precludes defendants from liability as a "covered person" under CERCLA.

11. Douglas County

Case Citation: *Douglas Cty. V. Gould, Inc.*, 871 F. Supp. 1242 (D. Neb. 1994)

Relevant Facts: Landowner (Douglas County) filed a CERCLA suit against a seller of lead plates from recycled batteries (Madewell) made to a previous property owner (Gould) for use in a secondary lead smelting and battery recycling operation, seeking to recover cleanup costs for lead contamination on property.

Issue(s): Whether Madewell is a "responsible person" under CERCLA and more specifically, whether Madewell "otherwise arranged" for disposal or treatment.

Holding/Rule(s): The Court found that Madewell did not arrange for treatment because it did not ship the plates to Gould to have them neutralized or processed from a hazardous to a non-hazardous substance. Further, the Court also found that Madewell did not arrange for disposal because selling hazardous substances as part of a complete, useful product does not generally make a party a responsible person.

Liability attaches only to a party who has taken an affirmative act to dispose of a hazardous substance, that is, "in some manner the defendant must have dumped his waste on the site at issue," as opposed to convey a useful substance for a useful purpose.

However, because merely characterizing a transaction as a sale cannot insulate a party from CERCLA liability, courts examine the facts surrounding the transaction to determine whether it constituted a prohibited arrangement for the disposal of a hazardous substance or a permissible sale of a useful product.

The sale of a useful, although hazardous substance, to serve a particular purpose is not an arrangement for disposal and will not impose CERCLA liability. Arrangement for disposal occurs when a party merely wants to get rid of a substance as opposed to convey a useful product. In Douglas, Madewell's lead plates were not a byproduct of its operation but rather its principal business product, sold at market price with the intention of making a profit. Absent an arrangement for disposal of a hazardous substance, liability cannot attach.

12. Evansville

Case Citation: *Evansville Greenway & Remediation TR. v. S. Ind. Gas & Elec. Co.,* 661 F. Supp. 2d 989 (S.D. Ind. 2009), *mot. compel denied*, No. 3:07-cv-66-SEB-WGH, 2010 U.S. Dist. LEXIS 100072 (2010), *and mot. granted in part and denied in part*, No. 3:07-cv-66-SEB-WGH, 2012 U.S. Dist. LEXIS 22710 (2012).

Relevant Facts[46]: A former scrap yard, operating on two parcels of land, closed its business in 1998 and voluntarily began cleaning up the first parcel. The company, including the president, admitted that in the course of its business, it had arranged for the transport and/or disposal of hazardous substances, including lead acid contained in batteries, at both sites. The company reclaimed the lead contained in the batteries by breaking them open and extracting the plates, causing battery acid to seep into the soil. During storage and handling, battery acid and lead also leaked onto the ground.

After voluntarily cleaning up one parcel and spending $100,000 to investigate the second parcel, the company ran out of money. As a result, the company, its president, and its insurance companies created a "qualified settlement trust" to complete the second parcel's cleanup. Additionally, the company sold the first parcel to the City of Evansville, and the money from that transaction was placed into the trust.

In 2008, the Trust sued several PRPs, comprised largely of coal mining companies, public utilities, and industrial manufacturers, under CERCLA § 107 and § 113. Only one PRP, Solar Sources, a coal mining company, claimed the SREA liability exemption, while the others sought to defend the claims but ultimately settled with the plaintiffs.

Issue(s)

- Whether a PRP who may have sent material to a Superfund Site -- although not material of the kind that caused the contamination at the site -- can still be held liable for reimbursement of response costs or contribution under § 113 of CERCLA.
- Whether a PRP that successfully claims the SREA exemption is entitled by law to recover its defense costs of the lawsuit.

Holding/Rule(s): A party in a CERCLA action who did not send any material responsible for contamination at the facility is not liable under §§ 107 or 113 of CERCLA for the response cost reimbursement or contribution to the costs. A party successfully claiming the SREA liability exemption is entitled by law to recover its defense costs.

Analysis: The one PRP that claimed the SREA exemption, Solar Sources, filed a motion for summary judgment on the grounds that it was exempt from liability and that it was entitled to its attorney and expert witness fees.

The Court granted Solar Sources' motion for summary judgment in early 2011. The order did not provide an in-depth analysis of the criteria for determining whether a material was a "recyclable material," whether the transaction was

[46] This lawsuit was originally brought in 2008 for actions that occurred prior to enactment of SREA but subsequent to a number of legal decisions relating to the SREA defense. This ruling is a straightforward analysis and application of the SREA defense. There are a number of slip opinions available for this case, however the three captioned opinions above provide the factual background and decisions specifically relating to SREA.

"arranging for recycling" or whether Solar Sources met the additional criteria for the arranging for recycling of scrap metal.

13. Alco Pacific

Case Citation: *Cal. Dep't of Toxic Substances Control v. Alco Pac., Inc.,* 217 F. Supp. 2d 1028 (C. D. 2002) (Alco I), *summ. J. denied,* 308 F. Supp. 2d 1124 (2004) (Alco II), *and partial summ. J. granted*, 317 F. Supp. 2d 1188 (2004), *rev'd and remanded*, 508 F. 3d 930 (9th Cir. 2007).

Relevant Facts[47] : Alco Pacific ("Alco") was a lead reprocessing (smelting) business that operated on a one-acre site ("the site") in Carson, California, from approximately 1950 to 1990. Alco reclaimed lead from various lead-containing materials (including lead ingots, battery plates, cuttings, dross and slag) generated by other parties and delivered to the site. The State of California alleged that surface soil sampling revealed several hazardous chemicals present at the site above maximum allowable levels. As a result, it undertook clean-up activities from 1993 to 2001. The State of California sought to recover its incurred costs, as well as future remediation costs.

Alco I – In this action, the defendants raised numerous defenses. Among the issues raised were whether CERCLA provides a right to a jury trial, attorneys' fees, and affirmative defenses.

Alco II – In this action, the primary issue defendants raised related to the statute of limitations on CERCLA cost recovery and contribution claims. The defendants asserted that a three-year statute of limitations began once the State completed its removal action.

In an Order issued on February 6, 2004, the Court addressed the "useful product defense" and whether the transactions in question qualify for the CERCLA liability exemption provided by SREA.

Alco III - This action came in response to the plaintiff's motion to limit the scope and standard for review of agency actions and is included to show a complete timeline of the decisions made by the Court.

Court of Appeals – The Ninth Circuit Court of Appeals ruled on the California DTSC's appeal of the District Court's grant of summary judgment for the defendants on the matter of whether the materials they shipped to Alco were a useful product.

Issue(s)

- Whether the defendants are entitled to attorney fees under § 127 of CERCLA.
- Whether a sequence of activities related to the hazardous waste clean up was best characterized as a single removal action or is a series of separate activities divisible into discreet phases, with the completion of each phase triggering the start of the three-year statute of limitations on cost-recovery actions.
- Whether the materials the defendants sent to the site fell under the useful product defense.
- Whether the materials sent to the site fell under the exemption from liability for recycling of scrap metal.

Holding/Rule(s): The defendants were not entitled to attorney fees as specified in § 127 of CERCLA because that provision only applies to contribution cases and this was a cost recovery case.

[47] This case went down a very convoluted path, having been filed in 2001 and finally closed in 2008, after certain remaining defendants agreed to a Consent Decree settling all claims against them. Oddly, some of the points most relevant to SREA and the "useful product "defense were addressed in unpublished orders that are not easy to obtain.

A removal and a remedial action are considered to be one removal action, and since the plaintiff argued that it was still involved in the removal phase, the defendants' motion for summary judgment on the statute of limitations defense was denied.

The materials the defendants sent were useful products, and the defendants' motion for summary judgment on that issue was granted. This Ninth Circuit Court of Appeals reversed this ruling.

Because evidence was lacking to determine whether the defendants qualified for the SREA exemption, the defendants' motion for summary judgment for SREA protection was denied.

Analysis: The court reviewed several points of law.

The Alco II Order/ Useful Product Defense

The question of whether the "useful product" or SREA defenses would apply in this case was answered in an unpublished Order of the Court and later overruled by the Ninth Circuit Court of Appeals.

It is worthwhile noting the District Court's logic in finding that the materials involved were, for the most part, useful products. The Court viewed most of the materials as useful products but it had major concerns with slag and dross. The Court therefore conducted an extensive analysis of what constitutes waste under CERCLA and then reviewed the precedents cited by the defendants.

Specifically, the Court considered the percentage of lead in the slags and drosses the various defendants had shipped to Alco and determined that percentages in the 30-40 percent range could amount to a useful product. The Court noted that cases involving slag and dross are difficult; the challenge is when a company has used the by-products of its main manufacturing process or has sold them for use as a raw material by others.

The defendants relied upon the *A&W Smelter* and *RSR v. Avanti* cases in support for their argument that the slags and dross should be deemed a useful product.

The Court ultimately looked at Ninth Circuit precedent and determined that it should focus on (1) the product's commercial reality and value; (2) a factual inquiry into the seller's intention to determine whether the transaction was just a sale to "get rid" of something of nominal value or if it was a true sale of a useful product; or (3) whether the materials in question were a principal product or by-product of the seller.

Relying on the Ninth Circuit's test, the Court found that the slags and dross were priced according to prevailing commodity prices published in widely available sources and adjusted for the lead content in the slag or dross. The Court determined that Alco was paying the "going price" for the materials because they were prices against market prices reported in various indices.

As a result, the Court concluded that the lead slag, dross and cuttings were as useful to Alco as any "virgin material." Accordingly, the primary motivation of the parties appeared to have been to trade in valuable metallic resources. The transaction, therefore, was no different than the sale of virgin ore to a normal smelting operation.

Regarding the Ninth Circuit's second factor, the Court stated that the defendants were not merely contracting with Alco to "get rid" of a substance. Rather, the dross, slag, ingots, and other products were sold for the same reason a primary lead smelting company might buy ore -- as a primary resource for the company's operations.

Finally, looking at the third factor, the Court acknowledged that slags and dross were by-products of the defendants' manufacturing processes but noted that the materials had real value to the defendants and therefore could not be properly characterized as wastes.

The Court then turned to the defendant's motion for summary judgment based upon SREA. The Court denied the motion on the basis of two missing fact sets: first, there was no evidence that the defendants complied with any applicable regulations regarding the storage, transport, management, or other activities associated with the recycling of scrap metal; and second, there was no evidence relating to the fact that the materials met a commercial specification grade.

Statute of limitations

In addressing the motion for summary judgment on the basis that the statute of limitations had run, the Court noted that "*there is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party*. *Thus, the non-moving party has the burden of producing operative facts, but the "mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff*." If the operative facts are not presented, summary judgment is appropriate

The Court also stated that*"[o]nce the moving party [in this case the Defendants] has met its burden under Rule 56(c), the non-moving party [Plaintiff] "must do more than simply show that there is some metaphysical doubt as to the material facts*." The Court emphasized that this is solely the plaintiff's responsibility, and that any inferences from the underlying facts must be viewed in light most favorable to the non-moving party.

The Court ultimately did not directly address the issue of whether there was sufficient evidence to warrant granting summary judgment. Instead, the Court did a thorough analysis of case law nationwide and found that generally, all removal actions performed at a single site constitute a single indivisible removal action. The Court also analyzed the definitions of the terms "remedy" and "removal", determining that "remedy" includes those actions consistent with permanent solutions taken instead of, or in addition to, while "removal" refers to actions taken in the event of a release or threatened release of a hazardous substance.

Finally, the Court stated that the statute of limitations is an especially disfavored defense when asserted against government entities.

The Ninth Circuit Appeal of "Useful Product" Defense

The plaintiff appealed the District Court's grant of summary judgment for the defendants on the matter of whether the materials shipped to Alco were "useful products."

In its ruling, the appellate court discussed the development of the useful product doctrine, particularly within the Ninth Circuit, after which it addressed the specifics of the case at hand:

> *"The district court correctly found that the link between the commodities market price of lead and the price paid by Alco for the Defendants' dross and slag supported their claim that they were selling a useful product, not disposing of waste. It is not particularly significant that Defendants received only a fraction of the market price: the dross and slag themselves contained only a fraction of lead, and clearly Alco would have to expend further resources in order to extract whatever portion of that fraction it could ultimately successfully reclaim. Nor does it matter that the prices at which the dross and slag were sold were "low" in some absolute sense. A product does not become waste simply because it is inexpensive."*

However, the Ninth Circuit further stated that there were triable issues of fact associated with all the defendants' transactions, and it reversed and remanded the matter to the District Court.

The plaintiff had also requested the appellate court to issue a declaratory judgment stating that, as a matter of law, the useful product defense was inapplicable to the case. The Ninth Circuit declined the request, stating that the record was insufficient to establish as a matter of law that the useful product doctrine was inapplicable.

The defendants also raised the matter of SREA liability exemption, of which the Ninth Circuit disposed of by noting the District Court's finding that the defendants had failed to provide sufficient evidence establishing that they had met all of the SREA requirements. Thus, the defendants' request for review was denied.

APPENDIX D

Superfund Recycling Act of 1999: Factors To Consider In A CERCLA Enforcement Case, Memorandum issued by EPA Office of Enforcement and Compliance Assurance and Office of Site Remediation Enforcement (August 2002)

United States
Environmental Protection
Agency August 2002

Superfund Recycling Equity Act of 1999: Factors To Consider In A CERCLA Enforcement Case

Office of Enforcement and Compliance Assurance
Office of Site Remediation Enforcement

Introduction

The Superfund Recycling Equity Act (SREA), Section 127 of CERCLA, 42 U.S.C. § 9627, exempts certain persons who "arranged for recycling of recyclable materials" from liability under Sections 107 (a)(3) and 107(a)(4). Owners and operators of CERCLA sites are ineligible for the exemption, as are arrangers and transporters of non-recyclable materials, or arrangers and transporters of recyclable material that fail to meet the criteria necessary for the exemption. SREA outlines the criteria necessary for a party to be eligible for the recycling exemption including the definition of a recyclable material, the factors needed to qualify as a recycling transaction, and the types of transactions and materials that are not exempt under the statute.

Since the passage of SREA, some site-specific transactions have raised questions and issues regarding what enforcement posture (e.g., whether to issue an information request letter or general or special notice letters, or how to develop settlement offers) the Agency may determine, in light of SREA, to be appropriate in evaluating a party's activities. This guidance addresses some of the key factors the Agency may consider, and has been developed in the exercise of the Agency's enforcement discretion.

SREA places the burden of proof on private parties seeking to establish their eligibility for the recycling exemption from CERCLA liability. Under subsections (c), (d) and (e) of Section 127, the party seeking the exemption from liability must "demonstrate by a preponderance of the evidence" that certain criteria are met. In addition, as a general matter a party seeking to take advantage of a statutory exemption has the burden of establishing

eligibility. [1] Furthermore, this burden encompasses a number of limitations on the protection afforded by Section 127. For example, Section 127(b)(2), the polychlorinated biphenyls (PCBs) exclusion from the exemption, states that "recyclable material" does not include any item of material that contained PCBs at a concentration exceeding 50 ppm, or any new standard promulgated pursuant to applicable Federal laws. Section 127(b)(2) serves to modify the requirements to qualify for the exemption outlined in subsection 127(c)-(e), as it restricts the scope of otherwise eligible recyclable material transactions to items of material that do not exceed 50 ppm concentration of PCBs.

This guidance addresses a number of issues. Section 1.0 addresses general considerations. Section 2.0 addresses the overall definition of "recyclable material," as it pertains to scrap metal, batteries, and PCBs. Section 3.0 focuses primarily on scrap metal issues. Section 4.0 focuses on battery transactions. Section 5.0 focuses on transactions involving PCB-containing materials. In addition, this guidance contains two appendices. Appendix A provides technical information on some of the materials covered in this guidance. Appendix B provides a summary of judicial opinions dealing with the exemption.

1.0 General factors to consider regarding SREA

When evaluating the appropriate enforcement posture to take with respect to a party that may be eligible for the SREA exemption, Regions should consider relevant information provided by that private party and others, including but not limited to:

- the specific facts at a given site, including how the material at the site was actually recycled;
- how and when any hazardous substances that are included in the recycled material came to be associated with it;
- if applicable, the size of the shipping containers and the nature of any hazardous substances in the containers that hold or constitute the recycled material;
- the nature of the transaction, including prices paid;
- the extent of contamination at the site and impact of the recycled materials at the site based on their relative toxicity, mobility and persistence[2];

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[1] *See*, United States v. First City Nat. Bank of Houston, 386 U.S. 361 (1967), cited in Ekotek Site PRP Committee v. Self, 881 F.Supp.1516, 1524 (D. Utah 1995)(finding burden of proving applicability of CERCLA's petroleum exclusion to be on defendants to establish their right to the exemption); SEC v. Ralston Purina Co., 346 U.S. 119, 126 (1953) (party claiming the benefits of an exception to a broadly remedial statutory or regulatory scheme has the burden of proof to show that it meets the terms of the exception). *See also*, E.E.O.C. v. Chicago Club, 86 F.3d 1423, 1430 (7th Cir. 1996)(separate provisos or exceptions curtail or restrict the operation of a statute in a case to which it would otherwise apply).

[2] Regions should consider the hazardous substances that are part of the recycled material (e.g., lead oxide paste attached to a battery; PCBs in the plastic insulation on a metal wire).

- compliance by the party and the consuming facility with applicable standards regarding the storage, transport, and management, or other activities associated with the recyclable material; and,
- satisfaction of all other requirements in CERCLA Section 127.[3]

Effective consideration of the above factors will be facilitated significantly if the parties produce adequate, credible information to support their eligibility for a recycling exemption (including information establishing that a transaction involves recyclable material). The level of information will be determined on a site-by-site basis. In evaluating the factors, it may be useful to consider interpretations the Agency has taken in its administration of other federal environmental programs, such as the Resource Conservation and Recovery Act (RCRA) and the Toxic Substance Control Act (TSCA).

Finally, while SREA is an exemption, the exemption is not automatic, as the party must demonstrate that it qualifies for the exemption. In some instances, parties may prefer the protection afforded by a CERCLA settlement. For instance, they may conclude that the risk of failing to prove the applicability of the exemption is high enough to make a settlement preferable. In such cases, the Regions are encouraged to explore settlement with such parties, and may use this guidance as a tool for determining factors to consider in crafting an appropriate settlement.

1.1 Structure of recycling exemption

CERCLA Section 127(b) provides that the liability exemption applies only to the recycling of certain materials: scrap paper, scrap plastic, scrap glass, scrap textiles, scrap rubber (other than whole tires), scrap metal, and spent lead-acid, nickel-cadmium and other batteries, as well as minor amounts of material incident to or adhering to the scrap material as result of its normal and customary use prior to becoming scrap. Therefore, the arranger or transporter must show that its scrap material qualifies as a "recyclable material" (e.g., this includes making sure the scrap material meets the definition above, including whether the scrap material had more than minor amounts of material incident to or adhering to it as a result of its normal and customary use prior to becoming scrap). Furthermore, the arranger or transporter must then show that its transaction(s) involving the recyclable material was an "arrangement for recycling"

[3] *See e.g.*, the criteria set forth in Section 127(c) that also must be met for transactions covered under subsections (d) and (e), as well as the exclusions under Section 127(f) that apply to all recycling transactions. These criteria and additional requirements address what is necessary to qualify for the exemption depending on whether the relevant transaction occurred on or before February 27, 2000 (90 days from the enactment of SREA). For example, for transactions occurring after that date, the party must have exercised reasonable care to determine whether a consuming facility is in compliance with all applicable environmental laws. 42 U.S.C. § 127(c)(5). The "reasonable care" analysis requires consideration of the applicable provisions of other statutes and regulations, such as the Resource Conservation and Recovery Act (RCRA) or the Toxic Substance Control Act (TSCA), and related regulations. Such an evaluation of other applicable environmental laws may apply to the arranger or transporter, depending on whether the transaction under consideration was pre- or post-enactment. *See also,* 42 U.S.C. § 127(f)(1)(A)(iii), (C).

by providing evidence that all criteria in Section 127(c) were met at the time of the transaction.[4] If the recyclable material is a scrap metal or spent battery or both, Sections 127(d) and (e) outline specific criteria for the recycling of these materials that must be met in addition to the criteria of Section 127(c). However, if any of the exclusions set forth in Section 127(f) are met, then the exemption will not apply.[5]

2.0 Definition of "recyclable materials"

CERCLA Section 127(b) contains an overall definition of the "recyclable material" covered by the SREA recycling exemption. Other subsections contain further, more specific clarifications of this overall definition.

CERCLA Section 127(b) states:

> "For purposes of this section, the term 'recyclable material' means scrap paper, scrap plastic, scrap glass, scrap textiles, scrap rubber (other than whole tires), scrap metal, or spent lead-acid, spent nickel-cadmium, and other spent batteries, as well as minor amounts of material incident to or adhering to the scrap material as a result of its normal and customary use prior to becoming scrap."

Sections 3.0 and 4.0 of this document discuss the scrap metal and whole battery exemptions in greater detail.

In addition, the overall definition found in Section 127(b) contains two exclusions. The first one addresses certain types of containers. The relevant language excludes, "shipping containers of a capacity from 30 liters to 3,000 liters, whether intact or not, having any hazardous substance (but not metal bits and pieces or hazardous substance that form an integral part of the container) contained in or adhering thereto." The second one excludes "any item of material that contained polychlorinated biphenyls at a concentration in excess of 50 parts per million or any new standard promulgated pursuant to applicable Federal laws." Section 5.0 discusses the PCB exclusion in greater detail.

2.1 Transactions involving "minor amounts of material"

[4] "Time of the recycling transaction" may not be limited to the time when the parties entered into a contract. It may include the time when the recyclable material is delivered to the recycling process. There may be situations where the parties enter into a relationship in which one party supplies the other with recyclable materials over a period of time, in which case, "time of transaction" may mean several points in time when the person arranges for recycling of recyclable material.

[5] Section 127(f) outlines five circumstances in which the arranger or transporter would be ineligible for the exemption.

SREA does not disqualify as "recyclable material," materials that may contain "minor amounts of material incident to or adhering to the scrap material as a result of its normal and customary use prior to becoming scrap." The statute does not define the phrase "minor amounts." When evaluating the appropriate enforcement posture to take, Regions should determine on a case-by-case basis whether "minor amounts," or more than "minor amounts," of material were present by considering the volume and/or weight of the recyclable material composition as compared to the total volume or weight of metal. For example, when the purported recyclable material is metal, such as wire, it is relevant whether the wire is:

- bare metal[6]; or
- metal with only residual (post-stripping) amounts of insulation or coating remaining on the metal[7]; or
- metal with a minor amount of insulation or coating fully intact[8].

3.0 Transactions involving scrap metal

In addition to the overall definition of recyclable material provided in Section 127(b), Section 127(d)(3) provides that the term "scrap metal" means:

> "bits and pieces of metal parts (e.g., bars, turnings, rods, sheets, wire) or metal pieces that may be combined together with bolts or soldering (e.g., radiators, scrap automobiles, railroad box cars), which when worn or superfluous can be recycled, except for scrap metals that the Administrator excludes from this definition."

This definition of scrap metal is the same as the RCRA regulatory definition of scrap metal set forth in 40 C.F.R. Section 261.1(c)(6).[9]

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[6] For example, metal that did not meet the manufacturer's specifications.

[7] For example, an arranger or transporter sends metal with insulating material to a stripping/chopping company to separate the insulating or coating material from the metal and the metal with residual amounts of insulation or coating remaining was sent to a recycling facility to be recycled. The residual material was once an essential part of the scrap during its normal and customary use prior to becoming scrap and therefore may be considered "minor amounts."

[8] For example, an arranger or transporter sends metal with insulation or coating which cannot be mechanically removed because of the relative weight of the insulation or coating as compared to the metal itself. The insulation or coating was once an essential part of the scrap during its normal and customary use prior to becoming scrap and therefore may be considered "minor amounts."

[9] Agency interpretation and regulatory actions involving scrap metal taken pursuant to RCRA may provide some guidance in determining which enforcement posture to take in CERCLA cases involving scrap metal issues. For example, in the preamble to the final rule where EPA promulgated 40 C.F.R. Section 261.1(c)(6), EPA stated

When evaluating the appropriate enforcement posture to take in CERCLA cases involving SREA's scrap metal provisions, Regions should determine whether RCRA and its implementing regulations have addressed similar or related scrap metal recycling issues, and whether the RCRA regulatory approach to the material involved at the site would be appropriate for CERCLA purposes.

3.1 Transactions that may involve "bits and pieces of metal parts"

When evaluating the appropriate enforcement posture to take in CERCLA cases involving bits and pieces of metal parts, Regions should consider the size of the metal involved in the transaction, whether the metal was attached to or combined with other materials, and whether the metal was in a solid or liquid form and whether it was melted prior to being recycled.

CERCLA Section 127(d)(3) defines scrap metal to include "bits and pieces of metal parts (e.g., bars, turnings, rods, sheets, wire)." Transactions involving "bits and pieces of metal parts" could involve metal parts in different sizes such as metal blocks, metal shavings, grindings, and floor sweepings. The size of the metal may be important. For example, material that is powdery or dust-like may not fall within the definition of "scrap metal" as a bit or a piece of metal.

The nature of the metal is also important. Mercury, for example, is a liquid metal that typically is different from solid metal in content, physical form and manageability. In its liquid state, mercury normally would not represent "bits and pieces of metal parts . . . or metal pieces that may be combined together with bolts or soldering."

3.2 Transactions involving scrap automobiles

Scrap metal under Section 127(d)(3) may include "metal pieces that may be combined together with bolts or soldering (e.g., radiators, scrap automobiles, railroad box cars)." Regions should consider whether the fluids were removed from the vehicle or device prior to the transaction, whether the material is only composed of metal (e.g., does the material also contain plastic or other synthetic components), and whether there are "minor amounts" or greater than minor amounts of other substances adhering to it (e.g., PCBs, fluid, oil, etc.).

3.3 Transactions involving scrap metal that has been melted

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that the definition of scrap excludes, inter alia, "residues generated from smelting and refining operations (i.e., drosses, slags, and sludges)." 50 Fed. Reg. 624 (Jan. 4, 1985). However, EPA's interpretations and regulatory actions taken pursuant to RCRA may not always be applicable. RCRA and CERCLA are different statutes with different purposes, a distinction that may be relevant in determining the appropriate approach to take under CERCLA. CERCLA is a remedial statute, that creates liability for past acts of disposal of hazardous substances. RCRA is a regulatory statute that addresses cradle to grave management of hazardous waste.

When evaluating the appropriate enforcement posture to take, Regions should consider whether the metal involved in the transaction was melted prior to the recycling transaction. CERCLA Section 127(d)(1)(C) provides that an arranger must demonstrate that it did not melt the scrap metal prior to the recycling transaction. To the extent material such as dross is melted prior to the recycling transaction, it may be covered by the exclusion in Section 127(d)(1)(C) and may be outside the scope of the recycling exemption.

On the other hand, solder baths (when cooled) are solidified bits and pieces of metal that generally are different in physical form and content from process residues such as sludges, slags, and drosses.[10] To the extent solidified solder baths are not melted prior to the recycling transaction, they may not be covered by the exclusion in Section 127(d)(1)(C) and thus eligible for the exemption.[11]

3.4 Transactions involving other scrap lead-bearing material

A. Lead-bearing components removed from whole spent batteries

1. plates/grids

When evaluating the appropriate enforcement posture to take in CERCLA cases involving battery parts, Regions should consider whether the material involves part of a spent battery and whether that part represents a valuable component that has been recovered prior to the recycling transaction.

The overall definition of "recyclable material" in CERCLA Section 127(b) includes spent batteries and scrap metal. CERCLA Section 127(e) addresses battery recycling in particular and excludes from the exemption a person who recovers the valuable components (e.g., lead plates) of a battery prior to it being recycled. These provisions suggest that Congress intended that arrangements involving whole batteries may qualify for the exemption, while arrangements involving battery parts may not qualify, either as batteries, or as scrap metal.

Limiting the exemption to whole batteries encourages the sound practice of selling whole batteries to a properly equipped recycling facility and discourages the cracking of batteries by smaller dealers on their own property. Improper handling (e.g., of the battery casing and acid)

[10] In a preamble to a RCRA rule, EPA reiterates its earlier interpretation from a 1993 letter which states that spent solder baths, in general, meet the definition of scrap metal contained in 40 C.F.R. Section 261.1(c)(6). *See* 62 Fed. Reg. 26013 (May 12, 1997). Letter from Jeffery D. Denit to Jeffrey T. Miller, Lead Industries Association, Inc. (September 20 , 1993).

[11] This exclusion may not apply to melting that occurs during a manufacturer's production process.

can cause serious environmental hazard. Sulfuric acid, battery case material and lead compounds are the main sources of air emissions generated from battery breaking.[12]

2. battery mud/paste and battery acids

When evaluating the appropriate enforcement posture to take in CERCLA cases involving battery parts, Regions should consider whether the material is in a solid or liquid form, whether the material is composed of only metal (e.g., does the material also contain plastic or other synthetic components), and if the material is scrap metal, whether there are only "minor amounts" of other substances adhering to it (see discussion in 2.1 above).

Typically, where a whole battery has been broken or cracked open to drain and/or remove the acid, the drained spent battery still contains materials such as battery mud/paste, sulfuric acid and the battery grid. Alone, the sulfuric acid and battery mud/paste would not be covered by the definitions of recyclable material or scrap metal under SREA as they are not "bits and pieces of metal."[13] In addition, broken batteries are not necessarily candidates for the recycling exemption, as discussed above in Section 3.4.[14]

B. Reject materials (e.g., off-specification commercial products)

Sometimes a metal plate/grid (e.g., a battery component) fails to meet the manufacturer's specifications and becomes "reject" material that does not become part of a whole battery and does not have any other substances (e.g., lead oxide paste) adhering to it. In such cases, Regions should consider how the material was used and how it may have been recycled (e.g., were the battery plates removed from the reject battery prior to being sent to a recycling facility).[15]

4.0 Transactions involving whole batteries

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[12] EPA Office of Compliance Sector Notebook Project. "Profile of the Nonferrous Metals Industry." U.S. Environmental Protection Agency, Office of Compliance, Office of Enforcement and Compliance Assurance. September 1995, at page 37. Experience has also shown that sulfuric acid and lead compounds drained and/or removed from a spent battery can cause soil and groundwater contamination.

[13] This is consistent with the preamble to a RCRA rule, in which the Agency has stated "..liquid metal wastes (i.e., liquid mercury), or metal-containing wastes with a significant liquid component, such as spent batteries" are not scrap metal as defined by RCRA. *See* 50 Fed. Reg. 624 (January 4, 1985).

[14] *See also* footnote 3 (providing a discussion on additional exclusions of Section 127(f)).

[15] There may be situations where the arranger or transporter sent reject battery plates covered with battery paste; in such cases the party may not qualify for the SREA exemption.

Section 127(e) states, "transactions involving spent lead-acid batteries, spent nickel-cadmium batteries, or other spent batteries shall be deemed to be arranging for recycling if the person who arranged for the transaction (by selling recyclable material or otherwise arranging for the recycling of recyclable material) can demonstrate by preponderance of the evidence that at the time of the transaction- -

> "(1) the person met the criteria in subsection (c), but did not recover the valuable components of such batteries; and
>
> "(2)(A) with respect to transactions involving lead acid-batteries, the person was in compliance with applicable Federal environmental regulations or standards and, any amendments thereto, regarding the storage, transport, management, or other activities associated with the recycling of spent lead-acid batteries;
>
> "(B) with respect to transactions involving nickel-cadmium batteries, Federal environmental regulations or standards are in effect regarding the storage, transport, management, or other activities associated with the recycling of spent nickel-cadmium batteries, and the person was in compliance with applicable regulations or standards or any amendments thereto; or
>
> "(C) with respect to transactions involving other spent batteries, Federal environmental regulations or standards are in effect regarding the storage, transport, management, or other activities associated with the recycling of such batteries, and the person was in compliance with applicable regulations or standards or any amendments thereto."

4.1 Transactions involving recovery of valuable components of batteries

CERCLA Section 127(e)(1) limits the recycling exemption to parties that "did not recover the valuable components"of batteries prior to the recycling transaction. One example of recovering "valuable components" may involve battery cracking. Batteries are sometimes cracked in order to retrieve the metal plates inside; the plates can then be sold. Battery plates are often covered with significant amounts of battery paste which contains lead.

When evaluating the appropriate enforcement posture to take, Regions should consider whether any component of a battery has been removed prior to the recycling transaction and whether that component has any commercial value. If those factors are present, valuable components may have been recovered for purposes of Section 127(e)(1) and the arranger or transporter may not be eligible for the SREA exemption.

4.2 Transactions involving lead-acid batteries

CERCLA Section 127(e)(2)(A) addresses lead-acid batteries. One condition of the recycling exemption with respect to transactions involving lead-acid batteries is "compliance with applicable Federal environmental regulations or standards and, any amendments thereto, regarding the storage, transport, management, or other activities associated with the recycling of spent lead-acid batteries."

The Agency first promulgated regulations under RCRA generally dealing with hazardous waste in 1980.[16] However, in such regulations, EPA deferred Subtitle C regulation of wastes which are beneficially used or reused, or legitimately recycled or reclaimed, or accumulated, stored, or treated prior to beneficial use or reuse. Therefore, there were no Federal regulations applicable to the recycling of batteries at that time. In 1985, the Agency added the first RCRA regulations pertaining specifically to batteries. One provision exempted from regulation all spent batteries, including lead-acid and nickel-cadmium batteries, that were returned to a battery manufacturer for regeneration.[17] Another provision of the 1985 rule-making, specifically addressed the reclamation[18] of spent lead-acid batteries.[19] *See* C.F.R. Section 266.80.

In 1995, the Agency promulgated regulations providing streamlined management standards for certain "universal wastes."[20] The universal waste standards provide an alternative regulatory framework under RCRA. These management standards generally prohibit universal waste handlers from treating or disposing of universal waste, and establish requirements, during transportation and at temporary transfer facilities, for various activities such as storage, tracking, labeling, and release response.[21] One category of universal wastes includes a number of different types of batteries, including lead-acid batteries. *See* 40 C.F.R. Part 273. Parties that handle lead-acid batteries have the choice of following either 40 C.F.R. Section 266.80 or 40 C.F.R. Part 273.

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[16] On May 19, 1980, EPA promulgated regulations for generators, transporters, and Treatment, Storage, and Disposal Facilities (TSDFs) of hazardous wastes, including lead and cadmium-containing wastes.

[17] This provision was codified at 40 C.F.R. Section 261.6(a)(3)(ii). *See* 50 Fed Reg. 614 (January 4, 1985). The Universal Waste Rule, promulgated in 1995, removed this exemption and added management provisions at 40 C.F.R. Section 273.13(a) and Section 273.33(a). *See* 60 Fed. Reg. 25492 (May 11, 1995).

[18] A material is "recycled" if it is used, reused, or reclaimed. A material is "reclaimed" if it is processed to recover a usable product, or if it is regenerated. *See* C.F.R. 261.1(4) and (7).

[19] On January 4, 1985, EPA promulgated regulations to govern hazardous wastes which are recycled., including special streamlined standards for lead-acid battery reclamation. This regulation went into affect July 5, 1985. This provision was originally codified in 40 C.F.R. 261.6(a)(2)(v), but has since been redesignated as Section 261.6(a)(2)(iv).

[20] The Universal Waste Rule, codified at 40 C.F.R. Part 273, became effective on May 11, 1995.

[21] Treatment, disposal and recycling of universal wastes at destination facilities is covered by 40 C.F.R. Part 273 Subpart E, which generally subjects such facilities to all RCRA subtitle C requirements (except for recyclers who do not store universal waste and instead are subject to 40 C.F.R. Section 261.6(c)(2)).

Under Section 3006 of RCRA, 42 U.S.C. § 6926, individual States can be authorized by EPA to administer their own equivalent hazardous waste programs in lieu of the Federal program.[22] Therefore, the Federal requirements applicable to the recycling of batteries in a particular State may be the authorized State regulations.

As a range of Federal regulations regarding batteries exists, there may be other Federal regulations or standards that may apply regarding the storage, transport, management, or other activities associated with the recycling of spent lead-acid batteries.[23]

Thus, when evaluating the appropriate enforcement posture to take in CERCLA cases involving lead-acid batteries, Regions should consider whether the transaction involving a lead-acid battery occurred on or before July 5, 1985**,** between July 6, 1985 and May 11, 1995, or after May 11, 1995, to determine which federal regulations, if any, may have been applicable. The Region also should consider whether the transaction occurred in a state that was authorized to administer the federal RCRA program in lieu of EPA**.** Finally, the Region should consider whether the party conducting the transaction was in compliance with regulations that were applicable at the time.

4.3 Transactions involving nickel-cadmium and other spent batteries

CERCLA Section 127(e)(2)(B) addresses nickel-cadmium batteries. One condition of the recycling exemption for nickel-cadmium batteries is the existence of "regulations or standards [that] are in effect regarding the storage, transport, management, or other activities associated with the recycling of spent nickel-cadmium batteries," as well as compliance with those "regulations or standards or any amendments thereto." CERCLA Section 127(e)(2)(C) contains identical provisions for "other spent batteries."

As discussed above, prior to the universal waste rule, there were two types of used batteries that were addressed by RCRA regulations: lead-acid batteries being reclaimed and batteries (of any type) returned to the manufacturer for regeneration. *See* Section 4.2. After May 11, 1995, however, the streamlined universal waste management standards provided an

[22] Under the Mercury-containing Rechargeable Battery Act of 1996, the federal universal waste regulations apply to the collection, storage and transportation of certain batteries unless a state receives approval for identical state regulations.

[23] The other Federal regulations or standards that may apply regarding the storage, transport, management, or other activities associated with spent batteries include the following: 1) 23 C.F.R. Section 751.7 (Department of Transportation; Federal Highway Administration); 2) 25 C.F.R. Section 226.34 (Department of the Interior; Bureau of Indian Affairs); 3) 29 C.F.R. Section 1910.106 (Department of Labor; Occupational Safety and Health); 4) 36 C.F.R. Sections 6.4, 6.5, 6.9, and 9.36 (Department of Interior; National Park Service); and 5) 49 C.F.R. Sections 172.101, 172.102, 173.159, 173.185, 173.189, 174.102, 175.10(ii), and 177.839 (Department of Transportation; Research and Special Administration).

alternative regulatory scheme for certain handlers of certain types of batteries, including nickel-cadmium and other spent batteries.[24]

As with lead-acid batteries, a range of Federal regulations regarding batteries exists, and there may be other Federal regulations or standards that may apply regarding the storage, transport, management, or other activities associated with the recycling of these types of batteries.[25]

Thus, when evaluating the appropriate enforcement posture to take in CERCLA cases involving nickel-cadmium batteries and other spent batteries, Regions should consider whether the transaction involving a nickel-cadmium or other spent battery occurred on or before July 5, 1985, between July 6, 1985 and May 11, 1995, or after May 11, 1995. If the transaction involves "other spent batteries," the Region should consider whether the batteries fall within the definition of 40 C.F.R. Section 273.9. The Region also should consider whether the transaction occurred in a state that was authorized to administer the federal RCRA program in lieu of EPA**.** Finally, the Region should consider whether the party conducting the transaction was in compliance with the regulations that were applicable at the time.

5.0 Transactions involving PCB-containing materials

CERCLA Section 127(b)(2) states that the term "recyclable material" shall not include "any item of material that contained polychlorinated biphenyls (PCBs) at a concentration in excess of 50 parts per million or any new standard promulgated pursuant to applicable Federal laws."

PCBs are the only hazardous substance specifically addressed in Section 127.[26] In addition, the PCB exclusion is not tied to "the time of the transaction," as is the case for other scrap material addressed in Section 127(c), (d) and (e). Furthermore, the term "item" is not defined in SREA or elsewhere in CERCLA.[27]

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[24] 40 C.F.R. Section 273.9 includes a definition of "battery" for purposes of the universal waste rule that includes an "intact, unbroken battery from which the electrolyte has been removed." The electrolyte is the medium for movement of ions within the cell. This definition may be broad enough to cover a whole reject battery (i.e., an off-specification commercial chemical product that has either not been used or does not meet the manufacturer's product specifications).

[25] *See* footnote 23.

[26] The inclusion of a specific provision addressing PCBs supports recognition by Congress of the risks to human health and the environment posed by PCB contamination, as well as the often high cost of remediating PCB contamination.

[27] Regulations promulgated under TSCA may provide guidance in defining an "item". Under TSCA regulations, PCB items fall into four categories: 1) PCB Articles (have had direct contact with PCBs) and include PCB transformers, PCB capacitors, PCB Hydraulic Machines, PCB-contaminated electrical equipment, and other

5.1 General factors to consider for PCB-containing material

When evaluating the appropriate enforcement posture to take in CERCLA cases involving transactions that may involve PCBs, Regions should consider: the type of material associated with the PCBs at the site (e.g., transformers);[28] the concentration of PCBs in the material at the time of the transaction, as well as before the transaction; and, the number of items with PCB concentrations in excess of 50 ppm.

5.2 Determining PCB concentrations

When evaluating the appropriate enforcement posture to take in CERCLA cases involving transactions that may involve PCBs, Regions should consider whether there is any evidence pertaining to the PCB concentrations of the items of material sent to be recycled and whether each item is known to have contained PCBs greater or less than 50 ppm at some previous point in time. In the absence of credible evidence demonstrating that an item did not exceed 50 ppm, Regions as a matter of enforcement discretion may presume that a party sent non-exempt hazardous materials (>50 ppm PCBs) if PCB contamination is present at the site.

The concentration of PCBs in an item may be demonstrated by such methods as sampling data that may have been collected to comply with TSCA disposal regulations, service records, manufacturing labels, or known specifications for similar items built or used in the same period.[29]

Pursuant to current regulations under TSCA, owners seeking to dispose of equipment (which includes sending PCB equipment for recycling) must dispose of the equipment based on its actual concentration at the time of disposal. TSCA regulations provide that actual concentration of PCBs can be determined by analytical testing or by assuming a worst case scenario (i.e., the equipment is $500 ppm). 40 C.F.R. Section 761.50.[30] If gathered, sampling

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PCB articles; 2) PCB Containers (have had direct contact with PCBs); 3) PCB Article Containers (have had no direct contact with PCBs); and 4) PCB equipment (has had no direct contact with PCBs). *See* 40 C.F.R. Section 761.3. For purposes of SREA, however, an "item" is not necessarily limited to the TSCA definition.

[28] An example of an item for which it may be appropriate to broadly apply the exclusion is a transformer. Even if a transformer has been drained and filled with new fluid at a concentration # 50 ppm, it is possible that the transformer may contain parts (such as a core or coil) that are made of porous materials (such as wood or fabric) that may retain concentrations > 50 ppm. Thus, although sampling of the oil may reflect PCB concentration # 50 ppm, the inner core of the transformer (e.g., porous material) could still contain a PCB concentration > 50 ppm.

[29] *See* Appendix A at p. 23 (question on how PCB concentration is typically measured when sampled).

[30] Sampling procedures in the PCB disposal regulations can be found in 40 C.F.R. Section 761, Subparts P, R.

data could be the best evidence to demonstrate that an item did not contain in excess of 50 ppm PCBs. These TSCA PCB regulations apply to transactions occurring after July 2, 1979.[31]

5.3 Amount of scrap material containing PCB concentrations in excess of 50 ppm

Section 127(b) of SREA excludes "any item of material that contained polychlorinated biphenyls at a concentration in excess of 50 parts per million" from qualifying for the exemption. Where a transaction involves a shipment that contains both items contaminated with PCBs in excess of 50 ppm and less than 50 ppm, the exemption under SREA may not be applicable. However, in those situations where a party cannot adequately demonstrate the concentration levels of *all* the items of material sent to the site, Regions as a matter of enforcement discretion may consider an appropriate share of liability at the site based on at least partial eligibility under SREA.[32]

5.4 Summary

This document provides guidance to EPA Regions concerning how the Agency intends to exercise its enforcement discretion when evaluating the appropriate enforcement posture to take under SREA. The guidance is designed to implement national guidance on these issues. Some of the statutory provisions described in this document may contain legally binding requirements. However, this document does not substitute for those provisions, nor is it a regulation itself. Thus, it cannot impose legally binding requirements on EPA, States, or the regulated community, and may not apply to a particular situation based upon the circumstances. Any decisions regarding a particular settlement or other enforcement decision will be made based on the statute and applicable regulations, and EPA decision makers retain the discretion to adopt approaches on a case-by-case basis that differ from this guidance where appropriate.

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[31] As noted in Section 3.0 with regard to RCRA, TSCA may provide some guidance for evaluating the appropriate enforcement posture to take under SREA in cases involving PCB-containing materials. For example, in some cases dilution may be allowed under TSCA. *See* 40 C.F.R. Section 761.30(a)(2)(v)(transformers may be drained of PCBs and refilled with non-PCB dielectric fluid; although residual PCBs are expected to remain in the transformer and contaminate the non-PCB dielectric fluid used to refill it, it is considered authorized dilution). While such dilution may be authorized as a regulatory matter under TSCA, it may not be appropriate at a Superfund site for purposes of Section 127.

[32] Thus, for example, if credible evidence provided by a party demonstrates that only three transformers out of a truckload of 15 transformers may have exceeded 50 ppm PCBs, the Region may consider reducing that party's share of liability to account for the fact that most of the items sent to the site were exempt under SREA (assuming the other elements in Section 127 are met).

APPENDIX A
TECHNICAL BACKGROUND INFORMATION FOR VARIOUS SCRAP MATERIALS (QUESTION AND ANSWER FORMAT)

Q: What is insulated wire and cable?

Ans: When wire is covered with coating or insulation it is usually referred to as insulated wire. The insulation is typically coating of dielectric or essentially nonconducting material which serves the purpose of preventing the transmission of electricity. The insulating material can be any material that is a poor conductor of heat or electricity and is used to suppress the flow of heat or electricity. In ordinary electric wiring, plastics are commonly used as insulating sheathing (cover or encasing) for the wire itself. Very fine wire, such as that used for the winding of coils and transformers, may be insulated with a thin coat of enamel.[33]

The insulation of wires inside electric equipment may be made of mica[34] or glass fibers with a plastic binder. Polyethylene and polystyrene are used in high-frequency applications (e.g., telecommunications). Other materials used as insulating material include nylon, silicone rubber, epoxy polyesters, polyurethane, and neoprene.[35] Asbestos is another material used in insulation for hot water piping.[36] The specific choice of an insulating material is usually determined by its application.

Cable is composed of one or more stranded conductors (composed of a group of wires or of any combination of groups of wires). Cable which is covered by insulation and sometimes a protective sheath is used for transmitting electric power or the impulses of an electric communications system.[37] Transmission cables have aluminum as the conducting metal. Utilities use insulated aluminum power cable as outside distribution cable but primarily use insulated copper wire for inside distribution. Building, communication, electronics and automotive markets normally use copper as the conducting metal.

Q: What methods are used to separate insulation (e.g., plastic) from metal?

Ans: Normally, for the metal to be recycled, the metal is separated from the insulation. The various techniques used for stripping insulation from wire and cable include mechanical

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[33] In industry, enamel is a coating often used primarily for the protection of a surface against corrosion or abrasion. Industry enamel is usually applied to cast iron or sheet that has previously been stamped into shape. The enamel is composed of raw materials such as borax, silica, fluorspar, and feldspar that are mixed and melted by heat. *Microsoft Encarta Encyclopedia 2000* <http://encarta.com>. [Accessed August 11, 2000]

[34] Mineral that crystallizes in thin, somewhat flexible, translucent or colored, easily separated layers and resistant to heat. *Webster New World Dictionary, Third College Edition. 1988.*

[35] "Insulation," *Microsoft Encarta Encyclopedia 2000* <http://www.encarta.msn.com.>. [Accessed April 26, 2000]

[36] *Id.*

[37] "Cable," *Microsoft Encarta Encyclopedia 2000* <http://www.encarta.msn.com.>.[Accessed April 26, 2000]

stripping, thermal stripping (high temperature or low temperature), chemical stripping,[38] or a mechanical chopping/grinding process. According to the Bureau of International Recycling, the predominant way of recovering the metal from cable scrap is automated cable chopping.[39]

Once the insulation is removed, the metal is either sent to a scrap metal recycling facility or recycled on-site, and the insulation is either disposed of or recycled as well. Polyvinyl Chloride (PVC) can be recycled into pellets or directly reused for insulation of electric cable, insulation tape, carpet lining, flooring and footwear, etc.[40]

Q: How are lead-acid batteries used and what are the components that make up a lead-acid battery?

Ans: Manufacturing of lead-acid batteries is the predominant end use for lead in the U.S. Lead-acid batteries are secondary, wet cell batteries, which means they can be recharged for many uses and they contain liquid. They are the most widely used rechargeable battery in the world.[41] Most spent lead-acid batteries, in particular automobile batteries, are recycled. It is estimated that approximately 80 to 95 percent of all spent automobile lead-acid batteries generated in the U.S. are recycled.[42]

Spent lead-acid batteries are the principal source of feed materials for secondary lead smelters. At present, most smelters purchase whole batteries rather than buying pre-separated lead-bearing components.[43] The lead bearing components include plates, groups, and lead oxide paste. Within each cell of a battery, several individual lead grids (plates) are combined to form a single unit (group) that is held together by a lead-oxide paste. Once these plates or groups are removed from a battery, they are considered to be hazardous material by the U.S. Department of

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[38] One example of chemical stripping involves the use of a hot bath to melt the plastic (e.g., PVC) away from the scrap copper wire. The high temperatures decompose plastic insulation into carbon, which separates out as a granular black material, and also enhances the dissolution of lead from the plastic insulation and copper from the metal wire. *SSPC Issues Technology Update on Chemical Stripping* <http://www.sspc.org>. [Accessed April 24, 2001]

[39] Plastic Coated Cable Scrap. *Bureau of International Recycling* <http://www.bir.org/cable>. [Accessed August 18, 2000]

[40] *Id.*

[41] Hawker Energy's <http://www.hepi.com/basics/pb.htm>. [Accessed December 23, 2001]

[42] Smith, Bucklin and Associates, Inc., "Battery Council International National Recycling Rate Study." December 1996.

[43] Midwest Research Institute. "Background Document for Secondary Lead Smelters Association Request for a Solid Waste variance." Prepared for the U.S. EPA, Office of Solid Waste (August 26, 1988).

Transportation and, therefore, are subject to its hazardous material requirements.[44] As a result of these restrictions and other factors, only 10 percent of the batteries recycled are opened by independent battery breakers prior to being recycled.[45]

The typical lead-acid automobile battery weighs approximately 36 pounds and consists of about 14 pounds of battery paste, 8 pounds of battery grid, 2 pounds of casing, 2 pounds of separators, and 10 pounds of sulfuric acid.[46] Highlight 2 presents a typical grid and paste content.[47]

Highlight 2: Typical grid and paste analyses

Components	Grid (%)	Paste (%)
Lead metal	89	1
Lead oxide	1	30
Lead sulfate	1	45
Antimony	1.6	0.3
Tin	0.2	<0.1
Arsenic	0.2	<0.1
Moisture	6	20
Silica	-	2
Carbon	-	2
Organics	1	1
Total	100	100

Q: What are the methods used to recover the lead-bearing components of a whole battery?

Ans: The most prevalent method used by smelting facilities to recover the lead-bearing components of a whole battery is to saw off the top with a large, slow-speed saw. Another method is to crush the entire battery in a crusher. Before beginning the breaking operation, a facility would first receive a bulk shipment of discarded batteries from its customers. Following the breaking operation, the various components of the batteries are separated. The acid is

[44] Midwest Research Institute. "Background Document for Secondary Lead Smelters Association Request for a Solid Waste variance." Prepared for the U.S. EPA, Office of Solid Waste (August 26, 1988).

[45] *Id*.

[46] Queneau, Paul et al. June 27–29, 2000. "Recycling Metals from Industrial Waste." Sponsored by Office of Special Programs and Continuing Education, Colorado School of Mines.

[47] *Id.*

allowed to drain from the opened case and is collected for disposal or resale. The plates and groups are removed from the cases, mechanically or manually, and transported to storage. All lead-bearing components, such as terminal posts and lead oxide (paste), are stored with the plates and groups. The lead-bearing components from the batteries comprise the major portion of the materials charged into the lead recovery furnace.[48]

Q: What is solder?

Ans: Solder is any of several metallic alloys that melt at comparatively low temperatures and are used for the patching or joining of metal parts or surfaces. Solder is classified into several groups of metal alloys[49] (e.g., lead, nickel, silver, steel, tin, etc.).[50] Solders are commonly classified as soft and hard solders, depending upon their melting points and strengths.[51] Solders are supplied in wire, bar, or premixed-paste form, depending on the application.[52]

Q: What process is used for soldering metal?

Ans: In joining two pieces of metal with solder, the metal surfaces to be joined are first cleaned mechanically and then coated with a flux, usually of rosin or borax, that cleans them chemically and assists the solder in making a bond. The surfaces are then heated, either with a hot metal tool called a soldering iron or soldering copper or with some form of alcohol or gas blowtorch. The metal surfaces are heated to the melting point of the solder, the solder is applied and it is allowed to run freely, solidifying as the surfaces cool. In the form of soldering known as sweating[53], the metal pieces to be joined are first coated individually with solder and then clamped together and heated to form the finished joint.[54]

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[48] Midwest Research Institute. "Background Document for Secondary Lead Smelters Association Request for a Solid Waste variance." Prepared for the U.S. EPA, Office of Solid Waste (August 26, 1988).

[49] Alloy refers to a mixture of two or more metals usually to convey certain properties to the **base metal** (the main metal of the alloy). Examples of alloys include stainless steel (steel, chromium and nickel), brass (copper and zinc), and bronze (copper and tin). Alloy metals are usually added to base metals to convey different properties such as corrosion resistance, hardening, and malleability.

[50] Roy A. Lindberg and Norman R. Braton. "Welding and Other Joining Processes." (1976).

[51] "Solder," *Microsoft Encarta Encyclopedia 2000* <http://www.encarta.msn.com.>. [Accessed May 1, 2000]

[52] "Soldering," Britannica <http://www.britannica.com>. [Accessed June 1, 2000]

[53] Sweating is a term of art in SREA. It relates to soldering as a way to unite or extract metal parts by heating at the point of contact.

[54] "Solder," *Microsoft Encarta Encyclopedia 2000* <http://www.encarta.msn.com.>. [Accessed June 1, 2000]

Q: What is the difference between solder baths, solder skimmings, and solder dross?

Ans: Solder baths are solidified tin/lead metal used in wave soldering in printed wire and electronics production. **Solder dross** (**or sometimes referred to as dross or solder skimmings**) is the material that forms on the surface of the solderbath.[55] Physically, dross is a grey, heavy metallic sludge which floats on top of the solderbath and sets into breakable heavy lumps when it cools.[56] Solder dross, a process residue, is different from scrap metal in physical form and content.[57]

Q: What is the difference between dross and agglomerated dross?

Ans: Dross is a by-product from the melting, processing, and fabrication of metal. It's a metallic sludge which floats on top of the solderbath and sets into breakable (disperable) heavy lumps when it cools. When the dross is manually or mechanically altered (sintered or melted) it becomes agglomerated dross. Agglomerated drosses are solid chucks of metal in a physical state that does not allow them to be easily crushed, split or crumbled.

Q: How is liquid mercury used in industry?

Ans: Mercury is a metallic element that is a mobile liquid, silvery-white in color that shines.[58] Electrical products such as dry-cell batteries, fluorescent light bulbs, switches, and other control equipment account for 50% of mercury used. Mercury is also used in paint manufacture (12%) and dental preparations (3%). Lesser quantities are used in industrial catalyst manufacture (2%), pesticides manufacture (1%), general laboratory use (1%), and pharmaceuticals (0.1%).[59]

Q: How are used automobiles typically recycled?

Ans: Vehicle salvage facilities, also known as "dismantlers," usually are the first places that receive vehicles after their useful life. The nature of operations generally depends on the size

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[55] In the preamble to a RCRA rule, the Agency stated that the definition of scrap metal does not include "residues generated from smelting and refining operations (i.e., drosses, slags, and sludges)." *See* 50 Fed. Reg. 624 (January 4, 1985).

[56] Strauss, Rudolf, *SMT Soldering Handbook,* Linacre House, Oxford, (2nd Edition, 1998).

[57] In the preamble to a RCRA rule, the Agency stated that the definition of scrap metal does not include residues generated from smelting and refining operations (e.g., drosses, slags, and sludges). *See* 50 Fed. Reg. 624 (January 4, 1985).

[58] "Mercury," Mallinckrodt Chemicals. Material Safety Data Sheet <http://www.mallchem.com/msds/ml599.htm>. [Accessed January 24, 2002]

[59] Technical Fact Sheet on Mercury. U.S. EPA, Office of Water <http://www.epa.gov/OGWDW/dwh/t-ioc/mercury.html>. [Accessed August 10, 2000]

and location of the facility. Vehicles are typically dismantled upon arrival, parts are segregated, cleaned, and stored. Remaining hulks are generally sold to scrap dealers.[60] Once the vehicle is brought to the site, fluids may be drained and the tires, gas tank, radiator, engine and seats may be removed. The dismantler may separate and clean parts. Such cleaning may include steam cleaning of the engine and transmission as well as the use of solvents to remove oil and grease and other residues. Usable parts are then inventoried and stored for resale. The remaining car and/or truck bodies are stored onsite for future sale of the sheet metal and glass. Stripped vehicles and parts that have no resale value are typically crushed and sold to a steel scrapper. Some operations may convert used vehicles and parts into steel scrap as a secondary operation. This is accomplished by incineration, shearing (bale shearer), shredding, or baling.[61]

Q: How are vehicles shredded and separated?

Ans: Vehicle shredders generally perform two primary tasks; shredding and separation. The shredding process chops the vehicle hulks received from the salvage facilities into small pieces no bigger than a fist. Once shredded, the pieces are separated according to the materials from which they are made. Most of the vehicle's iron and steel is removed magnetically. While the shredded material passes under a powerful magnet, these metals stick to the magnet, while all the other materials continue on to other separation processes. The materials remaining after magnetic separation then are further separated through a variety of processes. For example, materials may be washed in water; the heavy pieces sink to the bottom of the bath, while light objects, such as plastics, float. The materials that sink are separated into various metals (e.g., copper or aluminum), glass, and heavy rubber and plastic materials.[62]

Iron and steel, aluminum, and other metals may represent 75 percent of the vehicle weight that is typically recycled.[63] The materials that remain are the plastics, rubber, and glass (sometimes called "fluff"or automotive shredder residue).[64]

Q: What are the potential pollutant sources from activities that commonly take place at automobile salvage yards?

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[60] In a final notice for the National Pollutant Discharge Elimination System (NPDES) Storm Water Multi-Sector General Permit for Industrial Activities, EPA states that in urban areas, the remaining hulks are sold to scrap dealers due to limited space. In rural areas, remaining hulks are sold to scrap dealers less frequently. *See* 60 Fed. Reg. 189 (September 29, 1995).

[61] *See* 60 Fed. Reg. 189 (September 29, 1995).

[62] "Salvage Facilities and Vehicle Shredders," <http://www.environmentaldefense.org/programs/PPA/vlc/shredders.html>[Accessed November 28, 2001]

[63] *Id.*

[64] *Id*.

Ans: Below is a table identifying the common pollutant sources.[65]

Salvage Yard Activity	Pollutant Source	Pollutants
Vehicle Dismantling	Oil, anti-freeze, gasoline, diesel fuel, hydraulic fluids	Oil and grease, ethylene glycol, heavy metals
Used Parts Storage	Batteries, chrome bumpers, wheel balance weights, tires, rims, filters, radiators, catalytic converters, engine blocks, hub caps, doors, drive-ins, galvanized metals, mufflers	Sulfuric acid, galvanized metals, heavy metals, petroleum hydrocarbons, suspended solids
Outdoor Vehicle and Equipment Storage	Leaking engines, chipping/corroding bumpers, chipping paint, galvanized metal	Oil and grease, arsenic, organics, heavy metals, TSS
Vehicle and Equipment Maintenance	Parts cleaning, disposal of rags, oil filters, batteries, hydraulic fluids, transmission fluids, radiator fluids, degreasers	Chlorinated solvents, oil and grease, heavy metals, acid/alkaline wastes, arsenic, organics, ethylene glycol
Vehicle, Equipment, and Parts Washing Areas	Washing and steam cleaning waters	Oil and grease, detergents, heavy metals, chlorinated solvents, phosphorus, salts, suspended solids
Liquid Storage in Above Ground Storage Tanks	External corrosion and structural failure, installation problems, spills and overfills due to operator error	Fuel, oil and grease, heavy metals, materials being stored
Illicit Connection to Storm Sewer	Process wastewater, sanitary water, floor drain, vehicle washwaters, radiator flushing wastewater, leaking underground storage tanks	Oil and grease, heavy metals, chlorinated solvents, fuel, ethylene glycol, detergents, phosphorus, suspended solids

Q: How is PCB concentration measured?

Ans: Under TSCA regulations there are two basic ways of measuring PCB concentration. For example, when PCB oil is tested, the sampling results are measured in parts per million (ppm). When a transformer shell is surface wiped to determine PCB concentration, the sampling results are measured in micrograms per 100 centimeters squared ($\mu g/100\ cm^2$). While these measurements are not scientifically equivalent, as one measures volume, the other surface area, TSCA regulations provide an equivalency between bulk PCB concentrations and PCB contaminated surface measurements, so that they are effectively regulated in the same way. 40 C.F.R. Section 761.1(b)(3). Provisions that apply to PCBs at concentrations of < 50 ppm apply also to contaminated surfaces at PCB concentrations of #10$\mu g/100\ cm^2$. Provisions that apply to

[65] *See* 60 Fed. Reg. 189 (September 29, 1995).

PCBs at concentrations of $50 to <500 ppm apply also to contaminated surfaces at PCB concentrations of >10µg/100 cm^2 to < 100 µg/100 cm^2. Provisions that apply to PCB concentrations of $500 ppm apply also to contaminated surfaces at PCB concentrations of $100 µg/100 cm^2.

PCB concentrations can also be established from a permanent label, mark or other documentation from a manufacturer, service records or other documentation indicating the PCB concentration of all fluids used to service the equipment since date of manufacture, or testing (as described above). *See* 40 C.F.R. Section 761.2 - 761.3. While TSCA only allows these concentration assumptions while the equipment is in use, and not at the time of disposal, such evidence may nevertheless be considered in evaluating the applicability of SREA. For example, the Defense Reutilization and Marketing Service (DRMS) currently considers PCB transformers of <2 ppm to be non-hazardous items and sells transformers containing <2 ppm. Department of Defense (DoD) activities could identify such transformers by manufacturer plates but may not provide sampling data. Thus, there may not be sampling data to prove that the item did not contain PCBs > 50 ppm, but the Defense Reutilization and Marketing Office (DRMO) would refer to its policy and certification procedures for evidence the item was non-hazardous and make such representation to EPA for purposes of satisfying CERCLA Section 127(b)(2). EPA would then consider all the evidence regarding the item and transaction to determine SREA's impact on liability.

APPENDIX B
(SUMMARY OF JUDICIAL OPINIONS DEALING WITH THE EXEMPTION)

Case Law Pertaining to SREA

I. Cases pertaining to government actions

1). United States v. Mountain Metal Co., 137 F. Supp. 2d 1267 (N.D. Ala. 2001).
(ILCO CERCLA liability Trial and Settlements)

Judge Clemon rendered his opinion in this matter on April 5, 2001, finding the defendant Jowers Battery liable under Section 107(a)(3) of CERCLA for sending spent lead-acid batteries to the ILCO Site, and finding the Defendant Madewell and Madewell and consolidation Defendant Lion Metals not liable under Section 107(a)(3) of CERCLA for sending only batteries plates to the ILCO Site.

With respect to Jowers Battery, the Court followed the existing case law holding that Jowers did not sell a useful product to ILCO. The Court focused specifically on the fact that the batteries had to be broken open and the lead plates recovered. This process was found to amount to a treatment of a hazardous substance as defined by CERCLA. In contrast, the Court held that Madewell and Lion Metals sold useful products that did not have to be broken open by ILCO, thereby avoiding creation of the waste problem batteries generally created, citing to Douglass County Neb. v. Gould, 871 F. Supp 1242 (D. Neb. 1994) and RSR Corp. v. Avanti Dev. Inc., 58F. Supp 1037 (S.D. Ind. 1999).

With respect to Madewell and Lion Metals, the Court found that, "while the batteries themselves were no longer useful for their original intended purposes, the lead plates were in a form that allowed ILCO to place them directly in the furnace for smelting. As such they constituted a 'complete useful product,' [Douglass cite omitted] or raw material for processing rather than disposal." The Court responded to U.S. arguments that the lead plates still required treatment, as they contained sulfuric acid, by stating that, "while the testimony at trial indicated that a certain level of residual acid sometimes remained on the plates by necessity, [cite omitted] selling a useful product, albeit hazardous substances 'to serve a particular purpose' does not alone create arranger liability [citing to Douglass County and AM Int'l Inc. v. Int'l Forging Equipment Corp. 982 F. 2d 989 (6th Cir. 1993)].

The Court also discussed SREA liability, and found that though SREA's provisions had retroactive effect, the United States had a pending judicial action pursuant to CERCLA Section 127(i) and therefore, SREA did not apply. SREA did apply, however, to exempt the defendants from the action filed by the private plaintiffs, who were the settlors under the RD/RA Consent Decree for the ILCO Site. With regard to lead plates, the Court held that the recycling of lead plates is a defense to arranger liability under CERCLA, as lead plates are not excluded from the definition of "scrap metal" as a "recyclable material" under SREA. The Court found that both Lion Metals and Madewell met the exemption requirements under SREA, and were not excluded in that the plaintiffs were unable to show that either defendant had an objectively reasonable basis to believe that ILCO was not in compliance with environmental laws at the time they sold their lead plates to ILCO. The Court also found Jowers to be exempt under SREA, and not

subject to the exclusion for the same reasons as it found neither Madewell nor Lion Metals to be excluded. Finally, the Court ruled that the attorneys fees provisions under SREA did not apply because, "there was no notice to the plaintiffs of the fee-shifting provision before the commencement of this action."

2). United States v. Atlas Lederer Co., 97 F. Supp.2d 830 (S.D. Ohio 2000).

The United States brought an action against a property owner and a number of generators to recover response costs for cleanup and the defendants asserted contribution claims against another PRP, Livingston. On Livingston's motion for summary judgment, the Court held that SREA did not preclude third party contribution claims in action filed before the adoption of SREA. Contribution claims constitute part of the same "pending judicial action" brought by the United States, so Livingston's argument regarding the inapplicability of 127(i) to the cross-claims and third-party claims for contribution was rejected.

While Defendant Livingston admitted that the terms of SREA specifically state that the law shall not affect "any pending judicial action initiated by the U.S. prior to" the enactment of the exemption, (conceding that it is deprived of the literal application of SREA for the claim asserted by the U.S.), it argued that SREA should be applicable to the cross-claims and third-party contribution claims because they were not initiated by the U.S.. Livingston relied in part on the legislative statement read into the Congressional Record by Senator Lott to demonstrate Congress' intent that "any third party action or joinder of defendants, brought by a private party shall be considered a private party action, regardless of whether or not the original lawsuit was brought by the United States." 145 Cong. Rec. S14985-03 (daily ed. Nov. 19, 1999). The Court, however, found this argument unpersuasive. The Court found no "true" legislative history to support Livingston's interpretation of the provision.

Thus, the Court rejected Livingston's argument, holding that the plain language of SREA did not preclude the contribution claims in this lawsuit. The Court found that the present litigation, as a whole, constitutes a "judicial action," initiated by the U.S., and although the cross-claims and counterclaims are "claims," they are not "actions" as contemplated by the statute. The Court found that Livingston's argument failed to recognize the distinction between "actions" and "claims;" there is only one action, but there can be numerous claims, and therefore SREA was not applicable to the present lawsuit since it was commenced before passage of the exemption. Furthermore, the Court could not agree with Livingston's assertion that SREA merely constitutes codification of existing case law on the useful product defense. Livingston had argued for the Court to consider this case law in order to apply the "spirit and intent" of the law and the exemption to the contribution claims against Livingston notwithstanding Section 127(i).

[Note that there were four decisions, in which the Southern District of Ohio consistently held that the United States' pending claims, as well as private party cross- and third-party claims for contribution raised in the United States' action, are preserved. These decisions were issued on February 16, 2000 (97 F. Supp. 2d 830, (S.D. Ohio 2000)) (where the Court denied a

contribution defendant Livingston's motion for summary judgment); on February 22, 2000 (where the Court denied a motion for partial summary judgment filed by another defendant); February 21, 2001 (which distinguished DTSCA [described below] and rejected adherence to Lott statement because it "muddied" the plain meaning of Section 127(i), particularly in light of Daschle's having distanced himself from such statement); and March 12, 2001 (where the Court denied Livingston's motion to certify the question for immediate appeal). Note also that these decisions are not yet appealable.]

II. Cases pertaining to contribution claims

1). Gould, Inc. v. A & M Battery & Tire Serv., 232 F.3d 162 (3d Cir. 2000).

The Third Circuit held that: 1) SREA applies retroactively to judicial actions for CERCLA contribution initiated by private parties before November 29, 1999, if the actions were still pending on that date; 2) the definition of spent batteries means the entire battery, including non-recyclable components therein, such as rubber casings. Therefore, the Court vacated a district court grant of summary judgment in favor of a battery recycler who sought contribution costs from PRPs in connection with contamination at a battery recycling site.

The battery recycler entered into a consent agreement with EPA under CERCLA for the contamination. The recycler then initiated a contribution action against several PRPs, and the district court held the PRPs liable for a portion of the recycler's costs. After the PRPs filed their notices of appeal, however, Congress passed SREA. The Act states that it has no effect on any concluded judicial or administrative action or any pending judicial action initiated by the United States before November 29, 1999. The Court held that the Act may be applied retroactively in a judicial action initiated by a private party that is still pending as of November 29, 1999 because the Act is silent with respect to actions initiated by private parties. Contrary to the recycler's argument, the Court found that a private judicial action that was initiated following a related federal administrative action, in this case, the consent agreement, should not be deemed as having been initiated by the United States. Additionally, the it found Act does not violate the Fifth Amendment's due process guarantee for lacking a rational basis. It reasoned that the distinction between privately and federally initiated judicial actions is rationally related to preserving public finances. Finally, the Court based its finding (that SREA applied retroactively to pending private actions) on SREA's implication or negative inference. In addition, the Court found that Lott's "legislative history," inserted into the record by unanimous consent, supported a common sense construction of the Act that applies it retroactively to private judicial actions. The Court, therefore, remanded the case to determine whether the PRPs satisfy the Act's requirements for exemption from liability.

2). Morton Int'l, Inc. v. A.E. Staley Mfg. Co., 106 F. Supp.2d 737 (D.N.J. 2000).

The district court ruled that SREA can be applied retroactively in pending CERCLA private party actions for contribution. Accordingly, the Court granted a company's motion to amend its defense to encompass the provision. The Court found that Congress provided for the retroactivity of SREA in a manner that was "sufficiently express and unambiguous" and, therefore, a recycler may make a defense under the law.

In so ruling, the Court cited United States v. Atlas Lederer Co., 97 F. Supp. 2d 830 (S.D. Ohio 2000). and Department of Toxic Substances Control v. Interstate Non-Ferrous Corp., 99 F. Supp. 2d 1123, (E.D. Cal. 2000), two other recent cases that address whether the recycling law applies retroactively in CERCLA actions. The Court also cited the U.S. Supreme Court decision in Landgraf v. USI Film Products, 511 U.S. 244 (1994), in which the high Court said that statutes should not be applied retroactively unless Congress has expressly commanded or implied them to be. The Court, in assessing statements from Sens. Trent Lott, Blanche Lincoln, and Thomas Daschle, as well as the Act's plain meaning, concluded the congressional intent of SREA was for the law to be applied retroactively. In statements to Congress in 1999, Sen. Lott asserted that "Section 127 under CERCLA clarifies liability for recycling transactions and provides relief from liability for both retroactive and prospective transactions." Sen. Lincoln, in her statements to Congress, stated that she "first introduced the bill (Section 127) to relieve legitimate recyclers of scrap metal from unintended Superfund liability. The bill was developed in conjunction with the recycling industry, the environmental community and the administration and the Act is both retroactive and prospective." The Court interpreted this legislative history as expressing an intent by Congress to apply SREA retroactively. "Section 127 should be applied retrospectively here. The language, purpose, and legislative history of Section 127 support that determination. This determination, however, is not dispositive as a finding for any party. The Court rejected plaintiffs' argument that even if Section 127 were applicable, the defense would be futile because, it argued, mercury in liquid or sludge form is not "recyclable material." Rather, the Court left that issue for disposition in trial. The defendants seeking to add the Section 127 defense must still prove by a preponderance of the evidence that they meet all requirements set forth in this amendment," the Court said.

3). RSR Corp. v. Avanti Dev., Inc., 2000 WL 1449859 (S.D. Ind. 2000).

On June 13, 2000, the Court declined to decide whether SREA applied to a pre-enactment contribution action [as the Court had previously decided that the PRP's connection with the site was too attenuated to impose arranger liability; the Court did not reach whether SREA would then exempt the party], but suggested that retroactive imposition of Section 127(j)'s fee-shifting provision would result in manifest injustice. The Court noted that the Supreme Court had held in Key Tronic Corp. v. United States, 511 U.S. 809 (1994) that attorney and expert fees were not recoverable in a CERCLA contribution case, and that Section 127 changed that rule for cases covered by SREA. The Court suggested that change might result in manifest injustice, if it were applied retroactively. The Court reasoned that the plaintiffs made their decision about who to sue at a time when CERCLA did not allow a prevailing party in a contribution action to obtain costs and fees from its opponent. Further, the Court noted that to burden such a plaintiff's decision now with the imposition of attorney and expert fees of any

defendant that prevails under Section 127 is inconsistent with the "familiar considerations of fair notice, reasonable reliance, and settled expectations" identified in Key Tronic Corp. v. United States, 511 U.S. 809 (1994). [The case settled shortly after the Court issued its June 2000 Order, so there were no other decisions in the case addressing SREA.]

4). Department of Toxic Substances Control v. Interstate Non-Ferrous Corp., 99 F. Supp.2d 1123 (E.D. Cal. 2000).

The Court held that SREA applies to non-federal CERCLA enforcement actions pending at the time of its enactment. Therefore, the SREA exemption applies to a state environmental agency's CERCLA Sections 107(a) and 113(g) actions against several scrap metal recyclers. In enacting SREA, Congress did not explicitly mention every class of pending case to which Section 127 liability exemption applies. Nevertheless, SREA's structure, express language, purpose, and legislative history militate in favor of retrospectivity as to all pending actions brought by any party except the United States.

The Court held that Congressional intent that SREA apply retrospectively to pending cases initiated by parties other than the United States could be gleaned from: [1] the headings used in SREA indicating that Congress intended to clarify, not change, the law; [2] SREA's stated purpose, which was to exempt eligible recyclers from liability; [3] language throughout SREA, which fixes different requirements based on when the transaction occurred; [4] and, inter alia, the statement of Senator Lott, a chief co-sponsor of SREA, which was not "legislative history," but was to be accorded substantial weight. The Court, however, did not find SREA to be retroactive, meaning that it did not find that SREA attaches new legal consequences to prior acts, because: [1] no new liability was created, and the State of California's "rights" were not impaired (it would have cleaned up the site whether or not it thought it could recover costs from the parties it sued); and because [2] SREA clarified existing law, it did not change it.

Nevertheless, the retrospective application of the exemption to pending actions does not result in an automatic exemption because any party seeking to avoid liability under Section 127 must prove by a preponderance of the evidence all of the exemption requirements. In addition, the exemption does not apply retroactively to actions resolved before the passage of SREA.

APPENDIX E

SREA LEGISLATIVE HISTORY

The acquisition in fee of these three large parcels within Kodiak NWR now requires the U.S. Fish and Wildlife Service to make payments in lieu of taxes to the Kodiak Island borough in accordance with the Revenue Sharing Act of 1935. The act directs the agency to make such payments based on the fair market value of acquired lands.

The service is currently using the federally approved appraisals estimating fair market value of these three large parcels as the basis for computing the revenue sharing payment to the borough. The borough has rightly challenged the service's determination of fair market value based on the unique circumstances of these acquisitions and the findings made by the trustee council in approving funds for these acquisitions.

A plain reading of the Revenue Sharing Act (which authorizes the Secretary of the Interior to make refuge revenue sharing payments) requires that the determinations of fair market value be made in a manner that "the Secretary considers to be equitable and in the public interest." Clearly, the public interest associated with these unique acquisitions has been well documented in the findings of the trustee council.

The Revenue Sharing Act imposes no legal impediment for the Secretary to make a determination of fair market value that incorporates the unique circumstances of these acquisitions and the specific findings and actions taken by the trustee council. Thus, I urge the Secretary to review the Kodiak Island borough's appeal to the service's determinations for making revenue sharing payments and do what is fair and equitable as called for by the act.

These are unique circumstances that exist nowhere else in the United States and are limited in Alaska to lands acquired in the Exxon Valdez spill zone with settlement funds. Thus, there should be no consequences for how revenue sharing payments are computed for service acquired lands in other parts of Alaska or throughout the rest of the country.

At this opportunity, upon the passage of another year's funding for the Federal and Indian lands management agencies, I must call to the attention of my colleagues and to the attention of the President of the United States, an issue that troubles me deeply. Over the years, our Government has made commitments to native Americans which it has not kept. Many Americans thought that practice ended with the new, more enlightened self-determination approach to Indian policy. But as one of Alaska's representatives in the Senate, members of the President's staff made personal promises to me just last fall on behalf of the native people of the Chugach region which have not been kept.

In 1971 Congress passed the Alaska Native Claims Settlement Act (ANCSA). The act cleared the way for Alaska native people, including the Chugach natives, to receive title to a small portion of their traditional lands as settlement of their aboriginal land claims. The act also cleared the way for the additional millions of acres to our national parks, wildlife refuges, forests, and wilderness areas. Allowing native people to develop their lands freed them from economic bondage to the Federal Government. No longer would they have to depend exclusively on the benevolence of the Federal Government for hand-outs. They could create their own jobs, generate their own income, and determine their own destiny. But only if they had access to their lands.

Both the administration and the Congress recognized the lands would be virtually valueless if there was no way to get to them. The Claims Act recognized that native lands were to be used for both traditional and economic development purposes. Alaska natives were guaranteed a right of access, under law, to their lands across the vast new parks, refuges, and forests that would be created.

In 1971 and again in 1982, under the terms of the Chugach Native Inc. settlement agreement, the Federal Government made a solemn vow to ensure the Chugach people had access to their aboriginal lands. Now, a quarter of a century later, that commitment has not been fulfilled. Many of the native leaders who worked with me to achieve the landmark Native Land Claims Settlement Act have died after waiting for decades without seeing that promise honored. Last year, Congressman DON YOUNG, chairman of the House Resources Committee, added a provision to the House Interior appropriations bill that required, by a date certain, the Federal Government to live up to the access promises it made to the Chugach natives decades ago. In the conference last fall on the omnibus appropriations bill, the administration spoke passionately and repeatedly against the provision.

Why? They fully admitted the obligation to grant an access easement exists. They acknowledged further that access delayed is access denied and that further delays were harmful to the Chugach people. They opposed the provision on the grounds that it was not necessary since they were going to move with all due haste to finalize the easement before the end of 1998. Katie McGinty, then head of the President's Council on Environmental Quality sat across from me, looked me in the eye, and promised me they would fulfill this long overdue promise before the end of the year.

She even offered to issue a "Presidential proclamation" promising once again to do what had already been promised and promised and promised. My staff worked with OMB on the content of such a proclamation, but I told them it would not be necessary. I would take her at her word and believed the administration would live up to the personal commitment she made to me.

Here we are a year later. Chugach still has not received its easement. Ms. McGinty is gone, but her commitment on behalf of this administration remains. It is now the responsibility of others to ensure the promises she made to me and to Alaska's native people are kept.

Congressman YOUNG's House resources Committee has reported a bill, H.R. 2547, to address this issue legislatively, in the hope of forcing the administration to do what it has promised to do. Senator MURKOWSKI has been tireless in his efforts to get the Federal Government to live up to the promises made to Alaskans concerning access to our State and native lands. I support those efforts.

But I take the time today to say clearly to this administration that the promises made by our Government to the Chugach people for access to their lands—and to me personally as their representative—must be honored. Make no mistake, if the promises made to me by officials in this administration last fall are not lived up to soon, if they oppose the efforts of Congressman YOUNG and Senator MURKOWSKI on this issue, if they continue to obfuscate and "slow roll" this commitment, it will be clear to all that his administration does not perceive the true meaning of Robert Service's memorable phrase: "A promise made is a debt unpaid!"

Mr. LOTT. Mr. President. On behalf of myself and my cosponsor, Minority Leader DASCHLE, I would like to insert in the RECORD a legislative history which describes the purpose of each section of S. 1528, the Superfund Recycling Equity Act of 1999. Throughout the negotiations of this language there has been quite a bit of misrepresentation of the purpose of this bill. I hope this will be useful in clearing the confusion.

Mr. President, I ask unanimous consent that the legislative history be inserted in the RECORD at this point.

LEGISLATIVE HISTORY FOR S. 1528

SECTION 127—RECYCLING TRANSACTIONS

Summary

The Superfund Recycling Equity Act of 1999 (the language of S. 1528) seeks to correct the unintended consequence of CERCLA that actually discourages legitimate recycling. The Act recognizes that recycling is an activity distinct from disposal or treatment, thus sending material for recycling is not the same as arranging for disposal or treatment, and recyclable materials are not a waste. Removing the threat of CERCLA liability for recyclers will encourage more recycling at all levels.

The Act has three major elements. First, it creates a new CERCLA §127 which clarifies liability for recycling transactions. Second, it defines those recycling transactions for which there is no liability by providing that only those persons who can demonstrate that they "arranged for the recycling of recyclable material" as defined by the criteria in sections 127(c) through (e) are not liable under section 107(a)(3) or (a)(4). The specific definition of "arranged for recycling" varies depending upon the recyclable material involved. Third, a series of exclusions from the liability clarification are specified such that

persons who arranged for recycling as defined above may still be liable under CERCLA sections 107(a)(3) or (4) if the party bringing an action against such person can prove one of a number of criteria specified in § 127(f). Lastly, new CERCLA §§ 127(g) through 127(l) clarify several miscellaneous issues regarding the proper application of the liability clarification.

Discussion

§ 127(a)(1) is intended to make it clear that anyone who, subject to the requirements of § 127(b), (c), (d) and (e) arranged for the recycling of recyclable materials is not held liable under §§ 107(a)(3) or (4) of CERCLA. § 127 provides for relief from liability for both retroactive and prospective transactions.

§ 127(a)(2) is intended to preserve the legal defenses that were available to a party prior to enactment of this Act for those materials not covered by either the definition of a recyclable material in § 127(b) or the definition of a recycling transaction within the bill. It is not Congress' intent that the absence of a material or transaction from coverage under this Act create a stigma subjecting such material or transaction to Superfund liability.

§ 127(b)(1) is meant to include the broad spectrum of materials that are recycled and used in place of virgin material feedstocks. Whole scrap tires have been excluded from eligibility under this provision because of concerns about the environmental and health hazards associated with stockpiles of whole scrap tires. Processed tires including material from tires that have been cut or granulated, are eligible for the benefits of this provision.

The term "recyclable materials" is defined to include "minor amounts of material incident to or adhering to the scrap material . . ." This is because in the normal course of scrap processing various recovered materials may be commingled. An appliance may, for example, be run though a shredder that also shreds automobiles. As a result, the metal recovered from the appliance may come into contact with oil that entered the shredded incident to an automobile. Numerous other examples exist.

§ 127(b)(1)(A) is intended to exclude from the definition of recyclable material shipping containers between 30 and 3000 liters capacity which have hazardous substances other than metal bits and pieces in them. The terms "contained in" or "adhering to" do not include any metal alloy, including hazardous substances such as chromium or nickel, that are metallurgically or chemically bonded in the steel to meet appropriate container specifications.

§ 127(b)(1)(B) means that any item of material which contained PCBs at a concentration of more than 50 parts per million ("ppm") at the time of the transaction does not qualify as recyclable material. Material, which previously held a concentration of PCBs in excess of 50 ppm, but has been cleaned to levels below 50 ppm, would still qualify for exempt treatment. Item, in this context, is meant to apply only to a distinct unit of material, not an entire shipment.

This legislation builds a test to determine what are recycling transaction that should be encouraged under the legislation and what are recycling transactions that are really treatment or disposal arrangements cloaked in the mantle of recycling. The test specified in 127(c) applies to transactions involving scrap paper, plastic, glass, textiles, or rubber. Transactions can be a sale to a consuming facility; a return for recycling, whether or not accompanied by a fee; or other similar agreement.

§ 127(c), (d) and (e), the term "or otherwise arranging for the recycling of recyclable material" recognizes that while recyclables have intrinsic value they may not always be sold for a net positive amount. Thus a transaction in which one who arranges for recycling does not receive any remuneration for the material but rather pays an amount, less than the cost of disposal, still qualifies for the protection afforded by this § 127.

A commercial specification grade as referred to in § 127(c)91), can include specifications as those published by industry trade associations, or other historically or widely utilized specifications are acceptable. It is also recognized that specifications will continue to evolve as market conditions and technologies change.

For purposes of Sec. 127(c)(3), evidence of a market can include, but is not limited to: a third-party published price (including a negative price), a market with more than one buyer or one seller for which there is a documentable price, and a history of trade in the recyclable material.

§ 127(c)(3) means that for a transaction to be deemed arranging for recycling, a substantial portion, but not all, of the recyclable material must have been sold with the intention that the material would be used as a raw material, in place of a virgin material, in the manufacture of a new product. The fact that the recyclable material was not, for some reason beyond the control of the person who arranged for recycling, actually used in the manufacture of a new product should not be evidence that the requirements of this § 127 were not met.

Additionally, no single benchmark or recovery rate is appropriate given variable market conditions, changes in technology, and differences between commodities. Instead, a common sense evaluation of how much of the material is recovered is appropriate. For example, in order to be economically viable as a recycling transaction a relatively high volume of the inbound material is expected to be recovered for feedstocks of relatively low per unit economic value (such as paper or plastic), while a dramatically lower volume of material is expected to be recovered to justify the recycling of a feedstock of very high economic value (such as gold or silver).

It is not necessary that the person who arranged for recycling document that a substantial portion of the recyclable material was actually used to make a new product. Instead, the person need only be prepared to demonstrate that it is common practice for recyclable materials that he handles to be made available for use in the manufacture of a new saleable product. For example, if recyclable stainless steel is sold to a stainless steel smelter, it is presumptive that recycling will occur.

The first part of § 127(c)(4) acknowledges the fact that modern technology has developed to the point were some consuming facilities exclusively utilize recyclable materials as their raw material feedstock and manufacture a product that, had it been made at another facility, may have been manufactured using virgin materials. Thus, the fact that the recyclable material did not directly displace a virgin material as the raw material feedstock should not be evidence that the requirements of § 127 were not met.

Secondary feedstocks may compete both directly and indirectly with virgin or primary feedstocks. In some cases a secondary feedstock can directly substitute for a virgin material in the same manufacturing process. In other cases, however, a secondary feedstock used at a particular manufacturing plant may not be a direct substitute for a virgin feedstock, but the product of that plant completes with a product made elsewhere from virgin material. For example aluminum may be utilized at a given facility using either virgin or secondary feedstocks meeting certain specifications. In this case, the virgin and secondary feedstock materials compete directly. A particular steel mill, however, may only utilize scrap iron and steel as a feedstock because of the design restrictions of the facility. If that mill makes a steel product that competes with the steel product of another mill, which utilizes a virgin feedstock, the conditions of this paragraph have been met. In this example, the two streams of feedstock materials do not directly compete, but the product made from them do. It is the intent of this paragraph that the person be able to demonstrate the general use for which the feedstock material was utilized. It is not the intent that the person show that a specific unit was incorporated into a new product.

Section 127 provides for relief from liability for both retroactive and prospective transactions. However, an additional requirement is placed on prospective transactions in this paragraph such that persons arranging for such transactions take reasonable care to determine the environmental compliance status of the facility to which the recyclable material is being sent. Reasonable care is determined using a variety of factors, of which no one factor is determinant. The clause "not procedural or administratrative" is included to protect one who arranges for recycling from losing the protection afforded by § 127 due to a record keeping error, missed deadline or similar infraction by the consuming facility which is out of control of the person arranging for recycling. For transactions occurring prior to, or during the 90 days after, enactment of § 127 the requirements of § 127(c)(5) shall not be considered in determining whether § 127 shall apply.

The person arranging for the transaction must exercise reasonable care at the time of the transaction (i.e., at the time when the buyer and seller reach a meeting of the minds). Should a consuming facility's compliance record indicate past non-compliance with the environmental laws, but at the time the person arranged for the transaction the person exercised reasonable care to determine that the consuming facility was in compliance with all applicable laws, the transaction would qualify for relief under § 127.

In addition, the person must only determine the status of the consuming facility's compliance with laws, regulations, or orders, which directly apply to the handling, processing, reclamation, storage, or other management activity associated with the recyclable materials sent by the person. Thus, for example, a person who arranges for the recycling of scrap metal to a consuming facility would not be responsible for determining the consuming facility's compliance with regulations governing the consuming facilities production of its product, just the consuming facility's compliance with management of the scrap metal as an in-feed material.

It is common practice in the industry for scrap processors to otherwise arrange for the recycling of a secondary material through a broker. The broker chooses to which consuming facility the secondary material will be sold. In such cases, it is the responsibility of the broker, not the original person who entered into the transaction with the broker, to take reasonable care to determine the compliance status of the consuming facility. Likewise, a scrap processor may sell material to a consuming facility which in turn arranges for recycling of all or part of that material to another consuming facility. It is only the responsibility of the scrap processor to inquire into the compliance status of the party he arranged the transaction with, not subsequent parties.

In determining whether a person exercised reasonable care, the criteria to be applied should be considered in the context of the time of the transaction. Thus, when looking at "the price paid in the recycling transaction" in § 127(c)(6)(A) one should look not only at whether the price bore a reasonable relationship to other transactions for similar materials at the time of the transaction in question but should also take into account the circumstances surrounding the individual transaction such as whether it was part of a long term deal involving significant quantities. In addition, market conditions vary considerably over any given time period for any given commodity. Thus, when determining whether the price paid was reasonable, general market conditions, and variations should be considered.

Congress recognizes that small businesses often have less resources available to them than large businesses. Thus, § 127(c)(6)(B) acknowledges the fact that a small company may be able to determine less information about the consuming facility's operations than a large company. The size of an individual facility may be an important factor in the facility's ability to detect the nature of the consuming facility's operations.

§ 127(c)(6)(c) requires a responsible person who arranges for the recycling of a recyclable material to inquire of the appropriate environmental agencies as to the compliance status of the consuming facility. Federal, State, and local agencies may not respond quickly (or respond at all) to inquiries made regarding a specific facility's compliance record. § 127(c)(5) only requires a person to make *reasonable* inquiries; inquiries need not be made before every transaction. Inquiries need only be made to those agencies having primary responsibilities over environmental matters related to the handling, processing, etc. of the secondary materials involved in the recycling transaction.

§ 127(d)(1)(B) provides that a person who arranges for the recycling of scrap metal must meet all of the criteria set forth in § 127(c) as they relate to scrap metal and be in compliance with federal regulations or standards associated with scrap metal recycling that were in effect at the time of the transaction in question (not regulations promulgated or standards issued sequent to the time of the transaction). In addition, compliance must only be shown with Solid Waste Disposal Act regulations, which were promulgated and came into effect subsequent to enactment of § 127.

Section 127(d)(1)(C) as modified by § 127(d)(2) is not intended to exclude from liability relief such activities as welding, cutting metals with a torch, "sweating" iron from aluminum or other similar activities.

Section 127(d)(3) defines scrap metal using the regulatory definition found at 40 CFR 261.1 The Administrator is given the authority to exclude, by regulation, scrap metals that are determined not to warrant the exclusion from liability. Because § 127 grants relief from liability both prospectively and retroactively, any exclusion by the Administrator would only apply to transactions occurring after notice, comment and the final promulgation of a rule to such effect.

Persons who arrange for the recycling of spent batteries must meet the criteria specified in § 127(e), in addition to the criteria already discussed above and laid out in § 127(c) for transactions involving scrap paper, plastic, glass, textiles, or rubber.

The act of recovering the valuable components of a battery refers to the breaking (or smelting) of the battery itself in order to reclaim the valuable components of such battery. The generation, transportation, and collection of such batteries by persons who arrange for their recycling is an activity distinct from recovery. Thus, a person who generates, transports, and/or collects a spent battery, but does not themselves break or smelt such battery, is not liable under §§ 107(a)(3) and (4) provided all other requirements set out in this Section are met.

Section 127(e)(2)(A) provides that for spent lead-acid batteries, the party seeking the exemption must show that it met the federal environmental regulations or standards in effect at the time of the transaction in question (not regulations or standards issued subsequent to the time of the transaction).

Persons who arrange for recycling as defined by the criteria specified in sections 127(a)-(e) and discussed above may be liable under CERCLA §§ 107(a)(3) or (4) if the party bringing an action against such a person can demonstrate that one of the exclusions provided for in section 127(f) apply. Thus, the burden is on the government or other complaining party to demonstrate the criteria specified in section 127(f).

§ 127(f)(1)(A) is intended to mean that an "objectively reasonable basis for belief" is not equivalent to the reasonable care standard. The objectively reasonable basis for belief standard is meant to be a more rigorous standard than the reasonable care standard.

§ 127(f)(1)(A)(i) means that in order for the government to show that a recycling transaction should not receive the benefit of § 127, it would have to prove that a person knew that the material would not be recycled. Moreover, it is not necessary that every component of the recyclable material be recycled and actually find its way into a new product in order to meet this requirement.

For the purposes of § 127(f)(1)(A)(ii), smelting, refining, sweating, melting, and other operations which are conducted by a consuming facility for purposes of materials recovery are not considered incineration, nor would they be categorized as burning as fuel or for energy recovery. However, nothing in this bill shall be construed to limit the definition of recycling so as to restrict, inhibit, or otherwise discourage the recovery of energy through pyroprocessing from scrap rubber and other recyclable materials by boilers and industrial furnaces (such as cement kilns).

§ 127(f)(1)(A)(iii) sets forth certain obligations upon one who arranges for a recycling transaction which occurs within the first 90 days after enactment and had an objectively reasonable basis to believe that the consuming facility was not in substantive compliance with environmental laws and regulations. This is the corollary to § 127(c)(5). The clause "not procedural or administrative" is included to protect one who arranges for recycling from losing the protection afforded by § 127 due to record keeping error, missed deadline or similar infraction by the consuming facility which is out of control of the person arranging for recycling. There is no expectation that the person who arranged for recycling would necessarily have carried out any type of records search or made any extensive inquiries of administrative agencies.

The provision in § 127(f)(1)(B) is intended to apply to persons who intentionally add hazardous substances to the recyclable material in order to dispose or otherwise rid themselves of the substance.

§ 127(f)(1)(C) is intended to mean that reasonable care is to be judged based on industry practices and standards at the time of the transaction. Thus, in order to determine if a person failed to exercise reasonable care with respect to the management and handling of the recyclable material, one should look to the usual and customary management and handling practices in the industry at the time of the transaction.

In enacting § 127(l) Congress clearly intends that the exemptions from liability granted by §127 shall not affect any concluded judicial or administrative action. Concluded action means any lawsuit in which a final judgment has been entered or any administrative action, which has been resolved by consent decree, which has been filed in a court of law and approved by such court. Furthermore, § 127 shall not affect any pending judicial action brought by the United States prior to enactment of this section. Any pending judicial action, whether it was brought in a trial or appellate court, by a private party shall be subject to the grant of relief from liability. For purposes of this section, Congress intends that any third party action or joinder of defendants brought by a private party shall be considered a private party action, regardless of whether or not the original lawsuit was brought by the United States. Additionally, any administrative action brought by any governmental agency but not yet concluded as set forth above, shall be subject to the grant of relief from liability set forth in this § 127.

§ 127(l)(1) preserves the rights of a person to whom § 127(a)(1) does not apply to raise any defenses that might otherwise be raised under CERCLA. This is consistent with the explanation for § 127(a)(2).

By adding § 127(l)(2) Congress intended to make certain that no presumption of liability is created against a person solely because that person is not afforded the relief granted by § 127(a)(1).

Mr. DASCHLE. This past Wednesday—the day we finally produced a fragile budget agreement—marked the 199th anniversary of the first time Congress ever met in Washington, DC. They met that day in what was then an unfinished Capitol. Several times during the negotiations, the thought occurred to me that, if the same people who are running this Congress were in charge back then, the Capitol might still be unfinished.

These negotiations took longer, and were more difficult, than they needed to be. The good news is: We finally have a budget that will keep America moving in the right direction. Many longtime members and observers of Congress say this has been perhaps the most confusing, convoluted budget process they can remember.

There have been a lot of technical questions these last few weeks about accounting methods, economic growth projections, and CBO versus OMB scoring. But the big question—the fundamental question that was at the heart of this budget debate—is quite simple: Are we going to move forward—or backward?

We have chosen, thank goodness, to move forward. This budget continues the progress we've made over the last seven years. It maintains our hard-won fiscal discipline. It invests in America's future. And it honors our values.

This budget will put more teachers in our children's classrooms, and more police on our streets. It will enable us to honor our commitments to our parents, and fulfill America's obligations as a world leader. And, it will enable us to protect our environment and preserve precious wilderness areas for generations not yet born.

I want to thank the Majority Leader, my Democratic colleagues, especially Senator HARRY REID, our whip, and

Senator ROBERT BYRD, ranking member of the Appropriations Committee. I also want to thank some of my colleagues on the other side of the aisle, particularly Senator STEVENS, chairman of the Appropriations Committee.

In addition, I want to acknowledge and thank President Clinton and Vice President GORE, as well as the incredibly skillful, patient White House negotiating team, especially Chief of Staff John Podesta, Deputy Chief of Staff Sylvia Matthews, OMB Director Jack Lew; Larry Stein and Chris Jennings.

I also want to thank my own staff, and the staff of Appropriations Committee, who have worked many weekends, many late nights, to turn our ideas and debate into a workable budget document.

Finally, I want to acknowledge our dear friend, the late Senator John Chafee. Losing Senator Chafee so suddenly was one of the saddest moments in this difficult year. He embodied what is best about the Senate. He was a reasonable, honorable man who cared deeply about people. Completing the budget process was a major challenge. But in the end, I believe we have produced a budget John Chafee would have approved of.

This budget invests in our children's education - the best investment any nation can make. It maintains our commitment to reduce class size by hiring 100,000 teachers. It contains money to help communities repair old schools and build new ones. It will enable more children to get a Head Start in school, and in life. And it will allow more young people to attend after-school programs where they will be safe, and where they will have responsible adult supervision.

This budget protects Medicare beneficiaries by providing fair payments to the hospitals, clinics, home health care providers and nursing homes they rely on.

This budget will make our communities safer by putting 50,000 more police officers on the street—in addition to the 100,000 who have already been hired—and by investing in youth crime prevention.

This budget will help keep Americans healthy . . . by reducing hunger and malnutrition among pregnant women, infants and young children . . . and by increasing funding for the National Institute of Health and the national Centers for Disease Control.

This budget protects our environment. We took out riders that would have harmed our environment, and put in money to fund the President's Lands Legacy program.

This budget will help working families find affordable housing.

It will help farm and ranch families weather these hard times.

This budget protects our national security . . . by increasing military pay and readiness . . . and by reducing the nuclear threat at home and around the world.

This budget will help us fulfill our responsibilities as the world's only superpower. It provides money to pay our UN arrears and fund the Wye Accord to promote peace to the Middle East. It will also enable us to ease the crushing burden of debt on some of the world's poorest countries, so those nations can begin to invest in their own futures.

At the beginning of the year, our Republican colleagues proposed an $800 billion tax cut. For months, we all heard a lot of debate about what such a huge tax cut would mean. This budget makes it clear. There is no way we could have paid for an $800 billion tax cut without exploding the deficit again, or raiding Medicare, education, and other programs working families depend on.

Instead of moving backwards on taxes, we're moving forward. We're cutting taxes the right way. We're widening the circle of opportunity . . . by extending the R&D tax credit, and other tax credits that stimulate the economy . . . and by empowering people with disabilities by allowing them to maintain their Medicare and Medicaid coverage when they return to work.

There is one other point I want to make about the budget: For every dollar Democrats succeeded in restoring these last few weeks . . . for teachers, and police officers and other critical priorities . . . we have provided a dollar in offsets. Dollar for dollar, every one of our priorities is paid for. If CBO determines that this budget exceeds the caps, the overspending is in the basic budget our Republican colleagues drafted—on their own.

THE UNFINISHED AGENDA

As I said, Mr. President, this budget does move the country in the right direction—but only incrementally. My great regret and frustration with this Congress, is that we have achieved so little beyond this budget.

Look what we are leaving undone! In a year in which gun violence horrified America . . . a year in which gun violence invaded our schools and even a day care center . . . the far right has prevented this Congress from passing even the most modest gun safety measures—measures that would make it harder for children and criminals to get guns.

The far right has prevented this Congress—so far—from passing a Patients' Bill of Rights. More than 90 percent of Americans—Democrats and Republicans—support a real Patients' Bill of Rights that holds HMOs accountable. So does the AMA, the American Nurses Association—and 200 other health care and consumer organizations. And so does a bipartisan majority in both the House and Senate. Yet the Republican leaders in this Congress continue to use parliamentary tricks to deny patients their rights. As we leave here for the year, HMO reform, like gun safety, has been stuck for months in the black hole of conference committees.

The Republican leadership clearly is hoping that we will forget about all the shootings . . . forget about the families who have been injured because some HMO accountant overruled their doctor and denied needed medical treatment. I am here to tell them: The American people will not forget. And neither will Senate Democrats.

We will fight to close the gun show loophole. And we will fight to pass a real Patients' Bill of Rights next year. We will continue the fight for meaningful campaign finance reform. We will continue the fight to preserve and strengthen Medicare—including adding a prescription drug benefit. We will resume the fight for a decent minimum wage increase. We will fight for a fair resolution of the dairy-pricing issue. And, we will restore the rural loan guarantee program for satellite TV service, so rural Americans aren't left with second-class service.

It's taken a long time, but we finally have a budget that keeps America moving in the right direction. That is a relief, and a victory for the American people. But we still have a long way to go. We are leaving here with too many urgent needs unmet. We must do better next year.

Mr. LOTT. Mr. President, today the Superfund Recycling Equity Act, S. 1528, is being sent to the President as part of H.R. 3194. This is a great day for environmental law—this is the day that the public policy restores recycling as a rewarded, rather than punished activity.

This is a great day because partisan feuding was set aside so that the Congress could find a realistic, incremental, and common sense environmental fix. The freestanding Superfund Recycling Equity Act has strong bipartisan support with 68 cosponsors—68 Senators who have worked together to advance a fix to a small piece of the Superfund debate.

In this controversial world of environmental legislation it is rare that the leaders of the two parties in either Congressional body would agree on a piece of legislation. Well, here in the Senate we do. I wish to thank Minority Leader DASCHLE who understood the merits of recycling and twice joined with me to sponsor this legislation. Without his leadership, this legislation would not have been possible.

Mr. President, I would also like to commend the Senators who originally joined Senator DASCHLE and me in introducing this legislation. Senators WARNER and LINCOLN, who sponsored this measure in a previous Congress, have long exhibited their enthusiasm for fixing recycling rules. They are true leaders—leaders who have fostered this reasonable, workable, environmental proposal. Senator BAUCUS, the Ranking Minority Member of the Environment and Public Works Committee, has also been an avid supporter of recycling by including a version of the Superfund Recycling Equity Act in his comprehensive Superfund reform bill in the 103rd Congress. His six years of leadership in trying to fix public policy for recyclers is appreciated.

Mr. President, this bill would not be where it is at today, on the cusp of becoming law, had it not been for the active support of the late Senator John Chafee—a dear friend to me and many of our colleagues. John Chafee was a respected leader of the Environment and Public Works Committee. His advice and counsel helped shape my bill and he was an original cosponsor. I am proud to have been associated with him on this bill and its legislative process. I consider it a tribute that this bipartisan bill, negotiated with the Administration, representatives of the national environmental community, and the recycling industry, was supported by John Chafee, a man for whom consensus was so important. I believe this is not a footnote to John Chafee's legacy; rather I believe that he made this kind of cooperation possible.

The former mayor of Warwick, Rhode Island, is now the newly appointed Senator from Rhode Island. I have already had an opportunity to hear our newest senator—Senator LINCOLN CHAFEE—tell me about what Warwick has done with regards to recycling. It is a proud record—a record that would be extended and enhanced by this bill. I find it a credit to John Chafee's legacy that his son would be working with me on this legislation. Less than a month in the Senate and already LINCOLN's voice is being heard in ways that will directly help Rhode Island.

Mr. President, I also must recognize the vision of trade associations like American Petroleum Institute and National Federation of Independent Businesses for supporting an incremental solution. It would have been easier for these groups to oppose the bill because it did not address all the fixes for which they have been advocating. However, AFI and NFIB recognized that this increment would not jeopardize their efforts; rather it exemplifies the efforts of various stakeholders to accomplish something positive for the environment albeit it incremental.

And finally, I must thank the various staff members who have diligently worked toward the passage of this legislation: Eric Washburn and Peter Hanson of Senator DASCHLE's staff, Tom Gibson and Barbara Rogers of the Environment and Public Works committee staff, Charles Barnett of Senator LINCOLN's staff, Ann Loomis of Senator WARNER's staff, and my former staffer, Kristy Simms, who set the stage for this years success.

While too often Senators have seen various interest groups tell Congress why we cannot achieve some worthy environmental goal, the history of the Superfund Recycling Equity Act is replete with evidence of people coming together to correct a problem. Everyone, including myself, realizes that comprehensive reform is necessary to fix the vast array of problems in many different sectors of the environmental community. Unfortunately, we do not live in a perfect world, so Congress must do what is achievable whenever it is possible. This is good public policy—increments will show all parties there is a bridge for bipartisan environmental fixes. Recycling is the first of many necessary fixes, and I would bet my colleagues that it will not be the last fix.

This is a great day for many environmental groups who saw a change that they supported, not be taken hostage by the debate that has for so many years paralyzed reforms to Superfund. The original negotiation that resulted in the basis of the bill was tough and long—but it was fair. Each of the negotiating partners left items on the table that they would have wanted in an otherwise perfect world. Their collective approach was always bipartisan—they never pitted one party against another by pledging one group of interests against another. They remained loyal to their agreement for an unheard of five years—an eternity in Washington. Though this legislation was a long time in coming, I am grateful for its passage.

Mr. President, this is a great day for my good friend and fellow Mississippian, Phillip Morris. It is also a great day for the thousands of mom-and-pop recycling firms across America, like the one owned by Phillip Morris. This legislation protects the legacy of these firms which in most cases have been handed down through generations—often started by new immigrants to America nearly a hundred years ago. This ends the long Superfund nightmare that our nation's recyclers have suffered. Each time they sold their recyclable products they were, unintentionally, exposing themselves to costly Superfund liability. Removing Superfund as an impediment to recycling is a predicate to higher recycling rates throughout the nation.

The Superfund Equity Act is not about special interests getting a fix. No, this bill is about representing constituent interests throughout America and promoting the public interest. That is why Senator DASCHLE and I have 68 cosponsors—cosponsors that range completely across the liberal and conservative political spectrum, and range across all regions of America.

Mr. President, let me be clear, the Superfund Recycling Equity Act corrects a mistake nobody intended to make. When the Comprehensive Emergency Response, Compensation and Liability Act (CERCLA) was enacted in 1980, there was no suggestion that traditional recyclables—paper, plastic, glass, metal, textiles, and rubber were ever intended to be subject to Superfund liability. As a result of court interpretations, however, the sale of recyclables as manufacturing feedstock was considered to be arranging for the disposal of the material and, therefore, subject to Superfund's liability scheme. However, as we have all come to know as a matter of public policy, recycling is not disposal; it is the exact opposite of disposal.

Mr. President, let me say that again—recycling is not disposal, and a law is needed to remove this confusion. Sad, but true.

Enactment of this legislation clarifies this point and corrects the misinterpretations that have cost recyclers—primarily small family-owned businesses—millions and millions of dollars for problems they did not cause. With passage of the Superfund Recycling Equity Act, the costs of cleanup at sites that utilize recyclable materials as feedstock will be borne, rightfully, by those persons who actually cause or contribute to the pollution. As a result, those facilities will be less likely to cause contamination because they will no longer have recyclers to help them pay for Superfund cleanup. That's a powerful market incentive and will cause the consuming facility to become more environmentally conscientious.

Let me be clear, this legislation will not alter the basic tenants of environmental law—polluters will still pay. This legislation does not relieve recyclers of Superfund liability where they have polluted their own facilities. It also does not protect these businesses when they have sent materials destined for disposal to landfills or other facilities where those materials contributed, in whole or in part, to the pollution of those facilities. Furthermore, the public can expect recyclers to continue to be environmentally vigilant because they must operate their businesses in an environmentally sound manner, in order to be relieved of Superfund liability.

Today is a victory for coalition building that avoids the attack strategies that are so often employed by trade associations in DC. I hope they see the wisdom in building coalitions around achievable increments. This is how Congress can move forward. This is how Congress shows that it not only hears from its constituents but it acts successfully. Hostage taking, distortion, and scorch the earth approaches are not productive legislative strategies or lobbying tactics. Trade associations need to seek achievable solutions, develop responsible legislative goals, and avoid Beltway attack politics. I am extremely pleased that Congress has been able to take this tiny but very important step forward in reforming the Superfund law. I hope this accomplishment will inspire others to work for sensible, incremental solutions that help both our environment and our nation's economy.

I am proud that today Congress leveled the playing field and created equity in the statutory treatment of recycled material and virgin materials. I am proud to have removed the disincentives to recycling without loosening any existing liability laws for polluters. I am proud to have represented the mom and pop recyclers across America. I'm especially proud of the fact that this was all done in a bipartisan manner.

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