An Examination of, and Suggested Revisions to, CERCLA's Provisions Waiving the Federal Government's Sovereign Immunity from Actions Based on State Law

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An Examination of, and Suggested Revisions To, CERCLA’s Provisions Waiving the Federal Government’s Sovereign Immunity From Actions Based on State Law

Thomas Kearns*

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I. INTRODUCTION

This study focuses on the provisions set forth in section 120(a)(4) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) waiving federal sovereign immunity to actions based on state CERCLA-like laws concerning removal or remedial actions in response to the release.

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1 CERCLA, 42 U.S.C.A. § 9620(a)(4) (West, WESTLAW through Mar. 3, 1997). This section provides, "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) of this section 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." Citation to the U.S.C.A. is made due to Pub. L. No. 104-201, 110 Stat. 2484 (1996), which inserted, "or facilities that are the subject of a deferral under subsection (h)(3)(C) of this section." This amendment was added after the issuance of the latest supplement to the U.S.C. (Supp. I 1995). The amendment includes application to federal facilities subject to the deferral provisions section 120(h)(3)(C) of CERCLA which pertain to the deferral of the provision of a warranty that the United States will undertake any remedial action found necessary under CERCLA for federal property transfers covered by CERCLA section 120(h). This amendment has no bearing on the issues discussed in this paper, but reference heretofore will be made in this paper to 42 U.S.C.A. § 9620(a)(4) as it contains the latest version of CERCLA section 120(a)(4).

2 CERCLA, 42 U.S.C. § 9601(23) (1994). Remove or removal is defined as "the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided..."
for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act [42 U.S.C. s 5121 et seq.]

3 Id. § 9601(24). Remedy or remedial action is defined by CERCLA as "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 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."

4 Id. § 9601(22)(defining "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant), but excludes (A) any release which results in exposure to persons solely within a workplace, with respect to a claim which such persons may assert against the employer of such persons, (B) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine, (C) release of source, byproduct, or special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954 [42 U.S.C. § 2011 et seq.], if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under section 170 of such Act [42 U.S.C. § 2210], or for the purposes of section 9604 of this title or any other response action, any release of source byproduct, or special nuclear material from any processing site designated under
or threatened release\textsuperscript{5} of a hazardous substance.\textsuperscript{6} Currently the waiver only applies in cases of federal facility\textsuperscript{7} ownership or operation\textsuperscript{8} by

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\textsuperscript{5} "Threatened release" is not defined by CERCLA, but has been defined generally as a condition with the potential to result in release into the environment; see United States v. Martell, 887 F. Supp. 1183 (N.D. Ind. 1995).

\textsuperscript{6} 42 U.S.C. § 9601(14) (defining "hazardous substance" to mean, "(A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act (42 U.S.C. § 6921) (but not including any waste the regulation of which under the Solid Waste Disposal Act (42 U.S.C. § 6901 et seq.) has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 1317(a) of Title 33, (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

\textsuperscript{7} Id. § 9601(9) (broadly defining facility as "any building, structure, installation..., impoundment..., landfill, storage container," and "any site or area where a hazardous substance has... come to be located").

\textsuperscript{8} Id. § 9601(20)(A)(stating that "[t]he 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." Reference is made to 42 U.S.C.A. § 9601(20) for the definition in its entirety, including treatment of issues such as ownership resulting from foreclosure, etc., as provided by Pub. L. No. 104-208, § 2502(b), which added §9620(E)-(G).
a federal department, agency or instrumentality at the time the state law action is initiated, or when a facility was transferred by the federal government subject to the deferral provisions of section 120(h)(3)(C) of CERCLA.\footnote{\textit{CERCLA, 42 U.S.C.A.} § 9620(a)(4), (h)(3)(C) (\textit{West, WESTLAW through Mar. 3, 1997}); \textit{see also} Rospatch Jessco Corp. v. Chrysler Corp., 829 F. Supp. 224 (W.D. Mich. 1993); \textit{and} Redland Soccer Club, Inc. v. Department of Army of United States, 801 F. Supp. 1432 (M.D. Pa. 1992)(These cases held that federal ownership or operation must be current at the time the state CERCLA-like law action is commenced; however, the subsequent revision of section 120(a)(4) of CERCLA also waives federal sovereign immunity where the federal government transferred the facility in accord with the deferral provisions of section 120(h)(3)(C) of CERCLA, and the facility is not listed on the National Priorities List. There have been no reported cases, to date, interpreting this additional scenario where federal sovereign immunity from state CERCLA-like law has been waived).} \footnote{\textit{See CERCLA, 42 U.S.C.A.} § 9620(h) (\textit{West, WESTLAW through Mar. 3, 1997})(this section, as amended by Pub. L. No. 104-210, 110 Stat. 2484 (1996), governs CERCLA issues connected to the transfer of federal property). Subparagraph (h)(3)(C) provides in part: "(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," with this suitability decision premised on conditions set forth by sections 120(h)(3)(C)(I)-(IV). Subparagraph (h)(3)(A)(ii)(I) provides in part: "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"..."a covenant warranting that"..."any additional remedial action found to be necessary after the date of such transfer shall be conducted by the United States"; "the last day of the six month period beginning on the effective date of the regulations under paragraph (2) of this subsection," was October 16, 1990, \textit{see} 40 CFR § 373.1 (1996). The waiver of federal government sovereign immunity is only slightly expanded by the amended provisions of section 120(a)(4) of CERCLA as the fore-mentioned provisions must have been met prior to the transfer}
The issue of the federal government's liability for hazardous substance releases is arguably more than an issue of consistency with how the private sector is treated in order to avoid the appearance of hypocrisy. The federal government owns and operates more land and buildings in the United States than any private entity, and as such, its potential liability under any federal or state environmental law regulating private entities is a high visibility issue.\(^1\)

The federal government has been recognized as being the governmental entity most involved in the promulgation of statutes aimed at environmental protection in the United States.\(^2\) The result of the efforts of the federal government in the area of environmental affairs has been the development of a comprehensive federal framework providing for environmental protection.\(^3\)

The focus of federal environmental statutes and regulations has not only been on regulation of current and future behavior that threaten the environment, and the ramifications of such behavior, but also on imposing liability for harm caused by past behavior that has resulted in pollution - the effects of which pose potential risks to

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current and future generations.\textsuperscript{14} CERCLA is an example of legislation which focuses on present environmental harms resulting from past conduct.\textsuperscript{15}

This federal framework has prompted, and in some cases necessitated, states to follow the lead of the federal government by enacting statutes and regulations implementing federal enforcement regimens.\textsuperscript{16} However, states also have acted on their own initiative to enact statutes and promulgate regulations that mirror federal statutes and regulations even when the latter do not include explicit provisions for state enforcement.\textsuperscript{17} Finally, states have been forced to alter existing statutes and regulations in order to come into compliance with provisions of federal law.\textsuperscript{18}

Attempts to apply state laws with purposes similar to CERCLA to federal agencies and facilities may be stymied by the federal government's use of sovereign immunity as a defense to certain actions brought against it under these state laws.\textsuperscript{19} These clashes lead to several questions: (1) Are CERCLA's current provisions waiving the federal government's sovereign immunity from state liability too

\textsuperscript{14} CERCLA, 42 U.S.C. §§ 9601-9675 (1994 & Supp. I 1995) (indicating that CERCLA's main focus is on the cleanup of sites previously contaminated by hazardous waste, not the prevention of future pollution).

\textsuperscript{15} Id.

\textsuperscript{16} See generally CAA, 42 U.S.C. § 7410(a) (1994) (requiring every state to prepare a state implementation plan for the implementation, maintenance, and enforcement of National Ambient Air Quality Standards).

\textsuperscript{17} See generally Pennsylvania Hazardous Sites Cleanup Act (hereinafter HSCA), 35 PA. CONS. STAT. §§ 6020.101-6020.1305 (1993). HSCA is a state statute with the same purpose as CERCLA.

\textsuperscript{18} See generally RCRA, 42 U.S.C. § 6926 (1994) (allowing for state to issue treatment, storage or disposal facility (TSDF) permits if the state has adopted a permit program equivalent to that of RCRA, thus less stringent state requirements pertaining to the permitting of TSDFs would have to be altered or else they would be rendered meaningless by the provisions of RCRA).

\textsuperscript{19} See 42 U.S.C. § 9620(a)(4) (West, WESTLAW through Mar. 3, 1997) (stating that federal sovereign immunity is waived in certain, but not all, instances).
limited, too broad, or are they reasonable?; (2) What, if any, modifications should be made regarding the federal government's sovereign immunity from liability under state CERCLA-like laws?; (3) How should any changes to the sovereign immunity provisions of CERCLA be made?; and (4) Will suggested procedural and substantive revisions result in a more equitable system?

II. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA)

A. Summary of the History and Purposes of CERCLA

An understanding of the history and purpose of CERCLA is helpful to properly analyze the current status of sovereign immunity for the federal government under state laws with a purpose similar to CERCLA's.

CERCLA was enacted in part because common law was viewed as inadequate to protect the environment from problems arising from the handling of hazardous waste. These perceived shortcomings of common law include difficulty in proving the proximate cause of particular harm, a favoring of relief in the form of compensation rather than injunctions to achieve prevention of harm, and inherent difficulties in proving present injury for exposure to a hazardous substance because the harm may not manifest itself until years after the alleged tortious act. Promulgation of CERCLA and similar federal statutes exemplify efforts to alleviate the shortcomings of common law theories when seeking redress of environmental damage.

Since the 1970s, a plethora of federal laws, and amendments to these laws, have been enacted to provide environmental protection.

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21 Id.
22 Id.
These include the Clean Air Act (CAA)\textsuperscript{23} (aimed at protecting the air from pollution), the Clean Water Act (CWA)\textsuperscript{24} (aimed at protecting surface waters from pollution), and the Resource Conservation and Recovery Act (RCRA)\textsuperscript{25} (aimed at protecting the land and ground water from solid and hazardous wastes).

The primary emphasis of the preceding federal statutes was, and remains today, the regulation of future behavior and actions, not the remediation of damages caused by acts that occurred prior to the enactment of these laws.\textsuperscript{26} Events such as those at Love Canal,\textsuperscript{27} however, demonstrated a need for legislation to provide a framework for the remediation of harm resulting from past practices - practices that often were in accordance with the laws and regulations of the day.\textsuperscript{28} The 96th Congress, in its waning days passed, and President Jimmy Carter signed into law, the original version of CERCLA.\textsuperscript{29}

The main goal of CERCLA is the remediation of environmental damage resulting from past actions, regardless of the legality of those practices at the time at which they were employed.\textsuperscript{30}

\textsuperscript{26} MILLER \& JOHNSTON, supra note 20, at 52.
\textsuperscript{28} MILLER \& JOHNSTON, supra note 20, at 52.
\textsuperscript{30} MILLER \& JOHNSTON, supra note 20, at 52.
The prerequisites for the imposition of liability under CERCLA are set forth in the language of section 107 of CERCLA. The legality of past practices at the time at which they occurred is not a defense to liability under CERCLA. This approach results in the closure of the statutory environmental protection loop by imposing liability for present harms which have been caused by actions that occurred prior to the enactment of statutes (such as RCRA) regulating future behavior.

CERCLA provides for the remediation of sites where hazardous substances have been released, or where there is a threatened release of hazardous substances. Such remediation can be undertaken by the federal government, state governments, or potentially responsible parties. CERCLA also authorizes persons who have incurred response costs as a result of such a release or threatened release to bring an action in federal court, against those parties potentially responsible for the release or threatened release of hazardous substances, to recover any and all costs incurred in remediation actions.

This section's basic overview of CERCLA's history and purpose is followed in the next section by an examination of liability provisions, and of CERCLA's provisions with respect to federal sovereign immunity from provisions of state laws governing the past release and threatened release of hazardous substances.

32 42 U.S.C. § 9607(b), (j) (1994). No provisions are included within those defenses set out in the statute for a defense based on the acceptability of a practice resulting in the release of a hazardous substance, and in fact, such a provision would be counter to the intent of CERCLA.
33 See ROBERT V. PERCIVAL, ALAN S. MILLER, CHRISTOPHER H. SCHROEDER & JAMES P. LEAPE, ENVIRONMENTAL REGULATION 279-282 (1996)(An overview and summary of how events such as Love Canal demonstrated a need to address releases of pollutants that occurred as a result of conduct prior to enactment of regulations, such as RCRA, aimed at regulating behavior).
35 See id.
36 See id. § 9607.
B. CERCLA Liability and Consequences of Liability

Examination of the liability provisions of CERCLA, and their applicability to the federal government, is critical in determining what, if anything, should be done concerning sovereign immunity of the federal government to claims brought under state laws modeled after CERCLA.

1. CERCLA Liability and Consequences in General

a. CERCLA Liability as a Potentially Responsible Party

A party who may be liable under the provisions of section 107 of CERCLA is deemed to be a "Potentially Responsible Party" (PRP).\(^37\) A PRP's liability under CERCLA may be monetary (for damages for the response costs incurred by others due to actions of the PRP)\(^38\) or the PRP may be subject to an administrative order issued by the Environmental Protection Agency (EPA), enforceable by a federal court, requiring it to undertake all necessary remedial action.\(^39\)

There are four classes of persons who can be PRPs under CERCLA.\(^40\) The first class of PRPs are owners and operators of a vessel\(^41\) or facility where a release or threatened release of a

\(^{37}\) PRP (Potentially Responsible Party) is a general term and acronym for those persons subject to CERCLA liability.


\(^{39}\) Id. § 9606.

\(^{40}\) Id. § 9607(a); see also MILLER & JOHNSTON, supra note 20, at 64 (noting that the elements to establish a case under an administrative order issued under 42 U.S.C. § 9606 are essentially the same as to establish liability under 42 U.S.C. § 9607, which is helpful as the former does not identify PRPs); United States v. Outboard Marine Co., 556 F. Supp. 54 (N.D. Ill. 1992)(explaining that a party who would be liable as a PRP in a cost recovery action can also be issued a cleanup order).

\(^{41}\) 42 U.S.C. § 9601(28) (1994)(defining the term "vessel" as "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water").
hazardous substance has occurred and response costs are incurred.\(^4\)\(^2\) Ownership of the facility alone has been held to trigger liability; there is no need for the owner to have been involved in the activities leading to the disposal, release or threatened release of the hazardous substance.\(^4\)\(^3\) Owners who have asserted a lack of control over disposal activities taking place on their property have been determined nevertheless to meet the criteria of being a CERCLA PRP.\(^4\)\(^4\)

The second category of PRPs includes any person, who, at the time of disposal\(^4\)\(^5\) of any hazardous substance at a facility, owned or operated the facility where disposal of a hazardous substance took place, and from which a release of the hazardous substance occurred causing response costs to be incurred.\(^4\)\(^6\) This category has been interpreted by some courts to establish PRP status for a past owner or operator of a facility as a result of "passive disposal" such as the passive leakage of a hazardous substance from a container and its subsequent movement through the environment even in the absence

\(^4\)\(^2\) *See* id. § 9607(a)(1).
\(^4\)\(^5\) 42 U.S.C. § 9601(29) (1994)(giving "disposal" the same meaning as section 1004 of the Solid Waste Disposal Act amending RCRA, codified at 42 U.S.C. 6903 (1994). The term "disposal" is defined by RCRA as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters"). Judicial interpretations of what constitutes "disposal" appear broad, *see*, e.g., Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837 (4th Cir. 1992), *cert. denied*, 506 U.S. 940 (1992)(holding that "disposal" has a range of meanings, and does not require "active human conduct").
of active conduct.\textsuperscript{47} Such strict interpretations, however, appear to be the exception, not the rule.\textsuperscript{48}

The third group liable under CERCLA are any parties who arranged for the disposal or treatment of a hazardous substance owned or possessed by the arranger, at another party's facility, when a release or threat of release resulting in response costs took place at the facility.\textsuperscript{49} There are no rules for the absolute determination of "arranger" status; the facts of each case have been held determinative.\textsuperscript{50} Generators of hazardous substances have been held to fall within this category.\textsuperscript{51}

The fourth and final category of PRPs under CERCLA are those persons who accept a hazardous substance for transport to a disposal facility chosen by the transporter, and where a subsequent release or threatened release of a hazardous substance occurs with resulting response costs.\textsuperscript{52} A party accepting hazardous substances for transport to a disposal facility which is chosen by anyone other than the party receiving the hazardous waste, will not be liable under this provision of CERCLA.\textsuperscript{53}

\textsuperscript{47} Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d at 845.

\textsuperscript{48} See United States v. CDMG Realty Co., 96 F.3d 706 (3d Cir. 1996)(differentiating disposal from release, with ownership during the former a prerequisite to liability under CERCLA); Plaskon Electronic Materials, Inc. v. Allied Signal, Inc., 904 F. Supp. 644 (N.D. Ohio 1995)(holding that passive migration of pollutants that were released during a prior owner's tenure is not sufficient to result in PRP status under section 107(a)(2) of CERCLA).


\textsuperscript{51} See United States v. Hardage, 750 F. Supp. 1444 (W.D. Okla. 1990)(CERCLA liability for a generator does not require generator's knowledge that disposal would occur at a certain site, nor does a belief that the substances would be disposed of elsewhere prevent liability).

\textsuperscript{52} 42 U.S.C. § 9607(a)(4) (1994).

\textsuperscript{53} Id.
b. Strict Liability

Strict liability, in general, is defined as liability that is imposed upon a party regardless of that party's intent to interfere with a legally protected interest of another party.\(^{54}\) There is no requirement under strict liability that the party being held liable breached a duty of care.\(^{55}\) Consequently, strict liability is commonly referred to as liability without fault.\(^{56}\) Lack of intent, lack of negligence, or lack of the existence of a duty of care are not defenses to an action based upon strict liability.\(^{57}\)

Strict liability for violators of CERCLA has been established as the applicable standard of liability as a result of CERCLA's definition of "liable."\(^{58}\) The CERCLA definition of liable refers to section 311 of the CWA.\(^{59}\) Although strict liability is not explicitly specified as the standard of liability by section 311 of the CWA,\(^{60}\) past judicial interpretations of section 311 of the CWA have interpreted that section as specifying strict liability as the standard to be followed in determining liability.\(^{61}\)

Section 107 of CERCLA\(^{62}\) also has been interpreted as not requiring proof that a defendant in a cost recovery action caused the release or disposal of a hazardous substance.\(^{63}\) The only requirements that must be set forth in a cost recovery action against a PRP under

\(^{54}\) W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 75 (5th ed. 1984).
\(^{55}\) Id.
\(^{56}\) Id.
\(^{57}\) Id.
\(^{59}\) Id.
\(^{61}\) United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983); see also United States v. NEPACCO, 810 F.2d 726 (8th Cir. 1986).
section 107 of CERCLA are that: (1) the defendant fits into one of the categories of PRPs established by CERCLA; (2) a hazardous substance was released, or there was a threat of such a release, from a facility; (3) costs were incurred as a result of the release or threatened release; (4) these costs were necessary to respond to the release or threatened release; and only when the action is brought by a private party (5) these costs were consistent with the "national contingency plan" (NCP).

**c. Joint and Several Liability**

The term "joint and several liability" is not found within the statutory language of CERCLA. The concept of joint and several liability, however, has generally been applied to defendant PRPs in CERCLA cost recovery actions, but such application is not mandated by CERCLA.

The theory of joint and several liability provides for apportionment of damages among liable parties only in those circumstances where a defendant can demonstrate that the harm is divisible. Any one party found liable jointly and severally is potentially responsible for the entire amount of the plaintiff's recoverable response costs. The plaintiff in a case where joint and

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65 Id. § 9605(a) (requiring that EPA establish procedures for the cleanup of hazardous substances that have been released, including steps to identify the necessary level of cleanup).
67 See United States v. Chem-Dyne Corp., 572 F. Supp. 802, 808, 810 (S.D. Ohio 1983) (recognizing blanket application of joint and several liability is not mandated under CERCLA; where a party seeks to limit CERCLA liability, the burden of proving facts that merit such a limitation is on the party seeking such a limitation).
69 Id.
several liability is applicable bears no burden to prove the damages are not divisible.  

An example of the application of this principle would be a group of three separate entities who each shipped the same type of hazardous substances, in similar containers, to a storage facility in 1970. Subsequently, one of these containers released the hazardous substance into the environment in 1988 and the identity of the generator of that container cannot be determined. CERCLA liability provisions render each of the entities PRPs as they arranged for disposal of a hazardous substance that has been released into the environment. Because the harm is indivisible (since the origin of the container cannot be determined) each of the PRP entities may be jointly and severally liable for those response costs, consistent with the NCP, incurred as a result of the release. This is despite the fact that only one of the entities shipped the container from which the hazardous substance was ultimately released.

One scenario where courts have recognized an exception to the imposition of joint and several liability under CERCLA is a situation where harm is shown to be divisible.  

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70 See Purolator Products Corp. v. Allied-Signal, Inc., 772 F. Supp. 124 (W.D. N.Y. 1991) (holding that CERCLA liability is joint and several unless liable parties establish that the harm done is divisible among themselves, thus, this presumption negates the existence of any affirmative burden on the plaintiff to show indivisibility of harm).


73 See generally In re Bell Petroleum Services, Inc., 3 F.3d 889 (5th Cir. 1993) (although joint and several liability is often imposed under CERCLA, defendant met it's burden of showing harm was divisible and that imposition of joint and several liability was not appropriate); United States v. Alcan Aluminum, Inc., 964 F.2d 252 (3rd Cir. 1992) (defendant capable of proving harm it caused that resulted in the incursion of CERCLA response costs is divisible is only liable for costs associated with the harm it was responsible for causing); Laidlaw Waste Systems, Inc. v. Mallinckrodt, Inc., 925 F. Supp. 624 (E.D. Mo. 1996) (holding that joint and several liability applies in a CERCLA cost recovery actions absent a showing by the defendant of divisibility of harm, with the court noting such a
assume each entity shipped its hazardous substance in different types of containers, and that proof of this fact existed. Two of the three PRPs could conceivably escape joint and several liability if they could further show that the release of the hazardous substance was from a container of a type different from the ones they used.\(^7\)

However, in the scenario where divisibility could be shown, such a showing does not automatically absolve a PRP from CERCLA liability.\(^7\) Such a PRP still will be liable for costs incurred as a result of any response action (i.e., removal of the hazardous substance sent by the PRPs) in connection with the removal of the hazardous substances sent by the entities who established divisibility.\(^7\)

The applicability of joint and several liability may also be dependent upon the type of action brought against the PRP. Discussion of the consequences of being a PRP are discussed in more detail in the next section, but, in general, there are two types of actions where a PRP may find itself a defendant: (1) a cost recovery action brought under section 107 of CERCLA;\(^7\) or (2) an action for contribution brought by another PRP under section 113 of CERCLA.\(^7\) Courts have held that liability is joint and several in cost

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\(^7\) 42 U.S.C. § 9607(a) (1994). It is emphasized that a showing of divisibility is not analogous to a showing of not falling into one of the categories of liable parties set forth in CERCLA.

\(^7\) Id. § 9607(a)(4)(A)-(D).

\(^7\) Id.

\(^7\) Id. § 9613(f). To date, every federal Circuit Court of Appeals that has examined the issue of whether a PRP may bring a cost recovery action under section 107 of CERCLA against other PRPs has answered in the negative, relegating PRPs to contribution actions against other PRPs as set forth by section 113 of CERCLA. See, e.g., New Castle County v. Halliburton Nus Corp., 111 F.3d 1116, 1120 (3rd Cir. 1997); Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1496 (11th Cir. 1996); United States v. Colorado & Eastern R.R., 50 F.3d 1530, 1536 (10th Cir. 1995); United Technologies Corp. v. Browning-Ferris Indus., Inc., 33 F.3d 96, 99 (1st Cir. 1994); Akzo Coatings, Inc. v. Aigner Corp.,
recovery actions, but only several in contribution actions.\textsuperscript{79}

The ramifications of joint and several liability are potentially very costly because a PRP whose actions contributed little to the problems that resulted in the plaintiff's response costs may ultimately be liable for the entire cost of the cleanup.\textsuperscript{80}

d. Consequences of Liability

One possible consequence of PRP status is subjecting the PRP to an EPA administrative order to take remedial action that is necessary as a result of a release or threatened release of a hazardous substance for which PRP status is established.\textsuperscript{81} The PRP does not have the option of seeking pre-enforcement judicial review of such a cleanup order.\textsuperscript{82} Failure to comply with a cleanup order subjects the PRP to penalties of up to $25,000 per day and treble punitive damages.\textsuperscript{83}

Another possible consequence of PRP status is that a PRP may be liable in a cost recovery claim under section 107 of CERCLA\textsuperscript{84} for: (1) all costs of removal or remedial action incurred by the United States Government, a State or an Indian Tribe that are not inconsistent with the NCP developed by the Environmental Protection Agency (EPA);\textsuperscript{85} (2) other necessary costs incurred by any

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30 F.3d 761, 764 (7th Cir. 1994); (all rejecting the availability of a cost recovery action as set forth by section 107 of CERCLA as allowing a PRP to bring a cost recovery action against other PRPs). There are federal District Courts which have allowed PRPs to bring cost recovery actions against other PRPs under section 107 of CERCLA that have not yet been overruled by appellate decisions. \textit{See e.g.}, City of North Miami, Florida v. Berger, 828 F. Supp. 401 (E.D. Va. 1993).


\textsuperscript{80} \textsc{Restatement (Second) of Torts}, \textit{supra} note 68 at §§ 433A, 881.

\textsuperscript{81} 42 U.S.C. § 9606 (1994).

\textsuperscript{82} \textit{Id.} § 9613(h).

\textsuperscript{83} \textit{Id.} §§ 9606(b)(1), 9607(c)(3).

\textsuperscript{84} \textit{Id.} § 9607(a)(4)(A)-(D).

\textsuperscript{85} \textit{Id.} § 9607(a)(4)(A).
other person consistent with the NCP;\textsuperscript{86} (3) damages for injury to, destruction of, or loss of natural resources resulting from the release of a hazardous substance;\textsuperscript{87} and (4) the costs of any health assessments or studies of health effects that are undertaken.\textsuperscript{88}

To avoid liability a defendant in a cost recovery action brought by federal, state or Indian governments needs to prove that actions taken by those seeking recovery of costs were inconsistent with the NCP.\textsuperscript{89} However, private parties seeking recovery for their response costs have the burden of showing that their actions were consistent with the NCP.\textsuperscript{90}

Another consequence of CERCLA liability is that PRPs are also subject to CERCLA contribution actions brought by other PRPs.\textsuperscript{91} A PRP that has been held liable under a cost recovery action brought under CERCLA, or that has agreed to take remedial actions at a site after receiving a cleanup order issued under CERCLA, may pursue an action to receive contributions from other PRPs.\textsuperscript{92}

The potential consequences of CERCLA liability are clearly costly. Attention will be focused on whether these same ramifications exist for federal agencies who fall within the statutory language defining PRPs.

2. Federal Government Liability and Consequences

Section 120(a)(1) of CERCLA explicitly states that its provisions are applicable to all branches of the federal government (judicial,

\textsuperscript{86} \textit{Id.} § 9607(a)(4)(B).
\textsuperscript{87} \textit{Id.} § 9607(a)(4)(C).
\textsuperscript{88} \textit{Id.} § 9607(a)(4)(D).
\textsuperscript{92} \textit{Id.}
executive, and legislative), and that the federal government is explicitly required to comply with the procedural and substantive provisions of CERCLA just as any non-governmental entity. Under this provision, the federal government is explicitly subjected to CERCLA's liability provisions to the same extent that any other party is subject to under CERCLA. Language is also included in CERCLA stating that nothing in section 120 of CERCLA, "shall be construed to affect the liability of any person or entity under sections 9606 and 9607 of this title."

Section 120 of CERCLA does not merely require the federal government to adhere to the same standards as any other entity. Section 120(h) of CERCLA mandates certain behavior, in certain circumstances, from federal agencies which is not required from non-federal government entities. These additional provisions include such requirements as positive notification to transferees of federal property that hazardous substances have been stored at the facility being transferred for more than one year, released from the facility, or disposed of at the facility; and the inclusion of a covenant in any deed for facilities transferred by the federal government warranting that, "all remedial action necessary to protect human health and the

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93  42 U.S.C.A. § 9620(a) (West, WESTLAW through Mar. 3, 1997)(reference is made to U.S.C.A. in order to cite to a source which includes amendments to section 120(a)(4) of CERCLA added by Pub. L. No. 104-201, 110 Stat. 2484 (1996)).
95  Id.
96  Id.
97  Id.
98  42 U.S.C.A. § 9620(h) (West, WESTLAW through Mar. 3, 1997)(reference is made to U.S.C.A. in order to cite to a source which includes amendments added to section 120 of CERCLA by Pub. L. No. 104-201, 110 Stat. 2484 (1996)).
99  Id. § 9620(h).
100 Id. § 9620(h)(1).
environment with respect to any such substance remaining on the property has been taken before the date of such transfer."101

The federal government has been found liable under section 107 of CERCLA102 based upon judicial findings that the government met the requirements of being an operator of the facility at the time disposal of hazardous substances took place at the facility in question.103 Specifically, the federal government has been held liable under section 107 of CERCLA104 as an operator of a facility as a result of extensive regulation of that facility, although the facility was privately owned.105

Clearly, sovereign immunity of the federal government from CERCLA liability is waived because the federal government is subject to the same liability under CERCLA as any other entity.106 This includes CERCLA's provisions regarding behavior that results in PRP liability, the application of the same CERCLA strict liability standards, the application of CERCLA's joint and several liability standards, and being subject to CERCLA cost recovery actions.107

CERCLA also contains an explicit waiver of sovereign immunity provision which makes state laws concerning removal and remediation actions applicable, in certain circumstances, to the federal government.108 This waiver is applicable with respect to state laws concerning removal and remedial actions, including state laws governing enforcement, "at facilities owned or operated by a department, agency, or instrumentality of the United States," and certain property transferred by the federal government where the

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101 Id. § 9620(h)(3)(A)(ii)(I).
103 FMC Corp. v. United States Dept. of Commerce, 29 F.3d 833 (3d Cir. 1994).
105 FMC Corp. v. United States Dept. of Commerce, 29 F.3d 833 (3d Cir. 1994).
107 Id.
notice requirements of section 120(h) of CERCLA have been deferred in accord with the provisions of that section. Emphasis will be on the adequacy of the provisions requiring current federal ownership or operation, in light of the applicability of CERCLA liability to the federal government, because the provisions regarding waiver of the federal government sovereign immunity from state CERCLA-like laws for certain transfers of federal facilities is very narrow in its applicability.

C. Defenses to CERCLA Liability

CERCLA provides a limited number of affirmative defenses to any PRP. These defenses are available equally to federal government PRPs, as they are to any other PRP. Additional defenses are provided by CERCLA to the federal government.

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109 Id. § 9620(h).
110 Id. § 9620(a)(4).
111 42 U.S.C. § 9620(a)(1) (1994). Emphasis is placed on the ownership and operation requirements as the waiver provisions of section 120(a)(4) of CERCLA pertaining to certain transfers of federal facilities is explicit as to when it applies, and its application is narrow due to the procedural requirements of the transfer that are necessary for the waiver to apply. See 42 U.S.C.A. § 9620(a), (h) (West, WESTLAW through Mar. 3, 1997)(note 10 of this paper contains excerpts of section 120(h) of CERCLA outlining the procedural requirements of a transfer of a federal facility necessary for the waiver contained in section 120(a)(4) of CERCLA applicable to such transfers to apply).
113 42 U.S.C.A. § 9620(a) (West, WESTLAW through Mar. 3, 1997)(this assertion follows from this section making all portions of section 107 of CERCLA applicable to the federal government, and would thus include defenses contained therein).
114 42 U.S.C. §§ 9604(j)(3), 9607(d) (1994)(the former provides that PRP status is not conferred upon the federal government when it acquires property in order to conduct a remedial action under CERCLA, the latter provides that there is no liability from the release or threatened release of a hazardous substance as a result of rendering care, assistance or advice consistent with the NCP absent any negligence).
There are several statutory defenses available to a PRP. The PRP has the burden of proof to establish these defenses by a preponderance of the evidence. These defenses are releases resulting solely from: (1) an act of God; (2) an act of war; (3) the actions of a third party; or any combination of the actions covered by the preceding three defenses. Under the last defense, there is an "innocent landowner defense." The innocent landowner defense is

116 Id.
117 Id. § 9607(b)(1); see also United States v. Stringfellow, 661 F. Supp. 1053 (C.D. Cal. 1987) (holding that heavy rain resulting in a release of hazardous substance was not an act of God, but rather a foreseeable occurrence, thereby nullifying the use of this defense).
118 Id. § 9607(b)(2) (this defense would be available, for instance, if as a result of the Japanese attack on Pearl Harbor on December 7, 1941, a release of a hazardous substance occurred); see also United States v. Shell Oil Co., 841 F. Supp. 962 (C.D. Cal 1993) (government regulation of the production of aviation fuel during World War II not an act of war within the meaning of CERCLA, and cannot be used as a defense to the release of hazardous substances following production of the aviation fuel needed for the war effort).
119 Id. § 9607(b)(3) (providing a defense if the release of the hazardous substance from the facility was caused by a third party, but the third party cannot be an agent or employee of the party asserting the defense, nor can the third party's act have occurred in connection with a contractual relationship with the person asserting the defense. Further, the party asserting the defense must establish that he exercised due care regarding the hazardous substance, and that he took those precautions from acts or omissions reasonably foreseeable to result from the third party's actions or omissions.); see also City of Detroit v. A. W. Miller, Inc., 842 F. Supp. 957 (E.D. Mich. 1994).
120 Id. § 9607(b)(4) (allowing for a defense based upon a release of a hazardous substance resulting solely from a combination of an act of war, and act of God and/or an act of a third party where the requirements of section 107(b)(3) are met).
121 See, e.g., In re Hemingway Transport, Inc., 174 B.R. 148 (Bankr. D. Mass. 1994) (holding that the innocent landowner defense requires the party asserting the defense to show that he exercised due care with respect to hazardous substances, took necessary precautions against the foreseeable acts of third parties).
contained within CERCLA's definition of contractual relationship, and requires the party asserting the defense to show that "appropriate inquiry" was made regarding the prior disposal or placement of hazardous substances at or on the property prior to the purchase.

A PRP is not liable in any cost recovery action when the release of the hazardous substance was a "federally permitted release." A release of this type would include one that is in compliance with the terms of a permit issued in accord with a federal environmental statute.

Courts generally have held that these defenses provided in the language of CERCLA are the only defenses available to a PRP in a suit brought under CERCLA. The use of equitable defenses by PRPs has been rejected by the majority of courts considering the subject.

There is no mention of the invocation of sovereign immunity by the federal government as a defense to a CERCLA action where it is a PRP. The contrary, as previously mentioned, is true. Except as provided in sections 104(j)(3) and 107(d) of CERCLA, the federal government is generally held to the same liability standard, including the limitation on available defenses, as any other CERCLA PRP.

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123 Id. § 9601(35)(B).
124 Id. § 9607(j).
125 Id. § 9601(10)(defining federally permitted release).
129 Id. § 9620(a)(1).
This will be an important consideration when attention is given to the adequacy of the extent of the current waiver of federal sovereign immunity in actions brought under state statutes to remediate past releases of hazardous substances.

III. STATE LAWS WITH SIMILAR PURPOSES AS CERCLA

Responsibilities delegated to individual states by CERCLA are rather limited when compared to the delegation of authority to states under other federal environmental statutes. Under CERCLA, most remediation and enforcement authority is retained by the federal government.

The federal dominance under CERCLA should not be construed to infer that states have remained dormant in the area of cleanup of sites where there have been releases or threatened releases of hazardous substances. Commentators have noted that the federal government is not the only governing body with an interest in protecting the environment. Judicial decisions have upheld state requirements under state law imposing more stringent cleanup standards upon PRPs than contemplated by CERCLA.

By the mid 1990s, 48 states had enacted CERCLA-like statutes. Many of the state statutes are modeled directly upon CERCLA. These statutes are not necessarily exact clones of CERCLA, and have been grouped into three categories: (1) state statutes similar in scope

130 JAMES A. STIMSON ET AL., GUIDE TO ENVIRONMENTAL LAWS: FROM PREMANUFACTURE TO DISPOSAL 269 (1993).
131 Id.
134 Id. at 414-416.
135 Cooke, et al., supra note 132.
136 Id.
and basis to CERCLA; (2) state statutes with a narrower scope than CERCLA; and (3) state statutes with more breadth than CERCLA in either their scope, their requirements, or both. These statutes are constantly evolving, and this evolution can affect such matters as determining liability under these statutes.

These state statutes, in conjunction with CERCLA, have been critical in efforts to remediate sites where hazardous substances have been released or threatened with release. The beneficial effects of CERCLA have been recognized as significant in on-going efforts to address the problems of sites where hazardous substances have been released. Over 1,300 sites had been identified in need of cleanup, and had been placed by EPA on the National Priorities List (NPL) by the end of 1994. The seemingly large number of sites placed on the NPL pales in comparison to the number of sites identified by states for cleanup under state statutes: in excess of 100,000 by the end of 1994, a figure that demonstrates the value of these state statutes.

Parties that have been held liable under state CERCLA-like statutes have attempted to assert that these state statutes are preempted by CERCLA, but courts have not accepted such preemption arguments. This is not surprising, as CERCLA contains a broad disclaimer of any such preemptive intent.

137 Id.
138 Id.
139 Id.
140 Id.
141 See 42 U.S.C. § 9605 (1994)(the NPL is a list comprised of the most dangerous sites eligible for cleanup under CERCLA).
142 Cooke, et al., supra note 132.
143 Id.
144 SUPERFUND LAW AND PROCEDURE, § 2.2(B)(2) (Allan J. Topol and Rebecca Snow eds., 1992).
These state laws modeled after CERCLA, as previously mentioned, may be broader in their coverage (through explicit language, judicial interpretations, or both) than CERCLA.\textsuperscript{147} The applicability of these state laws to the federal government, however, is dependent upon the federal government's waiver of its sovereign immunity.

IV. FEDERAL SOVEREIGN IMMUNITY AND ITS WAIVER ALLOWING FOR FEDERAL LIABILITY UNDER STATE CERCLA-LIKE STATUTES

A. Overview of Federal Sovereign Immunity

The principle of sovereign immunity is a derivative of the ancient divine right of kings.\textsuperscript{148} The divine right of kings held that God ordains the king, and since God can do no wrong, it follows that the king could do no wrong.\textsuperscript{149} This immunity extended from the king to his government and its individual employees.\textsuperscript{150} The king, and only the king, could waive the prohibition against suits against the sovereign, and allow for his subordinates to be sued for their actions.\textsuperscript{151}

Sovereign immunity of the federal government has been derived from this ancient common law doctrine.\textsuperscript{152} The federal government is the highest governing body in the United States, and as such, the United States Constitution's Supremacy Clause\textsuperscript{153} has been deemed

\textsuperscript{147} Cooke, et al., \textit{supra} note 132.
\textsuperscript{148} SUSAN J. BUCK, UNDERSTANDING ENVIRONMENTAL ADMINISTRATION AND LAW 93 (1991).
\textsuperscript{149} \textit{Id.}
\textsuperscript{150} \textit{Id.}
\textsuperscript{151} \textit{Id.}
\textsuperscript{152} Nichols v. United States, 74 U.S. (7 Wall.) 122, 126 (1868)(recognizing that the government would be unable to function without the protection provided by sovereign immunity).
\textsuperscript{153} U.S. CONST. art. VI, cl. 2.
to prevent suits by states or individuals against the federal government, when the federal government's action was within the powers delegated by the United States Constitution. One ramification of this principle is that where sovereign immunity exists for the federal government, states can't bring suit seeking an order directing federal compliance with state laws.

The federal government, like the ancient king, can waive its sovereign immunity and require itself to comply with state law. Waiver of sovereign immunity may have been at the king's discretion in ancient times, but it is the sole province of the Congress in the United States. A waiver, when granted by Congress, has been required to be clear and unequivocal on the face of a statute. Waivers of the federal government's sovereign immunity will be strictly construed in favor of the federal government; that is, sovereign immunity is not assumed to be waived where Congress' intent is not clear.

One example where the federal government has waived, in certain circumstances, its sovereign immunity from suit is the Federal Tort Claims Act (FTCA). The FTCA allows suits against the federal government when it has not followed mandatory procedures, or when it performs a nondiscretionary duty in a negligent fashion. The

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154 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 427 (1819) (stating that the Supremacy Clause of the United States Constitution protects the federal government against actions brought by individual states when the federal government actions challenged by the state were consistent with the powers the Constitution gave to the federal government).

155 Id. at 436.


161 Id.
FTCA does not waive federal sovereign immunity for discretionary functions of federal agents and employees.\textsuperscript{162}

The concept of sovereign immunity is extended to states, with limitations, by the Eleventh Amendment.\textsuperscript{163} Under this amendment, a State and arms of the state, are essentially protected from suits by its citizens, or citizens of another state, in federal court.\textsuperscript{164} Municipal governments and their employees are not protected by the Eleventh Amendment, but, in some instances, may be protected by extensions of sovereign immunity granted to them by state law.\textsuperscript{165}

Sovereign immunity has been deemed by its critics as an obsolete doctrine, but such attacks have not rendered it, by any means, extinct.\textsuperscript{166} It has been recognized as a concept that will continue to be a consideration in matters involving government compliance with statutory laws.\textsuperscript{167}

\textsuperscript{162} Id.
\textsuperscript{163} U.S. CONST. amend. XI.
\textsuperscript{164} Id. (protecting states from suits by citizens of other states); Seminole Tribe of Florida v. Florida, 11 F.3d 1016 (11th Cir. 1994), \textit{cert. denied}, 116 S. Ct. 1416 (1996)(Congress generally lacks the authority to abrogate by statute the states' sovereign immunity from suits by its citizens granted by the Eleventh Amendment; Hans v. Louisiana, 134 U.S. 1 (1890)(construing Eleventh Amendment to extend protection to include suits against a state in federal court by its own citizens).
\textsuperscript{165} \textit{See} Community Communications Co. v. City of Boulder, 445 U.S. 40 (1982)("home rule" did not extend state's exemption from Sherman Act liability to municipality); \textit{but see} Scott v. City of Sioux City, 736 F.2d 1207 (8th Cir. 1984)(municipality shielded from Sherman Act liability as zoning act was enacted pursuant to a state law).
\textsuperscript{166} RICHARD H. RODGERS, JR., \textsc{Handbook on Environmental Law}, \textsection 1.7 (1977).
\textsuperscript{167} Id.
B. Summary of Waiver Provisions of Federal Sovereign in the CAA, the CWA, and RCRA

Provisions waiving the federal government's sovereign immunity are contained in the CAA, the CWA, and RCRA. However, differences exist in the language expressing each of these waivers.

The waiver contained in the CAA has been interpreted to subject federal facilities to the same requirements as private facilities. The relevant part of the waiver states that, "[e]ach department agency, and instrumentality of the Federal Government...shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any non-governmental entity."

The waiver provisions of the CWA are essentially the same as those in the CAA. The pertinent language of the CWA's waiver reads,

[e]ach department agency, or instrumentality of the Federal Government . . . shall be subject to, and comply with, all Federal, State, interstate, and local

172 Id. at 157.
requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the manner, and to the same extent as any non-governmental entity.\textsuperscript{175}

The provisions waiving sovereign immunity in RCRA have undergone a substantial revision through the adoption of the Federal Facilities Compliance Act (FFCA).\textsuperscript{176} The FFCA was a reaction to the Supreme Court's decision in United States Department of Energy v. Ohio.\textsuperscript{177} This decision narrowly construed the then existing provisions of RCRA to exempt the United States (i.e., the federal government) from civil penalties under RCRA.\textsuperscript{178}

The FFCA addressed Congress' disagreement with the Supreme Court's holding concerning RCRA, but it did not amend the sovereign immunity provisions of the CWA.\textsuperscript{179} The FFCA amended RCRA's waiver provisions to by adding the following language to RCRA:

The Federal, State, interstate and local substantive and procedural requirements referred to in this subsection include, but are not limited to, all administrative orders and all civil and administrative penalties and fines, regardless of whether such penalties or fines are

\textsuperscript{175} 33 U.S.C. § 1323 (1994).
\textsuperscript{177} United States Dept. of Energy v. Ohio, 503 U.S. 607 (1992)(holding narrowly construed RCRA's and the CWA's waivers of the federal government's sovereign immunity, thus barring states from imposing civil fines for past violations of RCRA or the CWA).
\textsuperscript{178} Id.
punitive or coercive in nature or are imposed for isolated, intermittent, or continuing violations. The United States hereby waives any immunity otherwise applicable to the United States with respect to any such substantive or procedural requirement (including, but not limited to, any injunctive relief, administrative order or civil or administrative penalty or fine referred to in the preceding sentence, or reasonable service charge).\(^{180}\)

Each of these waivers has been attacked as either too narrow in scope, too narrow in scope as judicially interpreted, or both.\(^ {181}\) Regardless of one's belief regarding the validity of such arguments, these are the waivers that currently exist under the CAA, the CWA, and RCRA. These waivers can be used by means of comparison, to interpret CERCLA's waiver provisions and to analyze what, if anything, should be done to CERCLA's waiver provisions.

**C. CERCLA's Provisions Waiving the Federal Government's Sovereign Immunity**

CERCLA, like the CAA, the CWA, and RCRA, contains provisions for the waiver of the federal government's sovereign immunity.\(^ {182}\) One provision explicitly makes the federal government subject to the same CERCLA liability and administrative order provisions of CERCLA as any private party.\(^ {183}\) These provisions must be considered when justifying any proposed changes to the


\(^{181}\) See Davenport, supra note 12; Horne, supra note 174; Kassen, supra note 179.


section of CERCLA waiving sovereign immunity of the federal government to state laws with purposes similar to CERCLA.

The provision of CERCLA waiving the federal government's sovereign immunity to removal and remedial actions under state laws reads:

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 subject to deferral under subsection (h)(3)(C) of this section 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.\textsuperscript{184}

The fact a federally owned or operated facility is listed on the NPL has been held not to prohibit the application of state CERCLA-like law to the facility.\textsuperscript{185} However, the Supreme Court has not addressed this issue. Although the Tenth Circuit has held that these provisions allow the application of state law to removal and remedial actions at federally owned or operated facilities regardless of NPL

\textsuperscript{184} 42 U.S.C.A. § 9620(a)(4) (West, WESTLAW through Mar. 3, 1997).
\textsuperscript{185} United States v. State of Colo., 990 F.2d 1565 (10th Cir.), \textit{cert. denied}, 510 U.S. 1092 (1993) (also holding that Congress did not intend RCRA or state versions of RCRA to be enforced instead of laws pertaining to removal and remedial actions).
status, this view has been rejected by a federal District Court. A revision of CERCLA may negate this inconsistency if clear statutory language addressing this issue is included in any amended version of CERCLA.

The CERCLA waiver provision quoted above also states that a federally owned or operated facility may not be held by state law to a higher standard than a non-governmental owned or operated facility would be held. Absent such a dichotomy in the provisions of a state's law based upon the existence of federal ownership or operation of the facility, the state law need only concern removal and remedial actions in order to be applicable. A state law has been held to meet these removal/remedial action requirements, based upon its form and purpose, which was to raise funds for site cleanups and to prevent future hazards due to improper disposal of toxic wastes through remedial action and enforcement. A court also has held that state CERCLA-like laws need not contain precise standards delineating violations with absolute certainty in order to be potentially applicable to federally owned or operated facilities, so long as the focus of the law is on removal and remedial actions.

The potential conflict in application of CERCLA's waiver of federal sovereign immunity provisions to state laws similar to CERCLA, is in the interpretation of the requirement of current ownership or operation by the federal government as a prerequisite

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186 Id.
189 Crowley Marine Services, Inc. v. Fednav Ltd., 915 F. Supp. 218 (E.D. Wash. 1995)(state law with the purpose of raising funds for the cleanup of sites where improper disposal of toxic substances had occurred is applicable to a federally owned facility under the waiver provisions of CERCLA).
for the waiver to operate (unless the facility was transferred subject to the deferral provisions of section 120(h)(3)(C) of CERCLA and not on the NPL).\textsuperscript{191}

The current line of reported cases holds that current ownership or operation by the federal government is required for the waiver provisions of CERCLA to subject the federal government to liability under state CERCLA-like laws.\textsuperscript{192} However, these holdings have been legislatively overruled for those federal facilities transferred in accord with the deferral provisions of section 120(h)(3)(C) of CERCLA\textsuperscript{193} and not on the NPL. These holdings have also been rejected in an unreported decision by a federal District Court.\textsuperscript{194}

The current provisions of section 120(a)(4) of CERCLA\textsuperscript{195} have been held not to waive the federal government's sovereign immunity from any civil or punitive penalty provisions contained in state CERCLA-like laws.\textsuperscript{196} This is consistent with the current view that any such waiver of the federal government's sovereign immunity must be clear and unequivocal in form on the face of the statute.\textsuperscript{197}

\textsuperscript{193} 42 U.S.C.A. § 9620(h)(3)(C) (West, WESTLAW through Mar. 3, 1997).
\textsuperscript{194} Tenaya Assoc. v. United States Forest Serv., No. CV-F-92-5375 REC, 1995 WL 433290 (E.D. Cal. May 19, 1995)(An unreported decision holding waiver of federal sovereign immunity applicable in any action where the harm occurred during federal ownership or operation, thus dispensing with the requirement that federal ownership or operation is necessary at the time the action is brought. Though of no precedential value even in the Eastern District of California, the same decision could be reached in the future in a reported case.); see also 42 U.S.C.A. §9620(A)(4) (West, WESTLAW through Mar. 3, 1997)(CERCLA's current provisions regarding waiver of federal government sovereign immunity from state CERCLA-like laws).
\textsuperscript{195} 42 U.S.C.A. § 9620(a)(4) (West, WESTLAW through Mar. 3, 1997).
\textsuperscript{196} State of Maine v. Department of Navy, 973 F.2d 1007 (1st Cir. 1992).
Although CERCLA's current provisions governing waiver of sovereign immunity by the federal government in relation to state laws involving removal and remedial actions, applies only when the facility in question is currently owned or operated by the federal government, or the facility was transferred subject to the provisions of section 120(h)(3)(C) of CERCLA and is not on the NPL. However, the state law need only concern removal or remedial actions in order to meet the criteria necessary to be the type of law that is potentially applicable to the federal government although it is unclear whether listing of the site on the NPL renders the waiver inapplicable. Furthermore, as noted earlier, this waiver is not applicable to any provisions of a state law that imposes more stringent standards upon federally owned or operated facilities than upon non-federal government owned or operated facilities.

V. THE CURRENT INEQUITIES OF THE CERCLA PROVISIONS WAIVING FEDERAL SOVEREIGN IMMUNITY FOR FEDERALLY OWNED OR OPERATED FACILITY NON-COMPLIANCE WITH STATE CERCLA-LIKE LAWS

Arguments can be made that there are inequities in the current provisions of section 120(a)(4) of CERCLA waiving federal sovereign immunity. These inequities, arguably, relieve the federal government from liability in situations where common sense would dictate liability should exist. Conversely, the present form of the waiver provisions can be argued to subject the federal government to litigation concerning liability under state laws governing removal and

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199 Id. § 9620(a)(4).
200 Id.
201 Id.
203 Id.
remedial actions in situations where application of state law unfairly affects the operation of the federal government.204

A review of the legislative history of the Superfund Amendments and Reauthorization Act of 1986 (SARA)205 shows that section 120 of CERCLA,206 indicates that Congress intended to have state CERCLA-like laws apply to federal facilities.207 Unfortunately, there is no indication as to the purpose or reason for limiting the waiver of federal sovereign immunity.208 This is evidenced by the fact that courts interpreting this section have relied upon analysis of the plain language on the face of the statute, while hypothesizing what purpose was sought to be furthered by Congress.209

The current interpretation of reported cases is that the federal government must own or operate the facility being subjected to state law at the time of the lawsuit's initiation, unless the facility was not on the NPL and was transferred in accordance with the deferral provisions of section 120(h)(3)(C) of CERCLA.210 An opposite view (that federal ownership or operation of the facility need only to have been present at the time of the release of the hazardous substance

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204 See Stan Millan, Federal Facilities and Environmental Compliance: Toward a Solution, 36, LOY. L. REV. 319, 326 (1990) (acceptance of such an argument can serve as a basis for the application of the doctrine of sovereign immunity).


208 Id.


from the facility) has been taken by a court in an unreported decision. This approach conceivably could be followed by federal courts in circuits where no binding precedent yet exists. The issue has yet to be addressed by either the Supreme Court, or by Congress in any proposed amendments to CERCLA.

Acceptance of the prevailing view, that the waiver of federal sovereign immunity is limited to instances where federal government ownership and operation is ongoing, or the facility was transferred in the manner outlined by section 120(a)(4) of CERCLA, leads to the potential for ridiculous results. The federal government would be potentially liable under state laws pertaining to "removal and remedial action" only at a facility currently owned or operated by the federal government.

\[\text{See} \ \text{Tenaya Assoc. v. United States Forest Serv., No. CV-F-92-5375 REC, 1995 WL 433290 (E.D. Cal. May 19, 1993).}\]
\[\text{42 U.S.C.A. § 9620(a)(4) (West, WESTLAW through Mar. 3, 1997).}\]
\[\text{See} \ \text{Tenaya Assoc. v. United States Forest Serv., No. CV-F-92-5375 REC, 1995 WL 433290 (E.D. Cal. May 19, 1993).}\]
\[\text{See} \ \text{Mary Ann Gwinn, Wastes May Have Contaminated MacNeil Island's Water, SEATTLE TIMES, May 16, 1987, at C20 (Ironically, the Federal Bureau of Prisons, charged with the duty of holding those sentenced for violations of federal criminal law, including environmental crimes, operated the United States Penitentiary (USP), MacNeil Island through 1981. This site was contaminated with 320 drums of hazardous waste. The site was subsequently transferred to the State of Washington. Since the transfer occurred prior to the initiation of any state law based action, and was not in accord with the procedures waiving the federal government's sovereign immunity based on the type of transfer (as set forth in section 120(a)(4) of CERCLA), the federal government's sovereign immunity from state CERCLA-like laws for the release or threatened release of hazardous substances on the former site of USP MacNeil Island would not be waived.); and Jeffrey A. Roberts, OSHA cites Jeffco federal prison - Employees worked in off-limits area, DENVER POST, April 7, 1994, at B4 (This article concerns work being in done in an area at the Federal Correctional Institution (FCI), Englewood, Colorado, identified by EPA as possibly containing buried solvents, liquid-filled} \]
The federal government, however, would be immune from a state CERCLA-like law action at a similar facility where the contamination occurred during federal government ownership or operation, but where the facility was transferred from the federal inventory prior to the initiation of the state law based action, and was not transferred in accordance with the deferral provisions of section 120(h)(3) of CERCLA. In the latter situation, the federal government would not escape CERCLA liability due to the provisions of section 120(a)(1)-(2) of CERCLA. The plain language of the statute may render such a result correct, but the result has been questioned on policy grounds.

In certain situations, application of state laws with purposes similar to CERCLA to a facility owned or operated by federal government is more than just unfair due to the fact the federal facility is covered by CERCLA. For example, simultaneous litigation under both CERCLA and state CERCLA-like laws with narrower or similar liability as CERCLA may interfere with the federal government's performance of its duties, in such a case, there is justification for the invocation of federal sovereign immunity from state laws with the same purpose of CERCLA. Arguably, state CERCLA-like laws with broader liability than CERCLA may reflect a deficiency in CERCLA necessitating amendment of CERCLA rather than reliance on state CERCLA-like law. This argument is

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See generally Millan, supra note 204 (outlining this argument as a justification for sovereign immunity).
bolstered by the retrospective nature of CERCLA,\textsuperscript{221} and the limitations on representation of the federal government's interests in state legislatures.

CERCLA is designed to deal with past transgressions resulting in contamination of the environment today.\textsuperscript{222} The word "transgressions" is in itself potentially misleading, because the strict liability under CERCLA makes the results of conduct that may have formerly been acceptable behavior subject to liability under CERCLA.\textsuperscript{223} CERCLA, despite this retroactive nature, has been held to be constitutional.\textsuperscript{224} Similarly, retroactivity attacks on state laws based upon CERCLA will also be unsuccessful.\textsuperscript{225}

The federal government is unfairly prejudiced when the federal government is liable under state CERCLA-like laws because the federal government is one entity with no representation in the state legislatures. Furthermore, the federal government lacks lobbyists equivalent to those of other PRPs who can lobby state lawmakers to oppose their adoption of state CERCLA-like laws. Any other entity who is a PRP has some means by which to be heard in the debate

\textsuperscript{221} See MILLER \& JOHNSTON, supra note 20, at 52 (CERCLA regulates the present effects of past acts).
\textsuperscript{222} Id.
\textsuperscript{223} Id.
\textsuperscript{224} United States v. Rohm and Haas Co., 939 F. Supp. 1142 (D. N.J. 1996) (CERCLA's retroactivity does not violate due process, ex post facto, or bill of attainder provisions of the Constitution of the United States); see also Nevada v. United States, 925 F. Supp. 691 (D. Nev. 1996); Gould, Inc. v. A & M Battery & Tire Serv., 933 F. Supp. 431 (M.D. Pa. 1996); but see United States v. Olin Corp., 927 F. Supp. 1502 (S.D. Ala. 1996), rev'd, 107 F.3d 1506 (11th Cir. 1997)(Federal district court held the retroactivity of CERCLA did not meet the test outlined in Landgraf v. USI Film Products, 511 U.S. 244 (1994), that absent a clear congressional intent, a statute should not be presumed to be retroactive. This test has been presumed to be met by other courts. This decision stood alone, and was reversed).
\textsuperscript{225} State laws would likely withstand the same scrutiny applied by courts examining CERCLA. However, if the intent of the legislative body regarding the retroactive application of the state law is held to be unclear, the state law may be deemed not to apply retroactively.
EXAMINATION OF CERCLA

over the adoption and revision of CERCLA-like state laws by individual states. Persons residing in states have the power of the vote, and the power to make contributions to help elect lawmakers who are sympathetic to their point of view. Corporations can rely on their employees in the election and lobbying of state legislators. Those PRPs who are not residents of a state do not have the power of the vote, but nonetheless have the power of the wallet to assist the election of those likely to represent their interests.

Federal agencies are more vulnerable to the legislative whims of a state as a result of this lack of a direct voice in the direction of state laws. Conversely, every entity with a voice in state government has a voice in federal government, and thus has a say as to the form and content of federal legislation, including CERCLA.

CERCLA does protect the federal government from the application of state standards that are stricter for federal facilities than for non-governmental facilities. Despite this, the potential exists to have a state pass a law that facially applies the same standard to all, but with the practical affect of imposing stricter standards on federal facilities.

The result is the potential, albeit a limited one, for inequitable treatment of the federal government, an entity that critics may deem as a faceless bureaucracy, and the expenditure of federal government resources to comply with state CERCLA-like laws with the same

227 See Massachusetts v. United States, 435 U.S. 444 (1978)(Holding that a state regulation must not: (1) discriminate against federal functions; (2) produce revenue for the state which exceeds the cost for the benefits provided; and (3) control, interfere with or destroy the ability for the federal government to perform essential functions). A statute that imposed stricter penalties on large facilities may meet this test assuming non-federal facilities are subject to the same requirements, thus, the statute would be permissible on its face, but further examination may be necessary to determine any ulterior motives that would render the law void, as applied.
purpose, and possibly the same results, as CERCLA.\textsuperscript{228} Ultimately, the application of state standards, whether draconian or merely duplicative, to the federal government may affect the federal government's ability to best use its limited resources, thereby affecting its ability to effectively govern.\textsuperscript{229}

Admittedly, this is an abstract theory, but it is symbolic of the unequal footing on which the federal government stands compared to others subject to state CERCLA-like laws. This inequality, and the possible ramifications upon operation of the federal government, coincide with the reasons in support of the application by the federal government of sovereign immunity by the federal government to state CERCLA-like laws.\textsuperscript{230}

The same argument is inapplicable to those state laws that regulate present and future behavior by the federal government.\textsuperscript{231} The reason for the difference is that all affected parties, including the federal government, are apprized of what standard of future conduct is required under such state statutes, and can modify their present and future behavior accordingly.\textsuperscript{232}

Any statutory provision can be criticized as being either too lenient, or too strong - and CERCLA section 120(a)(4)\textsuperscript{233} is no exception. The question remains, based upon the two foregoing

\textsuperscript{228} Hypothetically, a state law may have been interpreted to have a more restrictive definition for the defense of "Act of God" than does the defense under CERCLA. Despite the fact the case would likely be in federal court due to removal under 28 U.S.C. § 1441 (1994), the court would apply state law for the state law claim. Erie v. Tompkins, 304 U.S. 64 (1938).

\textsuperscript{229} See Millan, supra note 204 (such an interference, depending on its magnitude, could justify the invocation of sovereign immunity).

\textsuperscript{230} Id.


\textsuperscript{232} Id.; see also MILLER & JOHNSTON, supra note 20 (describing and comparing the retroactive nature of CERCLA to other environmental statutes).

\textsuperscript{233} 42 U.S.C.A. § 9620(a)(4) (West, WESTLAW through Mar. 3, 1997).
examples of criticisms of the statute as written, what, if anything, should be done to revise section 120(a)(4) of CERCLA?  

VI. GENERAL DIRECTIONS FOR THE POSSIBLE REVISION OF CERCLA PROVISIONS WAIVING FEDERAL SOVEREIGN IMMUNITY TO CLAIMS BASED UPON STATE LAW

There are several general directions that could be followed regarding the revision of the provisions of CERCLA waiving the federal government’s sovereign immunity to actions based on state laws concerning removal and remedial action. Each of these have their own advantages. None of these directions provide a panacea that will be satisfactory to all, but may provide a more equitable situation.

A. Completely Waive the Federal Government’s Sovereign Immunity from State CERCLA-like Laws

The broadening of the waiver of federal sovereign immunity from state CERCLA-like laws to include all instances where the federal government qualifies as a PRP under state CERCLA-like laws is one direction that could be followed. Such a revision would easily coincide with the existing language of CERCLA making CERCLA itself applicable to the federal government.  

This option would no doubt please those who have decried the hypocrisy associated with the federal government’s use of sovereign immunity to avoid being subject to the requirements of state environmental laws. This approach would also eliminate the

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234 Id.
236 See, e.g., Davenport, supra note 12; Laverdiere, supra note 27; Horne, supra note 174; Millan, supra note 204; (all containing criticisms of the application of federal sovereign immunity to escape liability under state environmental laws);
curious, and largely unexplained reasoning, of limiting application of state CERCLA-like laws only in cases where the federal government owned or operated a facility at the time of the commencement of the state law based action, or where transfer of the federal facility is covered by the exception given in section 120(a)(4) of CERCLA.237

Such a change would not be without precedent, and could be characterized as more evolutionary than revolutionary.238 This extension would be less of a change in policy than that contained in the FFCA,239 passed in response to the ruling in United States Dept. of Energy v. Ohio.240 A revision of this magnitude would represent a natural extension of CERCLA's existing provisions, and would indicate a sense of accountability by the federal government.

Arguably, the existing waiver provisions in CERCLA are more of a departure from what its critics charge is the archaic doctrine of sovereign immunity.241 A limited waiver is already exists in section 120(a) of CERCLA.242 Any revision along the proposed lines would merely be a natural extension of CERCLA's current waiver provisions.

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237 See 42 U.S.C.A. § 9620(a)(4) (West, WESTLAW through Mar. 3, 1997); Rospatch Jessco Corp. v. Chrysler Corp., 829 F. Supp. 224 (W.D. Mich. 1993); and Redland Soccer Club, Inc. v. Department of the Army of the United States, 801 F. Supp. 1432 (M.D. Pa. 1992); (both cases holding the provisions of CERCLA section 120(a)(4) necessitate federal ownership or operation of the facility at the time of commencement of a law suit based on state CERCLA-like law in order for sovereign immunity to be waived).


241 See Millan, supra note 204.

A clearly worded revision would also have the beneficial effect of clarifying when the waiver is applicable. This clarification would reduce the need for judicial attempts to decipher what was the intent of Congress. Reduction in the amount of judicial interpretation of section 120(a)(4) of CERCLA may have several benefits, including: (1) uniformity in the interpretation of the applicability of CERCLA's waiver provisions; (2) less litigation concerning what is covered by the CERCLA's waiver provisions, with the residual effect of reducing court dockets; and (3) quicker settlements as a result of less litigation, making the cleanup process more efficient.

B. Keep the Existing Waiver Provisions of CERCLA but Provide Additional Guidance on Issues Currently Subject to Judicial Determinations

There is a well worn axiom that sets forth the proposition that sometimes the best move one can make is to make no move at all. Application of this line of thinking to the current provisions of CERCLA section 120(a)(4) would result in maintenance of the status quo.

One advantage of the current arrangement is the existence of a line of case law that defines the coverage of the waiver of federal


245 The origin of this cliché is not known, but its application is exemplified by the baseball general manager who is trying to trade a player, doesn't, and then the player goes on to have the best season of his career.

sovereign immunity provision to actions based upon state CERCLA-like laws.\textsuperscript{247} The potential exists for future conflicts in judicial interpretation, but to date, uniformity in judicial determinations is far more prevalent than inconsistency.\textsuperscript{248} Congress could act by incorporating these judicial decisions into the language of CERCLA, eliminating the need for future litigation of these matters in courts not bound by these decisions, thus ensuring uniformity of application of the statute.\textsuperscript{249}

The rationale (reliance upon the plain language of the statute as evidence of Congress' intent) for the application of the waiver provisions to only those facilities currently owned or operated by the federal government may seem hypocritical. This appearance of hypocrisy should be left for debate by the academic community, without major ramifications for those pursuing actions against the federal government. Congress chose to limit the waiver as it did, and deference should be given to the plain language of the statute.\textsuperscript{250}


\textsuperscript{248} This is not to say differences do not exist, compare Rospatch Jessco Corp. v. Chrysler Corp., 829 F. Supp. 224 (W.D. Mich. 1993), and Redland Soccer Club, Inc. v. Department of the Army of the United States, 801 F. Supp. 1432 (M.D. Pa. 1992) (both cases holding that ownership by the federal government must exist at the time of the commencement of the action for sovereign immunity to be waived by section 120(a)(4) of CERCLA), with Tenaya Assoc. v. United States Forest Serv., No. CV-F-92-5375 REC, 1995 WL 433290 (E.D. Cal. May 19, 1995) (federal ownership or operation need only have been in place at the time of contamination).

\textsuperscript{249} Congress may overrule any judicial decision by adding express language contrary to the judicial interpretation, so long as such action would not result in an unconstitutional statute.

\textsuperscript{250} See MILLER & JOHNSTON, supra note 20, at 125-126 (outlining rules of statutory construction employed by courts); see also City of Chicago v. Environmental Defense Fund, 511 U.S. 328 (1994)(opinion by Justice Scalia
It must be stressed that the federal government is still covered by the liability provisions of section 107 of CERCLA, allowing for actions against the federal government under its provisions where the waiver of sovereign immunity from state CERCLA-like laws is inoperable. Conceivably, despite CERCLA's comprehensive nature, a state law may be enacted that will provide recourse against those PRPs who somehow slip through CERCLA. Until such time, any revision to CERCLA section 120(a)(4) may only result in a new line of cases interpreting the language of the statute, but providing no additional assistance in the effort to hold particular persons liable for past releases of hazardous substances.

Some may think that there is no way to satisfy all sides of this issue. The status quo may not in some circumstances decrease the amount of money spent on litigation for matters inadequately addressed by CERCLA, but it may represent a compromise that has proven itself to be workable. Revisions of CERCLA limited to incorporating judicial interpretations of CERCLA's existing provisions may further benefit both PRPs and plaintiffs in CERCLA cost recovery actions by encouraging quicker settlements due to uniformity in CERCLA's interpretation.

relying on "plain meaning" of statutory language in determining coverage of RCRA § 3001(I)).

252 Id. § 9620(a)(1).
253 Hypothetically, such a law could establish PRP status for someone who knows of activity that establishes PRP liability for another, but does not report this activity to the appropriate authorities.
C. Eliminate CERCLA's Waiver of Sovereign Immunity to Actions Based on State Law and Preempt State Laws Based on CERCLA

Repeal of CERCLA section 120(a)(4),\textsuperscript{256} in conjunction with the preemption of state CERCLA-like laws, will answer those who perceive hypocrisy in the current provisions that only waive the federal government's sovereign immunity from state CERCLA-like laws in certain circumstances. Such repeal and preemption would eliminate all actions under state CERCLA-like laws. The limitations of the provisions of section 120(a)(4) of CERCLA\textsuperscript{257} waiving the federal government's sovereign immunity from state CERCLA-like laws have created a double standard pertaining to when the federal government waives its sovereign immunity to such laws.\textsuperscript{258} These limitations have not been justified on any rational policy grounds.\textsuperscript{259} The preemption aspect of this option also will eliminate the potential for litigation against the federal government based on state laws with purposes similar to CERCLA, alleviating any argued (legitimate or politically motivated) adverse effects on the federal government's ability to carry out its duties (which is the rationale behind sovereign immunity).\textsuperscript{260}

Those persons who are critical of any amendment of CERCLA, to re-establish sovereign immunity of the federal government from

\begin{itemize}
\item \textsuperscript{256} 42 U.S.C.A. § 9620(a)(4) (West, WESTLAW through Mar. 3, 1997).
\item \textsuperscript{257} \textit{Id.}
\item \textsuperscript{258} \textit{Id.} (The federal government's sovereign immunity from state CERCLA-like laws is waived only when: (1) the federal government currently owns or operates the facility subject to the state CERCLA-like law action; or (2) the facility was transferred in accord with the provisions set forth in section 120(h)(3)(C) of CERCLA and the facility is not on the NPL).
\item \textsuperscript{259} There is no indication from the legislative history of SARA or Public Law 104-201 why the limitations of section 120(a)(4) of CERCLA exist.
\item \textsuperscript{260} Preemption will render CERCLA the only law upon which claims may be brought for cleanup of sites where past releases of hazardous substances occurred, unless such releases violate other statutes, i.e., RCRA, the CWA, etc.
\end{itemize}
state CERCLA-like laws, should be pacified by the preemption of state CERCLA-like laws. This follows because such preemption will eliminate exposing both federal and non-federal government entities to liability under state CERCLA-like laws, because such laws would be preempted. This approach would respond to the argument that it is hypocritical to require non-federal entities to comply with state CERCLA-like statutes that are inapplicable to the federal government.

Detailed treatment of preemption in general, and its application to CERCLA, are beyond the scope of this paper. However, some basic principles of federal preemption are helpful in understanding what is thought to be politically necessary to eliminate CERCLA's present waiver of federal sovereign immunity to state CERCLA-like laws.

The power of federal preemption is derived from the Supremacy Clause of the United States Constitution. Preemption of state law by the federal government can be accomplished in one of three ways. Congress can: (1) preempt state law by express statutory language; (2) preempt state law through the use of legislative language showing the intent to completely occupy the particular area of law; or (3) implicitly preempt state law when state law conflicts with provisions of federal law.

Preemption has been used in other fields of federally regulated activity. One example is the area of labor-management relations.

See, e.g., Davenport, supra note 12; Laverdiere, supra note 27; Horne, supra note 174; Millan, supra note 204; (all containing criticisms of the application of federal sovereign immunity to escape liability under state environmental laws). This is the result of the very nature of preemption. U.S. CONST. art. VI, cl. 2. See SUPERFUND LAW AND PROCEDURE, supra note 144, § 2.2(A). Id. See Labor Management Relations Act (LMRA), 61 Stat. 136, as amended by 73 Stat. 519 (1959); 29 U.S.C. §§ 141-197 (1994)(LMRA amended the National Labor Relations Act by preempting any conflicting state laws concerning matters covered by federal labor law).
States have been held to have no jurisdiction in areas where state and federal labor law overlap. The rationale for preemption is the importance of having a uniform national labor law policy. However, both judicial and statutory exceptions to federal preemption exist, providing for state jurisdiction in certain, limited instances.

The option that is the author's recommendation, if federal preemption is followed, is the addition to CERCLA of express statutory language preempting state CERCLA-like laws. Any peremptory language should clearly include provisions for states to continue to raise funds through taxation for the purposes of financing cleanup operations, and provisions that states may continue to bring cost recovery actions against PRPs under CERCLA. Enforcement of CERCLA's cleanup requirements would be the primary responsibility of the federal government under the amendments, with a streamlined process for states to petition to have the federal government issue cleanup orders.

Alternately, enforcement of a revised CERCLA could be delegated to the states, whereby each state would be enforcing the federal CERCLA, a uniform, federal law, in lieu of enforcing their own state CERCLA-like law. Either approach could prove to be

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267 Id.; see also Garner v. Teamsters, Chauffeurs, and Helpers Local Union No. 776, 359 U.S. 291 (1953) (state labor statutes are preempted when conflicting with federal labor statutes).
268 ROBERT J. GELHAUS AND JAMES C. OLDHAM, LABOR LAW § 114 (1996).
269 See id. §§ 125-142.
270 This will allow cleanups to be undertaken by states, and then these funds can be recouped, where possible, from PRPs through CERCLA cost recovery actions under section 107. The expedited process for the issuance of cleanup orders would take the place of any state law provisions similar to those under CERCLA section 106.
271 See Charles Openchowski, A Shorter, Simpler Approach to Superfund Reauthorization, 27 Envtl. L. Rep. 10357, 10365-10367 (1997); (Suggesting that any reauthorization of CERCLA include provisions to allow states with CERCLA-like laws that meet or exceed CERCLA to have delegation of the administration of CERCLA. Though the article envisions such delegation to follow where the federal law serves as minimum standards for state law, state delegation could also
workable, as would an intermediate approach where certain enforcement responsibilities would be delegated to the state, while others would be retained by the federal government could prove to be workable. The former approach (exclusive enforcement of CERCLA by the federal government) is more likely to assure consistent, uniform application of a CERCLA preempting state CERCLA-like laws because under this approach, enforcement will primarily be the responsibility of one entity (the federal government) rather than 50 entities (each state’s government).

The result of such an approach will provide a uniform national policy with respect to the liability of the federal government under state law for past hazardous waste releases. The policy would be uniform in its statutory form, and reliance on federal case law will reduce the number of conflicting judicial interpretations.\textsuperscript{272}

Federal legislation preempting state CERCLA-like law should not be drafted or adopted until after thorough examination of each state’s current CERCLA-like laws. The federal government should not preempt any substantive cleanup standards existing under state law as detailed standards are contained CERCLA.\textsuperscript{273} This examination

be feasible where preemption of state CERCLA-like laws renders CERCLA the only applicable standard in each state. Delegation could be based upon criteria including the adequacy of state funding and staffing levels for their programs. Such an approach would also be applicable to either the scenario where all federal sovereign immunity from state CERCLA-like laws are waived, or where the status quo is retained, with CERCLA serving as the minimum standard for state law prior to delegation of administration to that state).

\textsuperscript{272} Differences may arise as a result of different judicial interpretations of courts in different circuits. The Supreme Court has already provided much resolution of such conflicts, and since preemption will leave CERCLA essentially unchanged, there will arguably no more conflicts than would arise without preemption.

\textsuperscript{273} See 42 U.S.C. § 9621(d) (1994) (final cleanup standards are often determined by examining standards established under other statutes as CERCLA contains no such cleanup standards; CERCLA only specifies factors which must be considered); see also 42 U.S.C. § 9621(d)(2)(C) (1994). CERCLA requires any state standards regarding cleanups to be met; however, states are required to help
should be followed by including into CERCLA any state CERCLA-like law cleanup provisions that will enhance CERCLA's ability to achieve its goals.\textsuperscript{274}

The original motivation of this approach was an effort to resolve inequities in the present CERCLA provisions waiving federal sovereign immunity from state law. The end result, however, may be far more beneficial in arriving at a uniform national policy to achieve the original goals of CERCLA.

VII. ELIMINATION OF CERCLA'S WAIVER OF SOVEREIGN IMMUNITY TO ACTIONS BASED ON STATE LAW AND THE FEDERAL PREEMPTION OF STATE CERCLA-like LAWS: THE LOGICAL CHOICE

The best way to resolve the inequities of the current waiver of federal sovereign immunity from state CERCLA-like laws is the repeal of CERCLA section 120(a)(4)\textsuperscript{275} in conjunction with federal preemption of state CERCLA-like laws, making the federal government (and all other parties) totally immune from state CERCLA-like laws. This option not only can be defended on its own merits, but is further enhanced by some of the shortcomings of either of the other options previously discussed.

\begin{enumerate}
\item pay for cleanup actions necessitated by their more stringent standards. Since no CERCLA cleanup standards exist, it is thought states may continue to have their own cleanup standards exceeding what would result in their absence without a detrimental effect on federal preemption.
\item This serves the dual purpose of not weakening a state's existing standards pertaining to removal and remedial actions, and enhancing CERCLA, which will be the law applied in all states. One additional consideration would be adding an expedited process to CERCLA for states to petition EPA to issue orders of this type under CERCLA section 106, since states would no longer have independent jurisdiction to issue such orders under preempted state CERCLA-like laws.
\end{enumerate}

\textsuperscript{274} 42 U.S.C.A. § 9620(a)(4) (West, WESTLAW through Mar. 3, 1997).
A. Expanding the Waiver of Federal Sovereign Immunity - A Flawed Response

Expanding the existing waiver of sovereign immunity may satisfy those who simply do not like the doctrine of sovereign immunity. An expansion, however, implies a deficiency in CERCLA's liability provisions. Why else should the federal government, or for that matter, any party, need to be held liable under state standards in addition to those of CERCLA? Those persons who reject the argument that CERCLA is defective, but persist in arguing that the current form of CERCLA does not go far enough in cases involving the federal government, are then faced with explaining why any party (other than the federal government) also should be exposed to broader liability under a state law with the same purpose as CERCLA.

Expansion of the federal government's waiver of sovereign immunity may be politically correct. Politically correct action should not be confused with being correct action. Any defects inherent in CERCLA should be addressed by revising CERCLA to add beneficial provisions that are currently contained in state CERCLA-like laws that address these defects. This issue is separate and apart from waiving federal sovereign immunity regardless of the federal government's current owner or operator status. In short, any shortcomings in CERCLA are not solved by expanding the federal government's waiver of sovereign immunity under CERCLA.

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276 See, e.g., Davenport, supra note 12; Laverdiere, supra note 27; Horne, supra note 174; Millan, supra note 204; (all containing criticisms of the application of federal sovereign immunity to escape liability under state environmental laws).

277 This implication follows as critics of federal sovereign immunity assuming federal government liability under section 120(a)(1) of CERCLA is insufficient must also believe CERCLA itself is insufficient.

278 This follows from the reasoning that if CERCLA is sufficient, there would be no need to worry about application of state laws.

279 This should not be construed as an assertion that CERCLA is deficient in its present form, rather that expanding the waiver of federal sovereign immunity would not do anything to rectify any such problems.
Expanding federal government's waiver of sovereign immunity under CERCLA simply to expose the federal government to the same liability under state CERCLA-like law that non-governmental entities face is an asinine response. This condemnation is based on the fact that if a state CERCLA-like law does not contain beneficial provisions not found in CERCLA, there is no need for redundant liability to exist under state CERCLA-like law to the same extent it already exists under CERCLA.\(^{280}\)

The author also believes that such an approach would fail to garner the necessary legislative support from environmental conservatives, who may use the doctrine of sovereign immunity to defend their actions. Regardless of the ability to get the necessary support, the solution is not to expand the waiver of sovereign immunity under the guise of achieving equity.

B. Maintaining the Status Quo - Ignorance is Bliss

Reliance on the status quo can be referred to as the "Ostrich" approach to legislating.\(^{281}\) It may be more politically expedient to do nothing than it is to address a problem necessitating tough decisions. The author believes this approach is only attractive in its elimination of the need to lobby for votes necessary for any type of substantive change of CERCLA.

The status quo, as described, is not consistent with the comprehensive nature of CERCLA's own liability provisions.\(^{282}\) Why should the federal government receive special dispensation when it

\(^{280}\) If anything is gained from state laws in addition to CERCLA, the beneficial provisions should be added to CERCLA. If nothing is gained above what is provided by CERCLA, then the state laws, arguably, have no purpose for their application to either federal or non-federal entities.

\(^{281}\) This terminology is based on the ostrich, which places its head into the ground as a defense mechanism against perceived threats. See Compton's Interactive Encyclopedia for Windows, "Ostrich" (1994).

comes to liability under state CERCLA-like laws? The lack of an apparent justification for the present federal ownership or operator requirement for the waiver of federal sovereign immunity to actions based on state laws modeled after CERCLA renders the present provisions to be unjustifiable.\(^{283}\)

No purpose is served by merely codifying judicial interpretations, because the present approach of section 120(a)(4) of CERCLA\(^{284}\) is without justification.\(^{285}\) Again, if CERCLA is not comprehensive enough, change CERCLA instead of relying upon state laws to address any deficiencies in CERCLA on a hit or miss basis.\(^{286}\)

C. Elimination of CERCLA's Waiver of Federal Sovereign Immunity from Actions Based on State Law and Preemption of those Laws - The Best Option

The logical, and pragmatic, solution is repeal of section 120(a)(4) of CERCLA.\(^{287}\) Admittedly, mere elimination of the waiver of sovereign immunity may alleviate the expenditure of resources on duplicative litigation which arguably hinders the effectiveness of the federal government to carry out its duties. But this approach may be criticized as marked with the hypocrisy of a, "Do as I say, not as I

\(^{283}\) See Rospatch Jessco Corp. v. Chrysler Corp., 829 F. Supp. 224 (W.D. Mich. 1993) (indicating the lack of legislative history delineating the purpose of limiting CERCLA section 120(a)(4) applicability to those instances where federal government ownership or operation is in existence at the time of the commencement of the legal action).


\(^{286}\) Critics who assail that CERCLA is not comprehensive enough to address, and needs to be supplemented by state laws are then relying on 50 states to independently correct CERCLA's perceived flaws. The better approach is thought to be to address CERCLA's flaws in CERCLA, thereby providing the same level of protection for all 50 states.

The addition of language resulting in federal preemption of state CERCLA-like laws would alleviate both concerns, and therefore may make it politically acceptable to many of its critics.289

This combination is believed by the author to be palatable to those who feel strongly about the appropriateness of federal sovereign immunity (even if such a belief is born more from a conservative political orientation rather than ardent belief in sovereign immunity). Similarly, this approach can be supported by those legislators who are more liberal in their philosophy, and do not want the federal government to receive special treatment under state CERCLA-like laws as a result of federal sovereign immunity.

Sole reliance on CERCLA to hold the federal government liable for response costs for removal and remedial actions for the release or threatened release of hazardous substances is an approach that is both logical in theory and pragmatic. CERCLA's liability provisions, previously outlined, have been demonstrated to be comprehensive.290 CERCLA has provided the regulatory tools to close the loopholes that resulted from the CAA, the CWA and RCRA not applying to actions

288 The author does not necessarily agree or disagree with the validity of an argument justifying sovereign immunity invocation in response to any perceived argument that the current arrangement hinders the effectiveness of the federal government in carrying out its duties, but recognizes such an argument would serve as the basis for those who believe sovereign immunity is appropriate.

289 The author asserts support will have to come from those on both sides of this issue (i.e., those who don't feel the federal government should be mired in liability created by state laws, and those who feel the federal government should receive no special dispensation from state laws) in order for a compromise to be adopted by Congress.

which took place before their adoption but result in releases and contamination at the present time.\textsuperscript{291}

Arguments may be made that CERCLA is far from the most perfectly worded statute ever to emerge from Congress, and as such, is not the best place to seek a solution.\textsuperscript{292} There will be no attempt to rebut such arguments. Judicial determinations have, however, clarified many of the questions that CERCLA's textual format left ambiguous.\textsuperscript{293}

Critics who contend that CERCLA is not comprehensive enough should direct their efforts to amending CERCLA's provisions to eliminate perceived deficiencies. This approach is more beneficial than attempting to rely on state laws to address any weaknesses in CERCLA, because it assures the same level of protection, nationwide, through application of uniform liability provisions to PRPs nationwide.

This approach is also defensible based on the retroactive nature of CERCLA, which has been upheld as constitutionally valid.\textsuperscript{294} This retroactivity results in litigation over a PRP's past actions, actions which were not necessarily deemed improper before they took place. Having one statute, and one body of judicial interpretations of that statute, arguably puts PRPs in a more certain position.\textsuperscript{295}

\textsuperscript{291} See MILLER & JOHNSTON, supra note 20, at 52.
\textsuperscript{292} Id. at 53-54 (discussing some of the criticisms that have been made concerning CERCLA's language); an example of the judiciary's criticism is contained in United States v. Maryland Bank, 632 F. Supp. 573, at 578 (D. Md. 1986).
\textsuperscript{293} See, e.g., 42 U.S.C.A. §§ 9601-9675 (latest ed.) (this is one source that provides references to the plethora of judicial interpretations of CERCLA's many provisions).
\textsuperscript{295} The author contends this result follows from a PRP not having to simultaneously rely on a federal court's interpretation of CERCLA, and a state
reduce litigation that requires the courts in various jurisdictions to interpret a wide variety of issues in a number of different state statutes.\textsuperscript{296} This approach also makes the potential liability of PRPs more predictable, thus making settlements more predictable and litigation less attractive. This will result in a more efficient recoupment of funds expended by individuals, states, and federal governments in undertaking CERCLA response actions in efforts to cleanup contaminated sites.\textsuperscript{297}

Federal preemption of state CERCLA-like laws addresses criticism that the current waiver of the federal government's sovereign immunity from such laws set forth in section 120(a)(4) of CERCLA\textsuperscript{298} is not as broad as similar waiver provisions contained in the CAA,\textsuperscript{299} the CWA,\textsuperscript{300} and RCRA.\textsuperscript{301} The basis for such criticism is that in order for the waiver of the federal government's sovereign immunity from state CERCLA-like laws to apply, section 120(a)(4) of CERCLA\textsuperscript{302} requires that the facility in question: (1) is currently owned or operated by the federal government; or (2) was transferred by the federal government in the manner set forth in section 120(h)(3)(C) of CERCLA\textsuperscript{303} and is not on the NPL. However, the waiver of sovereign immunity provisions of the CAA, the CWA, and RCRA do not require the satisfaction of such stringent conditions in order for waiver of the federal government's sovereign immunity to court's interpretation of a state CERCLA-like law which may be in conflict with one another.

\textsuperscript{296} The author's premise for this assertion is that once a judicial interpretation of a CERCLA provision has been established, there would be no need to interpret a similar provision of state law as the latter would be preempted by the former, rendering such an interpretation moot.

\textsuperscript{297} This premise is based on a predicted reduction in litigation costs to all parties, resulting in a decrease in the volume and scope of interpretive litigation.

\textsuperscript{298} 42 U.S.C.A. § 9620(a)(4) (West, WESTLAW through Mar. 3, 1997).

\textsuperscript{299} 42 U.S.C. § 7418 (1994).

\textsuperscript{300} 33 U.S.C. § 1323 (1994).

\textsuperscript{301} 42 U.S.C. § 6961(a) (1994).

\textsuperscript{302} 42 U.S.C.A. § 9620(a)(4) (West, WESTLAW through Mar. 3, 1997).

\textsuperscript{303} Id. § 9620(h)(3)(C).
state versions of those laws. Preemption of state CERCLA-like laws eliminates any concerns regarding the fore-mentioned differences, because federal preemption eliminates the applicability of such state laws.

The author does not recommend preemption of state laws derived from federal environmental statutes other than CERCLA. The main reason is that these other laws regulate present and future behavior, and as such, every party subject to these laws has ample opportunity to follow their provisions before acting in the future, thereby avoiding liability. Additionally, these other federal laws sometimes require states to adopt programs at least as stringent as federal standards, and allow for more stringent standards to be adopted.

The end result would be the elimination of the existing double standard applied to the federal government by the limited waiver of its sovereign immunity set forth in CERCLA section 120(a)(4). In addition, such an approach would possibly alleviate the need for the federal government to litigate matters of liability under state

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305 As discussed, CERCLA was meant to close the loopholes resulting from the CAA, the CWA and RCRA, which regulate future behavior and do not deal with the release of hazardous substances prior to their enactment. See MILLER & JOHNSTON, supra note 20, at 52; see also 42 U.S.C. §§ 7401-7671 (1994 & Supp. I 1995); 33 U.S.C. §§ 1251-1387 (1994 & Supp. I 1995); and 42 U.S.C. §§ 6901-6992k (1994 & Supp. I 1995).

306 See, e.g., 42 U.S.C. § 7661a(b) (1994)(establishing minimum requirements for state permit programs); CWA 33 U.S.C. § 1342(b) (1994)(allowing states that develop permit programs "substantially equivalent" to the federal permit program to issue National Pollutant Discharge Elimination System permits, with "substantially being taken to mean more stringent permit requirements could be adopted by states); and RCRA 42 U.S.C. § 6926 (1994)(similar to the preceding CWA permits, permits for treatment, storage and disposal facilities may be state issued if the state has adopted a program "substantially equivalent" to RCRA, thus allowing for, in theory, stricter requirements).

CERCLA-like laws, thereby reducing its ability to efficiently perform its duties a result some persons may argue would result from a complete waiver. The ancillary result, which may be even more beneficial, is simplification of the regulatory scheme dealing with cleanup of where hazardous substances have been released or are threatened to be released.

The author recognizes that this option may be neither perfect, nor politically correct, but it is logical, workable, and an improvement over the present regime.

VIII. CONCLUSION

The federal government is this nation's largest owner and operator of facilities. Consequently, the issue of the federal government's liability under state CERCLA-like laws, that apply also to private persons, is an important issue that is more than an issue of appearance. Similarly, federal sovereign immunity is a traditional tool recognized as applicable in numerous situations to assure operation of the federal government without crippling litigious interruption.

The federal government is currently held to the same PRP standards as any other entity under CERCLA. CERCLA is broad in its definitions of who are deemed to be PRPs, liability is strict, liability is often joint and several, and defenses to liability are few and narrowly construed.

Hypocrisy arises when the federal government's invocation of sovereign immunity excuses it from being held liable under state CERCLA-like laws. The current waiver of federal sovereign

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308 Recall, hindrance with the ability to carry out its duties is one reason for the application of federal sovereign immunity.
309 STRATEGY, supra note 11.
310 Millan, supra note 204.
312 These are described in Section II of this paper, and by the citations therein.
immunity provided by CERCLA needs to be changed, and any such change must eliminate attempts to use federal sovereign immunity, regardless of its perceived validity, to allow the federal government to receive special treatment, possibly hindering cleanup efforts. Similarly, such an approach must not substantially adversely affect the use of federal resources.

The approach of eliminating the waiver of CERCLA section 120(a)(4) in conjunction with the preemption of state laws with purposes similar to CERCLA, renders moot arguments about the equity of merely eliminating the waiver of federal sovereign immunity. This approach also eliminates CERCLA's present special treatment of federal facilities based solely on that federal status, while eliminating the need to expend resources on the litigation of liability issues under both state and federal laws.

This approach may be deemed Machiavellian by its critics as legislative chicanery that will ultimately weaken efforts to remediate past contamination. This criticism cannot withstand scrutiny when consideration is given to the broad coverage of CERCLA, and the equitable side-effect that federal preemption of state CERCLA-like laws will produce: all parties will be held to the same broad, uniform federal standards of accountability, interpreted by the same federal judicial system.

This approach may ultimately do far more than its original motivation (to abrogate the federal government's liability under state law CERCLA-like laws). Will this approach solve all the problems removal and remediation actions associated with releases and threatened releases of hazardous substances? No. Will it allow more resources to be directed towards the enforcement of CERCLA rather than to its interpretation, and interpretation of similar state laws? Yes. The result not only ends the problem of the hypocrisy that exists under CERCLA section 120(a)(4), but allows redirection of resources from litigation involving interpretation of CERCLA, to

\[314\] Id.
efforts which will achieve reimbursement for effective hazardous substance cleanups.