[iv]—Superfund Cleanups, the National Contingency Plan and National Priorities List

Beyond a federal or state decision to compel a clearly identified responsible party to "cleanup" an inactive hazardous waste site, there are federal and state sponsored remediations through the various "superfunds." The federal Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA or federal Superfund)[109] is matched by parallel laws in most states for financed remediations authorized by state superfunds.

Application of the federal CERCLA to site remediation is governed by a National Contingency Plan.[110] Ranking of sites available for CERCLA cleanup is based on a "MITRE Model" prepared for the federal EPA by a contractor. Remedial operations entail (1) a feasibility study, (2) a design phase, and (3) a remediation phase.[111] Cost of the remediation to the federal or state government can be recovered against the owner or operator of a facility from which there is a release of hazardous wastes (or the threat of such a release) which caused the governmental agency to incur response costs.

In order for parties to seek contribution or cost recovery from a responsible party, the response actions must be consistent with the national contingency plan.[112] The NCP establishes procedures and

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[109] 42 U.S.C. §§ 9601 *et seq.*

[110] See National Contingency Plan at 40 C.F.R., Part 300.

[111] There are several components of the remediation phase. One of the components involves testing soil samples for hazardous substances and to determine contamination levels. EPA has issued guidance regarding soil screening levels. The guidance focuses on developing a methodology for site specific screening levels, buy also addresses generic levels. The guidance is intended to help EPA eliminate from further consideration certain sites, exposure pathways, or chemicals, or, in the alternative, to determine that further study is warranted. Typically, sampling might identify specific contaminants or exposure pathways, which information can be used in a baseline risk assessment that will indicate whether or not remedial action is needed. 61 Fed. Reg. 27349 (May 31, 1996).

[112] 42 U.S.C. § 9607(a)(4)(B). See, e.g.:

Eighth Circuit: K.C. 1986 Limited Partnership v. Reade Manufacturing, 1998 U.S. Dist. LEXIS 18436 (W.D. Mo. 1998).

Tenth Circuit: Public Service Co. of Colorado v. Gates Rubber Co., 175 F.3d 1177 (10th Cir. 1999) (plaintiff, having conducted cleanup of lead- and PCB-contaminated site, sought cost recovery and contribution from defendant; however, insofar as cleanup was not consistent with NCP, summary judgment dismissing complaint was granted to defendant). Nonetheless, one court has concluded that a due diligence site investigation by environmental engineers that inadvertently caused migration of wastes via monitoring well borings could not claim protection as having been done consistent with the NCP, insofar as the NCP

standards for responding to releases of hazardous substances.[113] The provisions addressing remedial actions are more stringent than the provisions addressing removal actions.[114] The NCP requires private parties undertaking cleanups to provide a notice and comment period to the public in connection with the particular response action selected.[115] Any response action carried out in compliance with an EPA cleanup order pursuant to CERCLA Section 106 is deemed to be consistent with the NCP.[116]

When a state conducts the cleanup on property formerly owned by a private property, pursuant to which it incurs response costs, there is a presumption that the cleanup is being conducted in a manner consistent with the NCP. Under such circumstances, the state may recover the remediation costs from a responsible party. However, this is a rebuttable presumption. In the event that the state

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was defined only in terms of response/remedial actions, and not pre-acquisition investigation.

See also,

Ninth Circuit: Boeing Co. v. Cascade Corp., 207 F.3d 1177 (9th Cir. 2000) (NCP requires accurate accounting by private parties of costs to be recovered, but does not require that at the time the necessary funds are expended, they be differentiated; although post hoc accounting may allow unscrupulous shifting of non-compensable expenses to compensable categories, the same danger lies when the accounting is simultaneous with the expenditure; the contemporaneity of the accounting goes only to the credibility of the accounting, and does not defeat compliance with the NCP; court used volume of contaminants as exclusive basis for apportionment, which also was not impermissible under NCP).

[113] 42 U.S.C. § 9605; see 40 C.F.R., Part 300. The NCP was promulgated in 1982, reissued in 1985, and revised in 1990. See Analytical measurements, Inc. v. Keuffel & Esser Co., 843 F. Supp. 920, 932 (D. N.J. 1993). The 1990 revision allows for substantial compliance, rather than strict compliance, with the NCP (See "National Oil and Hazardous Substances Pollution Contingency Plan," at 55 Fed. Reg. 8666 (Mar. 8, 1990)), so that an "immaterial" or "insubstantial" nonconformity might not require the conclusion that a private party response or remedial action is inconsistent with the NCP.

[114] Bancamerica Commercial Corp. v. Mosher Steel of Kansas, Inc., 100 F.3d 792 (10th Cir.), *superseded on other grounds* 103 F.3d 80 (10th Cir. 1996).

[115] See: 40 C.F. R. § 300.415(n); 40 C.F.R. § 300.430(f)(93); County Line Investment. Co. v. Tinney, 933 F.2d 1508, 1514 (10th Cir. 1991). The Second Circuit has characterized public comment to be "an important concern, but not an inflexible requirement" and found public input assured by the extensive involvement by a state environmental agency with the selection of the response plan. Since public participation thus guided the formulation and execution of the response in conformity with EPA's NCP requirements, the party conducting the private cleanup was not barred from pursuing contribution against other PRPs on the ground that there was no public participation. See Bedford Affiliates v. Sills, 156 F.3d 416 (2d Cir. 1998).

[116] 40 C.F.R. § 300.700(c)(3)(ii).

does not act consistently with the NCP, it may not recover remediation costs.[117]

The list of sites to which EPA must give priorities is the National Priorities List (NPL). However, listing on the NPL is not a prerequisite to a CERCLA enforcement action. EPA may conduct response actions at a site that is unlisted, although the more permanent remedial actions, such as removal, require NPL listing of the site.[118] For a site to be placed on the National Priorities List (NPL), it must be found by EPA to be among the most hazardous disposal sites in the nation.[119] EPA assesses the sites on the list to prioritize them based on relative risk to human health and the environment. EPA utilizes risk-based criteria to determine listing. Either a high score on EPA's hazard ranking system[120] or a health

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[117] See, e.g.:

Ninth Circuit: Washington State Department of Transportation v. Washington Natural Gas Co., 59 F.3d 793 (9th Cir. 1995).

Tenth Circuit: Public Service Co. of Colorado v. Gates Rubber Co., 175 F.3d 1177 (10th Cir. 1999) (despite claims of significant state involvement in plaintiff's cleanup efforts, the cleanup remained inconsistent with the NCP).

[118] *Ninth Circuit:* United States v. Asarco, Inc., ___ F. Supp.3d___, 1998 U.S. Dist. LEXIS 18061 (D. Idaho 1998).

District of Columbia Circuit: Montrose Chemical Corp. of California v. Environmental Protection Agency, 132 F.3d 90, 92, n.3 (D.C. Cir. 1998).

See 40 C.F.R. 300.425(b)(1).

[119] 42 U.S.C. § 9605. The former CERCLA requirement that the list must include at least 400 sites and that among the top 100 sites there must be at least one from each state was eliminated by SARA. Although NPL sites typically are abandoned landfills or industrial facilities, the definition is not so restricted. Hence, a thirty-five mile stretch of a river contaminated by PCBs was a NPL site. See Kalamazoo River Study Group v. Rockwell International Corp., 171 F.3d 1065 (3d Cir. 1999).

[120] See 42 U.S.C. § 9605(a)(8)(A),(B); 40 C.F.R. § 300.425(c). The hazard ranking system was promulgated in 1982 (see 47 Fed. Reg. 31180 (1982)) and revised in 1990 (see 55 Fed. Reg. 51532 (1990)). It is a mathematical model utilized to evaluate the relative risks posed by a particular release. It does so by correlating mathematical values from tables or formulas with the risks posed by various features of the hazardous substances at a site being evaluated and then scaling the results from 1 to 100 (see 40 C.F.R., Part 300, App. A). If the score for a particular site exceeds 28.5, then it is eligible for listing on the NPL (55 Fed. Reg. 51,532 at 51569). For soil contamination, if a hazardous substance is present at a site in concentrations greater than three times background level then it is deemed to be "observed contamination" (40 C.F.R., Part 300 App. A, Table 2-3, § 5.0.1). For certain hazardous substances such as lead, the hazard ranking system may incorporate a "Human Toxicity Factor" which correlates with that substance's association with cancer or other adverse health effects. The 1990 revised hazard ranking system in recognition of lead's extreme toxicity and the lack of any minimum threshold below which it will not cause adverse effects,

advisory[121] will result in listing. EPA may aggregate contiguous sites that contain hazardous wastes for purposes of listing. However, its policy of aggregating noncontiguous sites[122] has been criticized. To the extent that EPA seeks to aggregate noncontiguous sites for listing on the NPL, thereby including sites which otherwise would not qualify for listing under Section 105, the policy has been invalidated.[123] EPA may expand the boundaries of a NPL site

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assigns to lead the highest HTF value−10,000. This value will remain valid until the hazard ranking system is revised again. The D.C. Circuit, dismissing a challenge to the lead HTF value, held challengers to the strict statute of limitations imposed by CERCLA Section 113(a) (42 U.S.C. § 9613(a), requiring that any challenge to such regulations be filed within ninety days of promulgation (RSR Corp. v. E.P.A., 102 F.3d 1266 (D.C. Cir. 1997)), with the result that the current system and values are likely beyond current challenge.

[121] The HRS listing, although the more common method of NPL listing, is not exclusive. A state or territory may designate one priority site, regardless of whether it has a high HRS score, which will result in NPL listing. Alternatively, the Agency for Toxic Substances and Disease Registry may achieve NPL listing for a site by issuing a health advisory that recommends removing people from the site. If EPA determines that the site poses a significant threat to public health, and that it will be more cost effective for EPA to use its remedial authority rather than its emergency removal authority in response to the release, the site will be listed on the NPL. 40 C.F.R. § 300.425(c).

[122] See 48 Fed. Reg. 40658; 49 Fed. Reg. 37070.

[123] The Mead Corporation v. Browner, 100 F.3d 152 (D.C. Cir. 1996). Even though the noncontiguous sites historically may have been part of the same operation, the potentially responsible parties may have been the same or similar, the target population is the same or overlapping and the distance between the noncontiguous sites is not great, if a noncontiguous site cannot be justified for listing individually by reference to EPA's risk-based criteria or by state designation criteria, then EPA lacks authority under Section 105 to list the site. The court also rejected application of Section 104 as statutory authority. Section 104(d)(4) (42 U.S.C. § 9604(d)(4)) allows EPA to aggregate noncontiguous "facilities" meeting the criteria of geographic relationship and a threat to health or the environment for purposes of carrying out remedial or removal actions. However, the aggregation is specified to be solely for such purposes, which does not allow reliance on Section 104 to authorize aggregate listing under Section 105.

Another court seemed to contemplate that non-contiguous areas may be aggregated more easily. In this case, the challenge did not focus on whether each area had contamination. The defendants contended that each area required separate proof of the responsibility of each defendant. This court viewed the geographic division of a single site into separate parts each with different operations as speaking to a different issue. The fact of the geographic division did not equate with divisibility into several "facilities" requiring separate proofs for each defendant for each "facility". The entire site was treated as a single facility as

without formal rule making, although the expansion must bear some close relationship with the original designation of the site, as set forth in the original notice of the NPL listing. This might occur when subsequent studies indicate that the contamination had spread further than initially reported, or had broader ramifications than initially anticipated.[124] If the proposed expansion, though, was not contemplated by the notice already provided, then it may be accomplished only by formal procedures. At least one federal district court ruling has permitted a state to prioritize its own list of hazardous waste sites within its borders based on the availability of financially viable responsible parties.[125]

If a person owning a site discovers hazardous wastes on it, it should be ascertained whether the site appears on federal or state lists. If it does, some ranking for cleanup may exist and an administrative order can be entered to guide the owner in the feasibility study. If the site is not yet identified, it may be desirable to undertake a feasibility study and do a remediation design as soon as possible. Both should then be presented to state and federal officials and an appropriate administrative order entered to guide the implementation of the plan.

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defined under Section 101(9). See Akzo Coatings, Inc. v. Aigner Corp., 960 F. Supp. 1354 (N.D. Ind. 1996).

[124] *Cf.* United States v. Asarco, Inc., ___ F. Supp.3d __, 1998 U.S. Dist. LEXIS 18061 (D. Idaho 1998) (original HRS documentation, although referencing upstream and downstream areas of contamination, did not score areas beyond the geographic designation of the site; moreover, the HRS addressed lead contamination resulting from historic mining activities rather than contamination by other hazardous substances throughout the river basin; proposed expansion would have modified a twenty-one mile site to 1500 miles); Washington State Dep't of Transportation v. Environmental Protection Agency, 917 F.2d 1309 (D.C. Cir. 1990) (expansion would encompass a site only 500 feet from contaminated waterway requiring remediation, and NPL listing identified the site, broadly, to include the waterways tidal flats, encompassing the site to be added).

[125] Mannington Mills, Inc. v. Shinn, 877 F. Supp. 921 (D. N.J. 1995). The New Jersey Department of Environmental Protection and Energy prioritized sites based on its conclusions that some responsible parties were more capable of paying remediation costs than were other responsible parties with respect to other sites. The court found this determination rationally related to the state's legitimate interest in effectuating cleanups, so that due process requirements were satisfied. The fact that a defendant's wealth was a consideration did not in the court's view amount to an equal protection violation.