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"SHOVELS FIRST AND LAWYERS LATER":¹ A COLLISION COURSE FOR CERCLA CLEANUPS AND ENVIRONMENTAL TORTS CLAIMS

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In the aftermath of "Love Canal"² and in anticipation of Reagan Administration environmental policies,³ a Democratic Congress and outgoing President Carter enacted the Comprehensive Environmental Response, Compensation and Liability Act of 1980⁴ ("CERCLA") with the purpose of designating and cleaning up hazardous waste sites immediately and determining liabilities later.⁵ The primary liability to be determined under CERCLA is who must fund the cleanup of the hazardous waste site.⁶ One form of liability not addressed by the statute, nor by many commentators, is who is liable for environmental tort claims brought for damages under state nuisance and trespass laws that stem from site remediation procedures pursuant to CERCLA regulations. The issue presents a party facing potential CERCLA liability with a great deal of uncertainty in deciding whether to volunteer to clean up a CERCLA site and whether to settle claims brought under state tort law.⁷ This Note discusses the inherent conflict between CERCLA and state tort claims when a private party is ordered by the

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¹ DANIEL MAZMANIAN & DAVID MORELL, *BEYOND SUPERFAILURE: AMERICA'S TOXIC POLICY FOR THE 1990'S* 29 (1992) (quoting Ann O. Bowman).

² "Love Canal" refers to the well-documented tragedy in Niagara Falls, New York, where a neighborhood and schools built on top of a landfill containing 20,000 tons of over 200 types of chemical waste, resulted in health problems for neighborhood residents, evacuation of 1,004 households, and a \$30 million government "buy out" for those living nearby. See *id.* at 3.

³ See Ian G. John, Note, *Too Much Waste: A Proposal for Change in the Government's Effort to Clean Up the Nation*, 70 IND. L.J. 951, 954 (1995).

⁴ 42 U.S.C. §§ 9601-9675 (1994).

⁵ See MAZMANIAN & MORELL, *supra* note 1, at 27-30.

⁶ See generally Jerome M. Organ, *Superfund and the Settlement Decision: Reflections on the Relationship Between Equity and Efficiency*, 62 GEO. WASH. L. REV. 1043, 1046-48 (1994). Liability under CERCLA is the subject of much scholarly interpretation. See, e.g., Jeffrey H. Howard & Linda E. Benfeild, *CERCLA Liability for Hazardous Waste "Generators": How Far Does Liability Extend?*, 9 TEMP. ENVTL. L. & TECH. J. 33 (1990).

⁷ See Organ, *supra* note 6, at 1043-44.

Environmental Protection Agency ("EPA") to use certain methods to clean up a site and where those methods result in tort claims. The goal of this Note is to create policy incentives to ensure that toxic tort victims receive equitable compensation while hazardous waste cleanups are conducted more efficiently than under the current system.

Part I of this Note provides a review of CERCLA remediation and liability, as well as state environmental tort law. Part II examines CERCLA and tort liability when the EPA takes over a site to clean up hazardous waste. This part pays particular attention to tort liability for the private landowner and the EPA when the EPA, or its contractor, cleans up the site in a negligent fashion. Part III considers liability issues when a private party cleans up the site under an administrative order from the EPA or through a consent settlement entered with the EPA and approved by a federal district court. The section primarily analyzes whether CERCLA has any preemptive effect on state tort laws based on the EPA's role in selecting the remedy necessary to clean up the site if the tort claim is based on the cleanup methodology. This third part considers whether Congress intended courts to create federal law to address issues such as preemption, and, if so, whether sufficient conflict exists to warrant preemption and whether a preemptive "federal interest" is at stake. Part IV analyzes a proposal to reform CERCLA and proposes amendments allowing tort claims against the EPA for inadequate hazardous waste remedy selection and implementation. The proposal would change the system to create more incentives for private parties to enter into results-oriented consent decrees and would place a greater reliance on tort claims for victim compensation. Recognized in the solution, although not universally accepted, is the conclusion from Part III that tort claims are preempted by CERCLA to the extent that they are based on inadequate remedial procedures mandated by the EPA. The proposal would allow for the allocation of tort liability for hazardous waste claims when the cause of the tort is a combination of improper cleanup and improper disposal of the hazardous waste.

I. BACKGROUND ON CERCLA AND ENVIRONMENTAL TORT LAW

A. *CERCLA Cleanup Process*

CERCLA creates a system to identify and clean up any actual or

threatened release⁸ of a hazardous substance⁹ that poses an "imminent and substantial endangerment to the public health or welfare or the environment."¹⁰ The statute imposes joint and several¹¹ strict liability¹² for certain costs and damages on whom it classifies as "potentially responsible parties" ("PRPs").¹³ There are three categories of PRPs: ¹⁴ the owner or operator of the facility at the time of disposal and the owner or operator at the present time;¹⁵ the person who arranged for disposal and treatment;¹⁶ and the person who transported the hazardous waste or who accepted hazardous waste for transportation.¹⁷ PRPs can be held strictly liable for: (1) all

⁸ "Release" is defined to include "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment," with exceptions for certain substances emitted at workplaces, from motor vehicles, and nuclear releases. 42 U.S.C. § 9601(22).

⁹ "Hazardous substance" includes pollutants listed under the Solid Waste Disposal Act ("SWDA"), the Clean Water Act ("CWA"), the Clean Air Act ("CAA"), the Toxic Substances Control Act ("TSCA"), and threshold amounts of additional substances added by the EPA regulation pursuant to 42 U.S.C. § 9602(a). *See id.* § 9601(14) (the Clean Water Act is cited by reference to 33 U.S.C. § 1321(b)(2)(A) (1994)).

¹⁰ *Id.* § 9606(a).

¹¹ Joint and several liability is not mandatory under CERCLA, but it is generally seen as a presumption under the holding of *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983). This was reinforced by the legislative history behind the amendments to CERCLA. *See Organ, supra* note 6, at 1069-70.

¹² Although no CERCLA provision uses the term "strict liability," there is a consensus among courts and commentators that strict liability applies to PRPs based on statutory construction and legislative history. *See Organ, supra* note 6, at 1047 n.20.

¹³ *See* 42 U.S.C. § 9607. Additional CERCLA funding comes from an \$8.5 billion "Hazardous Substance Superfund" financed by taxes on oil, chemical feedstocks, and corporate profits. *See id.* § 9611(a).

¹⁴ *See id.* § 9607(a).

¹⁵ *See id.* § 9607(a)(1), (2).

¹⁶ *See id.* § 9607(a)(3).

¹⁷ *See id.* § 9607(a)(4).

response, removal and remedial¹⁸ action costs;¹⁹ (2) damages for injury to or destruction of or loss of natural resources including the reasonable costs of assessing such injury;²⁰ (3) destruction or loss resulting from such a release; and (4) costs of any health assessment or health effects²¹ (collectively called "CERCLA costs and damages"). Defenses to strict liability under CERCLA are limited to an act of God,²² an act of war,²³ and the act or omission of a third party other than one whose act or omission occurs in connection with a contractual relationship with the defendant.²⁴ A contract transferring ownership of land removes the third party defense for a defendant who acquired the land after the disposal unless he can establish by a preponderance of the evidence that at the time he acquired the facility he did not know, and had no reason to know, that any hazardous substance was disposed at the facility.²⁵ Thus, a landowner can be strictly liable as a PRP for pollution released many years earlier even if the pollution was released according to different legal and industrial standards as long as he should have

¹⁸ "Removal" refers to the actions taken in the cleanup of released hazardous substances to monitor, assess, and evaluate the release or threat of release of hazardous substances, disposal of removed material, and other actions taken as necessary to minimize short term danger. *See id.* § 9601(23). "Remedial action" is the procedure used for permanently removing any present or future dangers to public health or welfare or the environment by preventing any future release of hazardous substances. *See id.* § 9601(24). The key difference between the two is that removal is concerned with immediate danger while remediation includes procedures for a long-term solution.

¹⁹ *See id.* § 9607(a)(4)(A)-(B). Liability attaches whether the EPA or a private party conducted the cleanup. *See id.*

²⁰ *See id.* § 9607(a)(4)(C).

²¹ *See id.* § 9607(a)(4)(D). Liability under this provision is capped at \$50 million for owner/operators and by formulas for particular facilities and vessels. *See id.* § 9607(c). The cap is not applicable if the hazardous release was the result of willful misconduct or willful negligence, if the primary cause was negligence in operating standards or a failure to cooperate with public officials. *See id.* § 9607(c)(2). A person also may be liable for punitive damages of three times the amount of damages and costs established in § 9607(a). *See id.* § 9607(c)(3).

²² *See id.* § 9607(b)(1).

²³ *See id.* § 9607(b)(2).

²⁴ *See id.* § 9607(b)(3). To utilize this defense, a defendant must show by a preponderance of the evidence that he exercised due care with respect to the hazardous substance involved and took precautions against foreseeable acts or omissions of any such third party and the foreseeable consequences of such acts or omissions. *See id.*

²⁵ *Id.* § 9601(35)(A)(i). The party also must establish the due care required in 42 U.S.C. § 9607(b)(3). *See id.* § 9601(35)(A).

known that the site contained some amount of hazardous waste.²⁶

The cleanup process proceeds as follows. The EPA places a site on the National Priorities List ("NPL") if it poses a release threat mandating long-term remedial evaluation and response.²⁷ A Remedial Investigation ("RI") is then conducted to determine the extent of the contamination.²⁸ A Feasibility Study ("FS") follows to evaluate remediation and create site management alternatives based on the RI.²⁹ The goals of the RI/FS process are to determine what contaminants are present, determine the level of dispersment in the environment, develop a list of potential cleanup method alternatives, and use computer modeling to predict potential effects that each alternative could present.³⁰ The EPA considers the remedy alternatives presented in the RI/FS according to nine factors: health protectiveness; compliance with relevant laws and standards; long-term effectiveness and permanence; reduction of toxicity, mobility, or volume through treatment; short-term effectiveness; implementability; cost; state acceptance; and community acceptance.³¹ The EPA issues a Record of Decision ("ROD") that outlines a proposed remedial plan consisting of the Remedial Design ("RD") and Remedial Action ("RA").³² The ROD specifically selects a remedial method from the RI/FS for the site that provides adequate protection of public health, welfare, and the environment.³³

The EPA implements the ROD in one of three ways. First, the EPA can take over the site and hire a contractor to conduct the cleanup.³⁴ When the EPA takes over a site, it can sue PRPs to recover for CERCLA costs and

²⁶ See *United States v. Iron Mountain Mines, Inc.*, 881 F. Supp. 1432, 1446 (E.D. Cal. 1995).

²⁷ See 40 C.F.R. § 300.425(b) (1995).

²⁸ See *id.* § 300.430(d).

²⁹ See *id.* § 300.430(e).

³⁰ See Robert H. Abrams, *Using Experience to Improve Superfund Remedy Selection*, 29 U. RICH. L. REV. 581, 586 (1995).

³¹ See 40 C.F.R. § 300.430(e)(9)(iii). EPA discretion to consider these factors was left in place when CERCLA was amended in 1986 by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613 (1986), but the EPA was provided with more detailed guidance and standards and given the message that health and environmental risks were to take precedence over costs. See MAZMANIAN & MORELL, *supra* note 1, at 40.

³² See 40 C.F.R. § 300.430(f).

³³ See *id.*

³⁴ See 42 U.S.C. § 9604 (1994).

damages provided that the cleanup methods are not inconsistent with the National Contingency Plan ("NCP").³⁵ Second, the EPA can issue a Unilateral Administrative Order ("UAO") to a PRP requiring that the PRP clean up a site using methods specified in the ROD.³⁶ PRP non-compliance can result in penalties of up to \$25,000 a day and treble damages.³⁷ Third, the EPA can enter into a settlement with the PRP³⁸ for the PRP to remediate the site through procedures specified in a consent decree that were selected from the alternatives presented in the ROD.³⁹ Before entering into the settlement, the EPA must determine that the PRP will conduct the action properly and promptly.⁴⁰ The settlement does not reflect acknowledgment by the party that the release constitutes an imminent and substantial endangerment to the public health, welfare, or the environment.⁴¹ Any person who enters into such an agreement may sue other PRPs who do not enter into settlements with the EPA for recovery costs involved in the cleanup.⁴²

The EPA published a Model Consent Decree to be used as the basis for these settlement agreements.⁴³ The EPA maintains complete oversight authority throughout the RD/RA process.⁴⁴ CERCLA provides for limited

³⁵ See *id.* § 9607(a)(4)(A). The EPA was required to publish the NCP after notice and comment rulemaking on appropriate methods and standards for cleanup. See *id.* § 9605. In addition, it was required to specify procedures and standards for responding to the release of hazardous substances. See *id.* § 9605(a). These include proper methods for discovering, investigating, evaluating, and remedying releases or threats of releases that pose substantial danger to the environment. See *id.*

³⁶ See *id.* § 9606(a). The PRP can seek reimbursement for recovery costs incurred in the cleanup from other PRPs. See *id.* § 9607(a).

³⁷ See *id.* § 9606(b)(1).

³⁸ The EPA also may enter into a settlement with any other person including the present landowner. See *id.* § 9622(a).

³⁹ See *id.* The EPA also may settle with the PRP early enough in the process for the PRP to conduct the RI/FS itself. See *id.*

⁴⁰ See *id.* § 9604(a)(1).

⁴¹ See *id.* § 9622(d)(1)(B).

⁴² See *id.* § 9607(a). The PRPs who enter into the agreements cannot be held liable for contribution regarding matters addressed by the settlement. See *id.* § 9622(g)(5).

⁴³ Revised Model CERCLA RD/RA Consent Decree, 60 Fed. Reg. 38,817 (1995).

⁴⁴ The EPA must approve the remedial design and remedial action plans continually during the process including preliminary, intermediate, and pre-final/final submittals. See *id.* at 38,823-27. Remedial plans must include design criteria, treatability study results, field sampling and pre-design work results, project delivery strategy, preliminary plans, drawing sketches, specifications, and the construction schedule. See *id.* at 38,823. The EPA also must approve Remedial Action Work Plans that may include: completion schedules,

citizen and state participation in the remedy selection and settlement processes but stays such activity once a cleanup commences until it is completed.⁴⁵ Citizen and state involvement takes many forms. The EPA must provide opportunity for public comment on the ROD and any subsequent proposed changes to it.⁴⁶ Citizens may bring civil suits against any person or the government for violating any provision of CERCLA.⁴⁷ State governments also have the opportunity to review and comment on the studies conducted on the site⁴⁸ and the proposed remedy.⁴⁹ States are entitled

selection methods for the contractor, methodology for ground water monitoring and operation plans, and procedures and plans for decontamination of equipment and disposal of contaminated materials. *See id.* at 38,824. The EPA must approve selections and changes in the supervising contractor hired by the PRP. *See id.* at 38,823.

The most relevant aspect of the consent decree is the role that the EPA maintains in the remedy selection. At least every five years, the EPA may request any studies and investigations to conduct reviews of whether the remedial action is protective of human health and the environment. *See id.* at 38,825. In fact, the EPA may determine at any time that the remedial action is not protective of human health and the environment and select further response actions for the site. *See id.* Access to the site must be provided at any reasonable time for the EPA or its contractor to monitor the work; verify any data or information; conduct investigations relating to contamination at or near the site; obtain samples; assess need for additional response actions; inspect records, logs, and contracts; and assess settling defendants compliance with the consent decree. *See id.* at 38,825-26.

PRPs also are involved in a continuous exchange with the EPA through the monthly progress reports they must provide. *See id.* at 38,825. The monthly reports must contain summaries of all results of sampling and other tests; identify all work plans completed and submitted; describe all actions including data collection and implementation of work plans and provide other information relating to the progress of construction; include information regarding percentage of completion and unresolved delays encountered or anticipated that may affect the future schedule for implementation of the work; include schedule modifications; and describe activities undertaken in support of the Community Relations Plan. *See id.* at 38,826. Project coordinators must be named by both the PRP and the EPA, and the two coordinators must meet at least once a month. *See id.* at 38,827.

⁴⁵ *See Schalk v. Reilly*, 900 F.2d 1091, 1095 (7th Cir. 1990).

⁴⁶ *See* 42 U.S.C. § 9617(a). The EPA is required to provide a reasonable opportunity for the public to submit written and oral comments regarding the proposed remedy. *See id.* § 9617(a)(2).

⁴⁷ *See id.* § 9659(a).

⁴⁸ *See id.* § 9621(f)(1)(E). States can comment on the data used in the RI/FS to evaluate the remedial action proposals, the engineering design resulting from the selection of the planned remedial action, and other technical data relating to the implementation of a remedy. *See id.*

⁴⁹ *See id.* § 9621(f)(1)(G).

to participate in settlement negotiations with private parties on potential consent decrees,⁵⁰ but the EPA can settle without a state's concurrence.⁵¹ The state may challenge the remedy in the consent decree if the state believes that it violates standards required under state law⁵² or if it believes that the cleanup is not in compliance with the RA.⁵³

B. *Environmental Tort Law*

Hazardous waste problems that lead to CERCLA remedies and liability often raise state environmental tort issues because CERCLA purposely avoids providing compensation for victims and affected property owners.⁵⁴ Unfortunately, the relationship between traditional state tort remedies and CERCLA cleanups is not fully resolved. Examples of large-scale settlements of environmental tort claims stemming from hazardous waste ultimately cleaned up under CERCLA include tort suits for medical and economic harm by 280 residents in the "Three Mile Island" nuclear disaster, a \$20 million "Love Canal" settlement for 1,300 former and current residents, and a \$400,000 settlement for a Chevron McColl dumping site to seventy-eight families in Fullerton, California.⁵⁵ Typical environmental tort cases involve claims of nuisance and/or trespass with some basis in negligence or strict liability.⁵⁶ Nuisance law is a frequently litigated environmental tort, particularly when there are injuries arising from water or

⁵⁰ See *id.* § 9621(f)(1)(F).

⁵¹ See *id.* § 9621(f)(2)(C).

⁵² See *id.* § 9621(d)(2)(A). A state can challenge a remedy in federal court if it violates a state environmental standard, called an "applicable or relevant and appropriate requirement" ("ARAR"). See *id.* § 9621(f)(2)(B). However, a court can accept a waiver of the ARAR if the remedy selection is supported by "substantial evidence." See *United States v. Akzo Coatings of America, Inc.*, 719 F. Supp. 571, 583 (E.D. Mich. 1989), *aff'd*, 949 F.2d 1409 (6th Cir. 1991) (applying "arbitrary and capricious review" to allow an amendment of an ROD to allow for soil flushing method despite a state challenge that the method violated state ground water antidegradation laws). Often the determination of whether the remedy complies with the ARAR can only be made at the completion of the remedy. See, e.g., *id.* at 586.

⁵³ See 42 U.S.C. § 9621(f).

⁵⁴ See MAZMANIAN & MORELL, *supra* note 1, at 45.

⁵⁵ See *id.* at 45-46.

⁵⁶ See SUSAN M. COOKE, *THE LAW OF HAZARDOUS WASTE: MANAGEMENT, CLEANUP, LIABILITY AND LITIGATION* § 17.01[1][b] (1995). Because each state has its own tort law, this Note considers the coverage of this law in a general fashion.

soil pollution.⁵⁷ Nuisance actions can be brought publicly⁵⁸ or privately,⁵⁹ prospectively or after the interference with property commences.⁶⁰ Generally, a plaintiff in a nuisance claim must prove five elements: interference with use and enjoyment of land; possessory interest by the plaintiff in the land affected; creation of the nuisance by the defendant;⁶¹ substantial harm that comes from the interference with the land; and that the defendant meets the state's requisite liability standard.⁶² Depending on the jurisdiction, the conduct required in the last element is usually grouped as: intentional and unreasonable; negligent,⁶³ reckless, or abnormally dangerous; or based on strict liability.⁶⁴ A typical nuisance suit is one that stems out of a toxic site that leaches contamination of a hazardous substance, such as oil or plutonium, into soil or ground water on the property of another and causes either personal injury or decreases property value.⁶⁵ Trespass suits are generally brought as companion claims in nuisance suits,⁶⁶ but they are much less likely to be successful because trespass is based on an intentional

⁵⁷ See *id.*

⁵⁸ See *id.* § 17.01[2][a]. The suit is usually brought by a state or municipal representative for abatement or recovery of costs from an interference with a right common to the general public. See *id.*

⁵⁹ See *id.* The suit is a "civil action for damages or for abatement of an interference with use and enjoyment of land caused by the defendant's conduct." *Id.*

⁶⁰ See *Village of Wilsonville v. SCA Servs., Inc.*, 426 N.E.2d 824 (Ill. 1981).

⁶¹ At minimum, the plaintiff must prove that the defendant contributed significantly to the nuisance, such as disposing of hazardous waste on property belonging to someone else. See COOKE, *supra* note 56, § 17.01[2][b][iii].

⁶² See *id.* § 17.01[1][a]-.01[2][d].

⁶³ Some states provide that a violation of specific federal or state environmental statutes constitutes "negligence per se" in determining culpability under nuisance. See *id.* § 17.01[4][b][iii][B]. Violation of a CERCLA order would be "negligence per se" in these jurisdictions, although the unique nature of CERCLA does not mandate that any PRP be considered "negligent per se" because being a PRP does not alone constitute a violation of federal law. See *infra* note 120 and accompanying text.

⁶⁴ See COOKE, *supra* note 56, § 17.01[2][b][v][B][ii]-.01[2][b][v][B][iii][E].

⁶⁵ See *id.* § 17.01[2][b][i]. An example of a typical nuisance suit is where a court holds that an intrusion of volatile organic compounds ("VOCs") into well water constitutes a private nuisance. See *Fortier v. Flambeau Plastics Co.*, 476 N.W.2d 593 (Wis. Ct. App. 1991).

⁶⁶ See, e.g., *Fortier*, 476 N.W.2d at 608 (holding that VOCs constituted a trespass as well).

invasion of property.⁶⁷

This information on CERCLA and nuisance law provides a background to consider the conflict that exists when a nuisance claim could be created by an EPA-mandated CERCLA cleanup that involves a negligent selection or implementation of a remedy but that cannot be challenged until the remedy is complete.

II. TORT LIABILITY FOR NEGLIGENT REMEDIATION BY THE EPA

When the EPA takes over a site and hires a contractor to conduct a hazardous waste site cleanup,⁶⁸ a person may be injured by sickness resulting from an interference with his land that would not have occurred absent a negligent remedy selection by the EPA or negligent implementation by the EPA's contractor. Potential remedies include suing the EPA, the contractor, or the landowner.

A. *EPA and Contractor Tort Liability*

Congress waived governmental immunity for certain tort claims⁶⁹ under the Federal Tort Claims Act ("FTCA").⁷⁰ However, under the "discretionary acts exception" of the FTCA,⁷¹ the government⁷² or its agent cannot be held liable for a tort claim if the challenged government action involves an element of judgment or choice and if the challenged government action is based on considerations of public policy.⁷³ In this context, the question becomes whether SARA limited enough of the discretion originally

⁶⁷ See COOKE, *supra* note 56, § 17.01[3][a]. Nuisance suits for environmental claims usually stem from indirect invasions or a "percolation of injurious substances onto the land," rather than intentional entries onto a plaintiff's land. *See id.*

⁶⁸ *See supra* note 34 and accompanying text.

⁶⁹ *See* 28 U.S.C. § 2674 (1994). Before filing a claim under the FTCA, the party must give the EPA sufficient notice for it to value and settle the claim first. *See* *Laurence v. United States*, No. C-93-0381-DLJ, 1993 WL 266657, at *5 (N.D. Cal. July 8, 1993) (citing 28 U.S.C. § 2675).

⁷⁰ 28 U.S.C. §§ 2671-2680.

⁷¹ *Id.* § 2680(a).

⁷² The government can be held liable for the negligent or wrongful act or omission of any employee of the government who was acting within the scope of his office. *See id.* § 1346(b). The scope of his office does not include illegal acts. *See id.*

⁷³ *See* *Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988).

granted to the EPA in CERCLA to remove liability protection.⁷⁴

In *Richland-Lexington Airport District v. Atlas Properties, Inc.*,⁷⁵ the court conclusively held that CERCLA grants the EPA discretion with respect to cleanup of contaminated sites.⁷⁶ The EPA's Model Consent Decree for settlement agreements, however, may run counter to the requirement for immunity that there be no "federal statute, regulation, or policy specifically prescribing a course of action" for the EPA to follow.⁷⁷ Although the model allows EPA officials to use the model for "guidance" only and permits them to choose either the most recent model consent decree or previous ones,⁷⁸ the model itself does not address remedy selection. The guidelines for remedy selection promulgated under SARA, however, provide some fairly specific alternatives.⁷⁹ Nonetheless, they leave discretion to the EPA to determine whether a proposed remedy presents any hazard to human health.⁸⁰ For example, the guidelines require that detailed factual findings be made before selecting an appropriate remedial approach.⁸¹ Once a remedy is selected, it also must comply with cleanup standards in the guidelines.⁸²

A number of courts found that the discretionary acts exception applies when EPA officials make decisions in cleanups where they exercise discretion to weigh site-specific factors and determine the best way to meet

⁷⁴ For example, Topol and Snow claim that "Congress took away the Agency's discretion on many important issues and thus locked the EPA into a virtual enforcement straightjacket." 1 ALLAN J. TOPOL & REBECCA SNOW, *SUPERFUND LAW AND PROCEDURE* 15 (1992).

⁷⁵ 854 F. Supp. 400 (D.S.C. 1994).

⁷⁶ See *id.* at 423 (citing 42 U.S.C. § 9621); *United States v. Skipper*, 781 F. Supp. 1106, 1113-14 (E.D.N.C. 1991).

⁷⁷ *Berkovitz*, 486 U.S. at 536; see also Revised Model CERCLA RD/RA Consent Decree, 60 Fed. Reg. 38,817 (1995).

⁷⁸ See Revised Model CERCLA RD/RA Consent Decree, 60 Fed. Reg. at 38,819.

⁷⁹ See 40 C.F.R. § 300.430 (1995).

⁸⁰ See *id.*

⁸¹ See TOPOL & SNOW, *supra* note 74, at 47. Previously the EPA was given the broad task of determining remediation standards that were cost-effective and consistent with the National Contingency Plan. See *id.*

⁸² See *id.*

CERCLA's goals.⁸³ In *United States v. Skipper*,⁸⁴ the court held that "administrative decisions involving the cleanup and disposal of hazardous waste are grounded in environmental, economic and social considerations, and are just the sort of decisions the exception was designed to protect."⁸⁵ As long as EPA officials are making policy judgments based on resources and protecting public health and safety, the exception applies.⁸⁶ Thus, if the EPA negligently selects a remedy for the cleanup of hazardous waste and, as a result, someone is injured or property is damaged, the affected party cannot sue the EPA under state tort law. The only remaining possible tort defendant would be the current landowner of the property where the hazardous waste was originally located, even though the landowner did not select the remedy.

Generally the EPA also cannot be held liable under the FTCA if an independent contractor hired by the EPA negligently carries out its work under the contract.⁸⁷ In order to encourage contractors, called "response action contractors" ("RAC"), to perform cleanup work, the EPA is permitted to indemnify an RAC from any liability under federal law stemming from non-negligent work⁸⁸ and any tort claim for negligent work in carrying out

⁸³ See generally John F. Seymour, *Liability of Government Contractors for Environmental Damage*, 21 PUB. CONT. L.J. 491 (1992). Seymour's article reviews a number of cases where EPA officials implemented CERCLA cleanups. In one case, an on-site EPA coordinator was considered to be acting in a discretionary function when he rejected a state hydrogeologist's advice and scheduled remediation activities on days when air emissions could be dangerous to workers. See *United States Fidelity & Guar. Co. v. United States*, 837 F.2d 116 (3d Cir. 1988), *cert. denied*, 487 U.S. 1235 (1988). As a result of the coordinator's decision, a number of workers were seriously injured from a toxic cloud in the windy conditions. See *id.* at 119. The official was held not liable because "the authority delegated to the On-Scene Coordinator left room for, and indeed required, the exercise of policy judgment based upon the resources available and the relative risks to the public health and safety from alternative actions." *Id.* at 122. Similarly, in another case, a court found that, because the statute did not mandate specific conduct for the EPA in cleaning up a scrapyard contaminated by PCBs, the EPA could not be held liable for negligence in failing to mitigate the problem or adequately warn neighbors. See *Lockett v. United States*, 938 F.2d 630 (6th Cir. 1991).

⁸⁴ 781 F. Supp. 1106 (E.D.N.C. 1991).

⁸⁵ *Id.* at 1114.

⁸⁶ Governmental sovereign immunity is also waived specifically in the CERCLA statute but only to the extent that the federal government can be held liable for violating CERCLA and not for state tort claims. See 42 U.S.C. § 9620(a) (1994).

⁸⁷ See *United States v. Orleans*, 425 U.S. 807, 814-15 (1976).

⁸⁸ See 42 U.S.C. § 9619(a).

the RA.⁸⁹ Before the EPA can indemnify the RAC it must determine the amount that the PRP may indemnify the RAC and only indemnify the difference between adequate indemnification and the resources of the PRP.⁹⁰ Thus, not only will a PRP possibly be held liable for negligent remedy selection by the EPA, but it also will be liable for negligent implementation of a remedy by an RAC to the extent that it is required to provide indemnification.

B. EPA Liability for CERCLA Response Costs

An examination of EPA liability for CERCLA response costs when it takes over a site, rather than other tort claims, reveals why this policy may not make sense. A number of courts have extended EPA immunity to claims for CERCLA response costs due to negligent cleanup efforts by the EPA.⁹¹ A 1995 court decision persuasively rejected the reasoning behind these cases and showed that the EPA waived the sovereign immunity it possessed from the discretionary acts exception in the CERCLA statute.⁹²

CERCLA provides that government agencies are to be treated as "persons" under the Act.⁹³ Another provision states that the United States "shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title."⁹⁴ The Supreme Court stated that this provision amounts to an unequivocal waiver of sovereign immunity.⁹⁵ Some courts differ, however, on whether the EPA's takeover of a site converts the EPA into an "operator" for the purposes of determining liability. If the EPA is considered to be an "operator" of the site, then it can be liable for CERCLA response costs that

⁸⁹ See *id.* § 9619(c). However, the indemnification under the latter provision may not extend to state claims based on strict liability. See Seymour, *supra* note 83, at 541.

⁹⁰ See 42 U.S.C. § 9619(c)(5)(C)(i).

⁹¹ See, e.g., *United States v. Azrael*, 765 F. Supp. 1239 (D. Md. 1991) (holding that the counterclaims based on EPA removal action were barred by sovereign immunity); *United States v. Western Processing Co.*, 761 F. Supp. 725 (W.D. Wash. 1991) (rejecting claims for response costs based on EPA regulatory and cleanup activities).

⁹² See *United States v. Iron Mountain Mines, Inc.*, 881 F. Supp. 1432 (E.D. Cal. 1995).

⁹³ See 42 U.S.C. § 9601(21).

⁹⁴ *Id.* § 9620(a)(1). Section 9607 refers to liability under CERCLA as an owner/operator, arranger, or transporter. *Id.* § 9607(a).

⁹⁵ See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).

result from negligent acts.⁹⁶ Although conceding that the EPA exercises sufficient dominion and control over the operation of a facility that it takes over in order to be considered an "operator," a number of courts have concluded that the EPA should not be considered an "operator" because its role in taking over a site is different than that of a private actor.⁹⁷ These courts claim that a private actor would not take over the site of someone else's pollution and clean it up.⁹⁸ *United States v. Iron Mountain Mines, Inc.*,⁹⁹ however, rejected this conclusion because CERCLA

encourages private cleanup of pollution caused by others by exposing current owners to liability and at the same time providing them with a cause of action for the recovery of their costs. In many instances private remediators will be current owners of property who had nothing to do with the creation of the hazardous waste problem that they must respond to. These private parties are not different in any significant respect from a government agency acting in a remedial capacity and CERCLA does not acknowledge such a difference but treats them in the same way.¹⁰⁰

Another point made by many courts is that imposing CERCLA response cost liability on negligent government action shifts costs from PRPs to the government.¹⁰¹ Again, however, the court in *Iron Mountain Mines, Inc.* disposed of this point by reiterating that many PRPs are landowners who became responsible for pollution released many years earlier when there were different technical and industrial standards.¹⁰² The policy idea that the current landowner would internalize the costs of pollution into business operations¹⁰³

⁹⁶ See *Iron Mountain Mines, Inc.*, 881 F. Supp. at 1443-44 (giving an example where the court interprets 42 U.S.C. § 9607(d)).

⁹⁷ See, e.g., *In re Paoli R.R. Yard PCB Litigation*, 790 F. Supp. 94, 97 (E.D. Pa. 1992); *United States v. Western Processing Co.*, 761 F. Supp. 725, 730 (W.D. Wash. 1991).

⁹⁸ See, e.g., *In re Paoli R.R.*, 790 F. Supp. at 97.

⁹⁹ 881 F. Supp. 1432 (E.D. Cal. 1995).

¹⁰⁰ *Id.* at 1445 (citations omitted).

¹⁰¹ See *Western Processing Co.*, 761 F. Supp. at 729.

¹⁰² *Iron Mountain Mines, Inc.*, 881 F. Supp. at 1446; see also MAZMANIAN & MORELL, *supra* note 1, at 3 (stating that the common landfill procedure in the post World War II era was to fill a pit or ravine with industrial or household waste and then to cover and level it).

¹⁰³ See *United States v. Azrael*, 765 F. Supp. 1239, 1245 (D. Md. 1991).

does not always apply when the current landowner may not even have any current business operations.¹⁰⁴ Further, no public policy considerations justify internalizing the EPA's negligent cleanup activity.¹⁰⁵ Even the case law above concedes that a PRP can avoid the EPA's attempt to collect response costs if it can show that the effort was inconsistent with the procedures that must be followed under the NCP.¹⁰⁶ Negligent method selection or implementation is inconsistent with the NCP. Thus these cases hold that a PRP can refuse to pay costs to the EPA if it can show negligent method selection, but that the same negligence cannot be used to require the EPA to pay response costs that a PRP must incur under 42 U.S.C. § 9613(f)(1) to make up for the EPA's negligence.¹⁰⁷

Proper interpretation of 42 U.S.C. § 9607(d)(1) mandates that the EPA may be held liable for contribution costs under CERCLA.¹⁰⁸ The provision says that remediators can be held liable for CERCLA costs and damages for a negligent cleanup.¹⁰⁹ Immunity from CERCLA costs and damages is granted for those that conduct a cleanup of a site using NCP procedures or that are under the direction of an approved on-scene coordinator.¹¹⁰ The provision is followed by this sentence: "This paragraph shall not preclude liability for costs or damages as the result of negligence on the part of such person."¹¹¹ The court in *Skipper* held that this provision meant that NCP compliance and approved on-scene supervision does not foreclose state tort liability.¹¹² However, the court in *Iron Mountain Mines, Inc.* argued that such statutory construction is a tortured reading of the provision because it ignores the placement of the sentence and the phrase "costs and damages."¹¹³ As the court in *Iron Mountain Mines, Inc.* said, "[S]urely the reference in the second sentence is to 'costs or damages' under

¹⁰⁴ See *Iron Mountain Mines, Inc.*, 881 F. Supp. at 1446.

¹⁰⁵ See *id.*

¹⁰⁶ See, e.g., *Western Processing Co.*, 761 F. Supp. at 729.

¹⁰⁷ See *Iron Mountain Mines, Inc.*, 881 F. Supp. at 1446 (evaluating the decision in *United States v. Skipper*, 781 F. Supp. 1106, 1112 (E.D.N.C. 1991)).

¹⁰⁸ See *id.* at 1447.

¹⁰⁹ 42 U.S.C. § 9607(d)(1) (1994). Some potentially liable remediators include the EPA, indemnified RACs, and PRPs. See *id.*

¹¹⁰ See *id.*

¹¹¹ *Id.*

¹¹² See *United States v. Skipper*, 781 F. Supp. 1106, 1112 (E.D.N.C. 1991).

¹¹³ *Iron Mountain Mines, Inc.*, 881 F. Supp. at 1447.

CERCLA and not state law, a subject never mentioned.”¹¹⁴ Further, subsections 9607(d)(2) and 9607(d)(3), the only other subsections within 9607(d), deal with “costs or damages” for CERCLA, not state action.¹¹⁵

The other argument for providing the EPA with immunity for misconduct and negligence is the rejection of a Senate amendment that would have added such misconduct and negligence as a defense to CERCLA liability.¹¹⁶ However, as the court in *Iron Mountain Mines, Inc.* made clear, a PRP using EPA negligence as an absolute defense to PRP liability is very different from the EPA trying to avoid any responsibility for negligent cleanup efforts.¹¹⁷ CERCLA envisions a wide scope of liability upon the discovery of a hazard to provide incentives for parties to commence cleanup quickly with the understanding that the party who conducted the cleanup will be entitled to equitable reimbursement from responsible parties.¹¹⁸ Liability for costs and damages incurred throughout the cleanup process are allocated based on respective fault and should include possible EPA liability for negligent remedy selection or implementation.¹¹⁹

The *Iron Mountain Mines, Inc.* holding is limited to imposing CERCLA response costs and does not address whether the EPA should be found negligent under state tort law for negligent remedy selection or implementation. The holding is instructive on two reasons why the EPA should bear liability for any tort damage it causes someone else. First, when the EPA takes over a site for cleanup, it controls the site as the “owner/operator” and thus should bear responsibility for the cleanup. The landowner loses control of his property under the power of federal law, and thus cleanup mistakes are solely the work of the EPA. Second, the holding stands for the broad proposition that the EPA should be liable for its mistakes in remedy selection and implementation. CERCLA’s willingness to waive sovereign immunity for the importance of ensuring proper cleanup procedures should be duplicated when faced with the importance of ensuring that environmental tort victims are compensated by those responsible regardless of the discretionary functions exemption to the FTCA. If it is impossible to clean up the site without causing a nuisance to a neighbor, then

¹¹⁴ *Id.*

¹¹⁵ *See id.*

¹¹⁶ *See Skipper*, 781 F. Supp. at 1112.

¹¹⁷ *See Iron Mountain Mines, Inc.*, 881 F. Supp. at 1448.

¹¹⁸ *See id.* at 1432.

¹¹⁹ *See id.* at 1448-49.

the court trying the state tort claim should attempt to apportion the fault to the EPA and the private defendant responsible for the underlying hazardous substance. Such a policy would deter dangerous cleanups and provide PRPs with incentives to clean up sites themselves to avoid the high costs that the EPA will incur in using safe, expensive cleanup methods to avoid liability. The alternative of a plaintiff suing the PRP landowner for EPA negligence is unfair, but in states where negligence is the culpability standard for nuisance claims, a suit is possible if the plaintiff can show that the PRP proximately caused the exposure. However, the unique nature of CERCLA may prevent successful "negligence per se" suits against the PRP landowner.¹²⁰ Such a scenario leaves the injured person without a state nuisance remedy. In states with a strict liability basis for nuisance law, particularly related to the disposal of hazardous waste, a PRP landowner is faced with tort liability for EPA negligence. Either result is flawed.

III. TORT LIABILITY WHEN A PRP PERFORMS THE CLEANUP

The question of environmental tort liability also exists for a PRP that cleans up a hazardous site pursuant to methods in a ROD, either under a UAO or pursuant to a consent decree entered into with the EPA.¹²¹ A state

¹²⁰ See *Gray v. Murphy Oil USA, Inc.*, 874 F. Supp. 748, 755 (S.D. Miss. 1994) (refusing to accept federal jurisdiction over a suit because CERCLA could not provide the basis for a state tort claim as negligence per se unless the defendants failed to properly conduct any proposed cleanup). If the EPA takes over the site without issuing a Unilateral Administrative Order ("UAO") for the PRP to clean up the site, then no CERCLA "violation" exists on which to base a claim of negligence per se. See *id.*

¹²¹ See *supra* notes 36-39 and accompanying text. A PRP faces a number of considerations regarding CERCLA costs and damages when deciding what to do when it receives a notice of PRP classification. See generally *Organ, supra* note 6. If the PRP takes no action, it will face four potential types of liability risks. See *id.* at 1065. First, if the EPA takes over the site and cleans it up as discussed earlier in this Note, the PRP will be faced with joint and several liability for CERCLA costs and damages. See *id.* Second, the EPA also may issue an administrative order to the PRP to participate or face huge penalties. See *id.* Third, another PRP may clean up the site, and the first PRP may risk being sued for contribution from that PRP for CERCLA costs and damages. Fourth, by entering into the consent decree the PRP faces other liability risks. See *id.* If it enters before or during the RI/FS, it does not know which remedy the EPA will choose. See *MAZMANIAN & MORELL, supra* note 1, at 45. However, at least the PRP will participate in the collection of data and the shaping of alternate remedies to be chosen by the EPA. See *John, supra* note 3, at 972 n.148. Also, because the EPA rarely considers equitable allocation among PRPs effectively, the settling

tort claim may be preempted by an EPA consent decree or UAO in a number of ways under the Supremacy Clause of the Constitution. The Constitution states that the laws of the United States "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."¹²² Federal preemption of state law under the Supremacy Clause can occur in three instances: statutory prescription, direct conflict between federal and state law, or an area involving "uniquely federal interests."¹²³

A. *Statutory Prescription*

An examination of the CERCLA statute reveals that Congress never specifically addressed whether a PRP can be held liable for a state tort claim for injuries stemming from a cleanup. The statute clearly envisions a role for state law in hazardous cleanup because it states, in a "savings clause," that "[n]othing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State."¹²⁴ The statute does not preempt state tort claims for personal or property injury caused by hazardous waste released before any cleanup begins.¹²⁵ Validity of state

PRP likely will bear a disproportionate share of response costs even if the EPA selects a remedy that the PRP supports. *See Organ, supra* note 6, at 1067. The incentives for the PRP to enter into the consent decree are to have an influence in the determination of liability, to avoid being sued by the EPA, and to avoid being sued for CERCLA costs and damages on matters covered by the consent decree with other PRPs. *See id.* at 1066.

¹²² U.S. CONST. art. VI, cl. 2.

¹²³ *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988).

¹²⁴ 42 U.S.C. § 9614(a) (1994). Another CERCLA provision also is relevant. Section 9607(j) specifies that

[n]othing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance or for removal . . . of such hazardous substance.

Id. § 9607(j).

¹²⁵ *See Edward Hines Lumber Co. v. Reilly Tar & Chem. Corp.*, 685 F. Supp. 651, 657 (N.D. Ill. 1988); *see also Artesian Water Co. v. New Castle County*, 851 F.2d 643, 648-49 (3d Cir. 1988) (holding that CERCLA does not provide compensation for economic loss or personal injury resulting from the release of hazardous substances so that state law must govern such claims); *Attorney General v. Thomas Solvent Co.*, 380 N.W.2d 53, 59 (Mich.

nuisance claims for hazardous waste exposure also is confirmed by the leniency that courts give to "traditional state remedies" so as not to upset the balance between federal and state law.¹²⁶ Because of this leniency provided to traditional state remedies, consideration of issues arising under the Supremacy Clause starts with the assumption that historic police powers of the states are not to be superseded by federal law unless it is the clear and manifest purpose of Congress.¹²⁷ The combination of the savings clause and the fact that nuisance law is a traditional state remedy mandates the assumption that CERCLA would not displace state tort claims in any cleanup action without a clear intention to do so.

Statutory construction assists in determining whether Congress clearly intended to preempt state tort claims once the PRP cleanup commences. CERCLA requires that a PRP indemnify a contractor for liability from the contractor's own negligence, as long as it is not willful or intentional, in allowing the release of any hazardous substance arising out of response action activities.¹²⁸ The PRP in turn is not allowed indemnification for such negligence.¹²⁹ By requiring PRPs to indemnify a contractor for negligent compliance of the remedial plan, CERCLA places the tort liability for negligent implementation of a remedy on the PRP.¹³⁰ However, given the EPA's selection of the remedy and oversight of the cleanup, this provision

Ct. App. 1985) (holding that CERCLA provides that states may supplement any liability that may be imposed under CERCLA). The Supreme Court determined that Superfund money is not available to compensate private parties for harm resulting from discharge of hazardous substances, making it clear that compensation for damages should be addressed by state, rather than federal, law. *See Exxon Corp. v. Hunt*, 475 U.S. 355, 375 (1986).

¹²⁶ *See Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1975) ("This assumption provides assurance that 'the federal-state balance' . . . will not be disturbed unintentionally by Congress or unnecessarily by the courts.").

¹²⁷ *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

¹²⁸ *See* 42 U.S.C. § 9619(c). The EPA also may indemnify the contractor hired by the PRP for an amount that does not exceed the difference between the indemnification that the PRP can afford and the amount necessary to provide the contractor with enough security to feel comfortable to conduct the response action. *See id.*

¹²⁹ *See id.* § 9619(d).

¹³⁰ *See supra* notes 110-12 and accompanying text for a discussion of the fact that there is no dispute that plaintiffs may recover under state law for negligent cleanup implementation, although it is not clear from whom they may recover. The dispute centers around whether a party could be held liable for CERCLA response costs for negligently implementing a cleanup. *See supra* notes 109-15 and accompanying text.

makes no statement as to a PRP's liability for negligent remedy selection.¹³¹

Provisions in CERCLA that define its preemptive reach imply that matters beyond that reach are not preempted.¹³² For example, section 9613(f)(2) of CERCLA states that a PRP that has entered into a judicially approved settlement shall not be liable for claims of contribution from other PRPs for CERCLA costs and damages.¹³³ If Congress intended to provide absolute protection to PRPs that enter into consent decrees from state tort liability, then the protection provision would include not only CERCLA costs and damages, but also state tort claims.

The timing of challenges to a negligent remedy selection in RODs and judicially approved consent decrees, however, leads to an opposite conclusion of congressional intent. The statute provides for citizen suits,¹³⁴ but denies federal court jurisdiction for challenging the scope of remedies until remedial actions are completed.¹³⁵ The scope of the citizen suit provision, and its corresponding timing limitation, appears to be limited to challenges that the chosen remedy violates CERCLA,¹³⁶ including CERCLA's mandate to protect public health, and thus does not necessarily

¹³¹ See 42 U.S.C. § 9619(d).

¹³² See *Cipollone*, 505 U.S. at 520.

¹³³ 42 U.S.C. § 9613(f)(2).

¹³⁴ See *supra* note 47 and accompanying text.

¹³⁵ See *Schalk v. Reilly*, 900 F.2d 1091, 1095 (7th Cir. 1990) (reviewing "plain language" of § 9613(h)(4) and deciding that a remedy selection can only be challenged in court for violating a provision of CERCLA once the remedy is completed). Legislative history supports this view as well. Senator Thurmond commented on this provision on the Senate floor:

This section is designed to preclude lawsuits by any person concerning particular segments of the response action, as delineated by the records of decision, until those segments of the response have been constructed and given the chance to operate and demonstrate their effectiveness in meeting the requirements of the act. Completion of all of the work set out in a particular record of decision marks the first opportunity at which review of that portion of the response action can occur.

132 CONG. REC. S14,929 (daily ed. Oct. 3, 1986) (statement of Sen. Thurmond). This provision is in place to avoid the delays on cleanup implementation that such pre-cleanup challenges would cause. See *generally* *Alabama v. EPA*, 871 F.2d 1548, 1558 (11th Cir. 1989).

¹³⁶ See *Coburn v. Sun Chem. Corp.*, No. CIV.A.88-0120, 1988 WL 120739 (E.D. Pa. Nov. 9, 1988) (holding that a federal court does not have subject matter jurisdiction over a lawsuit challenging that a chosen remedy is incompatible with CERCLA until the remedy is completed).

include tort claims. Although the provision does not seem to explicitly bar pre-cleanup challenges to remedy selection under state tort law, it is difficult to see how Congress could have intended that citizens not be able to challenge the sufficiency of remedies for protecting human health under CERCLA before the cleanup is finished but allow tort claims based on the exact same theory before the cleanup is finished.¹³⁷

The legislative history behind SARA displays confusion on the subject as well. Senator Mitchell stated that "[t]he conferees agreed that some pre-implementation review would be provided so that citizens would not be disadvantaged by having to wait until cleanup was complete. *Nuisance suits would, of course, be permitted at any time.*"¹³⁸ Representative Eckart disagreed with Senator Mitchell's assessment when he said that "[s]tate laws are to be used as a source for remedy determinations under this law, but in fact are preempted by it."¹³⁹ The statute, both in its construction and the history surrounding its enactment and subsequent amendments, does not provide a satisfactory answer to the narrow preemption inquiry of this Note.

B. Actual Conflict

The Supreme Court held that state law is preempted by federal law to the extent that the two "actually conflict," regardless of congressional design or intention.¹⁴⁰ An "actual conflict" exists if the state law stands as an obstacle to the accomplishment of the full purposes and objectives of federal law.¹⁴¹ Federal regulations, including both the authority to enter into consent

¹³⁷ For a thorough discussion on actual conflict between federal and state law in this context, see *infra* notes 140-69 and accompanying text.

¹³⁸ 132 CONG. REC. S14,917 (emphasis added).

¹³⁹ 132 CONG. REC. H9574 (Oct. 8, 1986) (statement of Rep. Eckart). It was also asserted by Representative Eckart that statements made on the Senate floor, including the one made by Senator Mitchell, did not truly reflect the sentiment of the conference committee. See *id.*

¹⁴⁰ See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

¹⁴¹ See *id.*; see also *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963) (stating that the inquiry is whether compliance with both federal and state requirements is a physical impossibility).

decrees¹⁴² and the power to issue UAOs, possess the same degree of preemptive power as a statute provided that the agency determination represents a reasonable accommodation of conflicting policies that are within the agency's domain.¹⁴³ The EPA is given clear regulatory authority in CERCLA to set up proper remediation of hazardous waste sites in the form of provisions to sign consent decrees with PRPs and to issue UAOs to PRPs.¹⁴⁴

A number of courts have held that consent decrees pursuant to CERCLA and RCRA¹⁴⁵ sufficiently conflict with state law to warrant preemption.¹⁴⁶ A private plaintiff in *Feikema v. Texaco, Inc.*,¹⁴⁷ sought injunctive relief under state nuisance and trespass laws to require greater remedial measures than those included in a RCRA Consent Order presented to the responsible party.¹⁴⁸ The court found that the state tort claim was preempted by the EPA consent order because it was impossible for the defendant to comply with the two inconsistent procedures.¹⁴⁹ The holdings in *Feikema*, *United States v. Akzo Coatings of America, Inc.*,¹⁵⁰ and *Hermes Consolidated, Inc. v. People*¹⁵¹ demonstrate that state tort suits brought for injunctive relief are preempted if they call for remediation methods that are inconsistent with procedures specified by the EPA in orders and consent

¹⁴² Once the consent decree is signed by the PRP, it is a fully enforceable federal judgment that overrides any conflicting state law or state court order. See *Badgley v. Santacroce*, 800 F.2d 33, 38 (2d Cir. 1986) (stating that the strong policy encouraging settlement of cases requires that terms of a consent judgment, once approved by a federal court, be respected as fully as a judgment entered after trial).

¹⁴³ See *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984).

¹⁴⁴ See 42 U.S.C. § 9622(d) (1994).

¹⁴⁵ A consent order under RCRA, 42 U.S.C. § 6973, is similar to a UAO or consent decree under CERCLA for the purposes of preemption analysis. See 55 Fed. Reg. 30,798, 30,852 (1990) (codified at 40 C.F.R. § 264). In fact, the case for preemption should be even stronger under CERCLA because the EPA is more involved in CERCLA cleanups than it is in RCRA cleanups. See *id.* at 30,798. For a thorough comparison of CERCLA and RCRA, see generally John, *supra* note 3.

¹⁴⁶ See, e.g., *Feikema v. Texaco, Inc.*, 16 F.3d 1408, 1419 (4th Cir. 1994); *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1458 (6th Cir. 1991); *Hermes Consol., Inc. v. People*, 849 P.2d 1302, 1307 (Wyo. 1993).

¹⁴⁷ 16 F.3d 1408 (4th Cir. 1994).

¹⁴⁸ See *id.* at 1411.

¹⁴⁹ See *id.* at 1416.

¹⁵⁰ 949 F.2d 1409 (6th Cir. 1991).

¹⁵¹ 849 P.2d 1302 (Wyo. 1993).

judgments.¹⁵² The court in *Feikema* did not extend the logic to preempt a tort claim for monetary damages brought by the private party.¹⁵³ The concurring judge in *Feikema* made a compelling argument, however, that injunctive relief and monetary damages should not be split to determine federal preemption of state tort law.¹⁵⁴ A claim for monetary damages alleging that cleanup remedies are inadequate is based on the same theory that supports a claim for injunctive relief to change the remedies to make them adequate.¹⁵⁵ When preemption prevents injunctive relief, it must foreclose a claim for monetary damages as well because it is indirectly pursuing the same theory.¹⁵⁶ Otherwise, it would be impossible for the defendant to avoid paying monetary damages because it must follow the mandatory remedy selected by the EPA that cannot be altered by suits for injunctive relief. The EPA's inadequate remedy selection would automatically amount to a successful damages suit against the PRP.

Feikema's holding that a state nuisance claim for monetary damages is not preempted by the RCRA consent order may be misleading.¹⁵⁷ The decision on damages was based on two reasons: first, that the order did not

¹⁵² In *Hermes* and *Akzo Coatings*, state governments brought suit challenging consent decrees entered into between the EPA and the PRP and sought injunctive relief rather than monetary damages. After the PRP in *Hermes* entered into a federal consent decree, the state Department of Environmental Quality filed suit alleging that the operations of the facility caused the discharge in violation of state law, and was denied a request that further violations be enjoined through a state remediation plan. *See id.* at 1304. The state in *Akzo Coatings* was denied its challenge to a state remediation plan drafted to ensure compliance with state statutes and nuisance law because the court held that requiring the defendants to comply with two different cleanup procedures on the site would be inconsistent. *See Akzo Coatings*, 949 F.2d at 1458.

¹⁵³ *See Feikema*, 16 F.3d at 1416. Although *Feikema* is based on RCRA, rather than CERCLA, the provisions at issue are very similar. *See supra* note 144.

¹⁵⁴ *See Feikema*, 16 F.3d at 1418 (Murnaghan, J., concurring) (citing Supreme Court decisions for the proposition that preemption analysis for claims of monetary damages is consistent with preemption analysis for injunctive relief claims).

¹⁵⁵ *See Michigan Canners & Freezers Ass'n v. Agricultural Mktg. & Bargaining Bd.*, 467 U.S. 461, 469 (1984) (stating that a state law also is preempted if it interferes with the methods by which the federal statute was designed to reach its goal).

¹⁵⁶ *See id.*

¹⁵⁷ In fact, Judge Murnaghan's concurrence attempted to clarify the holding of the court by stating that, in his view, preemption of a suit for injunctive relief also bars a suit for monetary damages based on the theory that the use of an inadequate remedy caused a tort. *Feikema*, 16 F.3d at 1417 (Murnaghan, J., concurring).

consider damages to the plaintiff caused by the hazard of possessing the hazardous substance,¹⁵⁸ and, second, that the EPA is only authorized to seek injunctive relief and not compensation for damages.¹⁵⁹ The second reason, while true, should not overshadow the first. The key to understanding the holding is to recognize the distinction between the tort of the improper disposal or possession of a hazardous substance and the tort of negligently removing the substance.¹⁶⁰ The PRP may be responsible for the underlying hazardous waste, but the EPA is responsible for the remedy selection.¹⁶¹ Both torts may result in a viable nuisance claim, but they should be distinguished so that the responsible party may be held liable. Otherwise, the court would end up with the same result it sought to avoid by denying injunctive relief.

In *Feikema*, the court's refusal to require that the defendant use cleanup methods sought by the plaintiff that were different from the methods specified by the EPA was based on the theory that the defendant could not comply with the two different methodologies at the same time.¹⁶² Exactly the same result would have occurred if the plaintiff was permitted to sue for monetary damages based on the theory that improper methods were used to clean up the hazardous waste.¹⁶³ Regardless of the type of tort suit brought by plaintiffs, the defendant is required by federal law by severe financial penalties to comply with the methodology provided in the ROD.¹⁶⁴ Allowance of the suit for monetary damages would mean that the PRP could then be held liable for failing to use methods that it was prevented by law

¹⁵⁸ See 1993-94 *Fourth Circuit Summary*: *Feikema v. Texaco, Inc.*, 18 WM. & MARY J. ENVTL. L. 415, 416 (1994).

¹⁵⁹ See *id.*

¹⁶⁰ The amount for damages for negligent remedy selection should equal the difference between the monetary damages imposed on the plaintiff by the cleanup remedy required by the EPA and the damages that would result from the cleanup remedy deemed necessary by the tort plaintiff.

¹⁶¹ The PRP lacks any choice in the matter because the cleanup method in the ROD will be carried out regardless of its participation. See generally *Organ*, *supra* note 6, at 1065-69. If it declines to sign a consent decree, it is likely to face a UAO; if it declines to follow the UAO, the EPA or another PRP will clean up the site according to the methodology in the ROD. See *id.*

¹⁶² *Feikema*, 16 F.3d at 1416.

¹⁶³ See *id.* at 1418 (Murnaghan, J., concurring).

¹⁶⁴ See *id.* CERCLA expressly makes it illegal for a PRP to deviate from a consent decree or UAO without EPA approval. See 42 U.S.C. § 9622(e)(6) (1994).

from using.¹⁶⁵ Imposing a damage claim on the defendant would be a direct usurpation of the EPA's statutory authority to determine which remedies are adequate to protect human health and would conflict with a judicially enforceable order. Simply put, "common-law damages actions are preempted to the same extent as common-law injunctive suits."¹⁶⁶

Plaintiffs in states with a negligence standard of culpability for nuisance claims may find it even more difficult to rebut conventional PRP defenses to environmental tort claims once this preemption is recognized.¹⁶⁷ Defendants would have an additional defense that it was the EPA's negligent remedy selection that caused the nuisance rather than the underlying hazardous waste. As courts tend to blur the distinction between negligence and strict liability standards when dealing with hazardous substances, however, the defendant likely will bear much of the burden of proving the portion of the damage that was preempted and thus not recoverable from the defendant.¹⁶⁸ More scientific information is becoming available to differentiate between harm caused by the underlying waste and harm caused by inadequate remedy selection. For example, the Agency for Toxic Substances and Disease Registry is required by CERCLA to study the effects of a number of hazardous substances on humans and produce significant data and information that could be used to show the effects of exposure to hazardous waste before a cleanup is commenced.¹⁶⁹

C. *Uniquely Federal Interest*

The actual conflict between an EPA order to conduct a specified remedy and a state tort claim for monetary damages alleging that the remedy is inadequate is clear enough alone to warrant preemption of the tort claim. The case for preemption is strengthened by an examination of the nature of the federal interest involved. The extent of the conflict necessary for preemption of state tort claims is lessened for issues that are of a "uniquely

¹⁶⁵ See *Feikema*, 16 F.3d at 1418 (Murnaghan, J., concurring).

¹⁶⁶ *Id.* (citing *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)).

¹⁶⁷ See COOKE, *supra* note 56, § 17.01[2][b][v][C].

¹⁶⁸ See *id.* § 17.01[2][b][v][C]-.01[2][b][v][D].

¹⁶⁹ See 42 U.S.C. § 9604(i). In certain cases, medical care and testing must be provided to exposed individuals. See *id.* § 9604(i)(1)(D).

federal interest.”¹⁷⁰ If there is a federal interest at stake, federal courts have the power to create federal common law to preempt state law,¹⁷¹ such as tort law, if there is a “significant conflict” between the federal policy or interest and the operation of state law.¹⁷²

The nature of the interests at stake in CERCLA cleanups seem analogous to others classified as “uniquely federal.”¹⁷³ First, the desire of Congress to develop uniform methods to clean up hazardous waste shows that cleanup methodology is an area that is uniquely federal. As stated in one

¹⁷⁰ See *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 (1988). The court stated that “the fact that the area in question is one of unique federal concern changes what would otherwise be a conflict that cannot produce pre-emption into one that can.” *Id.* at 507-08 (emphasis added).

¹⁷¹ See *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981). Courts are also free to develop common law in areas where Congress expressly gave courts the power to develop substantive law. See *id.* Courts are reluctant to develop federal common law that would preempt state law except when Congress expressly provided courts with such power. See, e.g., *Wheeldin v. Wheeler*, 373 U.S. 647, 651-52 (1962). The Supreme Court has concluded that generally “it is not for us to fill any *hiatus* Congress has left” when the creation of federal common law would preempt existing state law. *Id.* at 652 (emphasis added). Nonetheless, a number of federal courts have applied federal common law in CERCLA litigation because they decided that Congress intended that federal courts would fill in gaps left by the statute. See *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 91 (3d Cir. 1988) (imposing successor liability for CERCLA liability on corporations that have either merged or consolidated with a PRP despite a state incorporation law to the contrary). See generally *United States v. Bliss*, 667 F. Supp. 1298, 1308 n.8 (E.D. Mo. 1987) (discussing in dicta the appropriateness of federal common law for deciding CERCLA successor liability questions). In *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, the court stated that “[t]he meager legislative history available [on CERCLA] indicates that Congress expected the courts to develop a federal common law to supplement the statute.” *Id.* at 91. However, preempting state tort claims is much different than imposing successor liability. While the definition of PRP is consistent with successor liability, see 42 U.S.C. § 9607(a), the broad savings clause makes clear that generally state tort claims are not to be preempted. See *id.* § 9614. Given this savings clause, courts are not likely to find anything in the statute that expressly authorizes the development of federal common law unless an actual conflict exists between federal and state law, as discussed *supra* notes 140-169 and accompanying text, or unless the interests at stake in CERCLA cleanups are uniquely federal and there is some accompanying conflict between federal and state law.

¹⁷² See *Boyle*, 487 U.S. at 507.

¹⁷³ See *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 808 (S.D. Ohio 1983) (“The improper disposal or release of hazardous substances is an enormous and complex problem of national magnitude involving uniquely federal interests.”).

district court decision, "In attempting to eliminate the dangers of hazardous wastes, CERCLA presents a national solution to a nationwide problem."¹⁷⁴ Necessity for national uniformity within specific sub-categories related to CERCLA has made courts hesitant to allow corresponding liability to depend on the particular state in which the defendant happens to reside.¹⁷⁵ Cleanup methodology is one of the sub-categories of CERCLA that Congress intended to leave to the EPA. Congress did not intend to allow plaintiffs to recover from PRPs based on the theory that the remedy used to clean up hazardous waste was inadequate. Although it is clear in the statute that state tort liability is not preempted for torts caused before the cleanup begins, Congress determined that remedy selection should ultimately be decided by the EPA under the NCP and ROD processes.¹⁷⁶ Thus, because remedy selection is a uniquely federal interest, tort damage recoveries against PRPs should be preempted to the degree that they include liability for inadequate remedy selection.

Second, courts should consider government contract cases when developing federal common law on the preemption of state tort claims stemming from remedy selection. There can be a unique federal interest involved in a liability suit between private parties if it arises out of the performance of a contract with the federal government.¹⁷⁷ However, a unique federal interest is at stake only if the suit will directly affect the terms of government contracts.¹⁷⁸ In *Boyle v. United Technologies Corp.*,¹⁷⁹ a uniquely federal interest was at stake in a tort suit against a producer of military equipment for the federal government because the suit was based on inadequate design by the government.¹⁸⁰ The Court held that if the government contractor could be held liable for poor design by the government, then the contractor would either raise its contract price or refuse to agree to a contract with the government.¹⁸¹ Either result would affect

¹⁷⁴ *In re Acushnet River & New Bedford Harbor Proceedings*, 675 F. Supp. 22, 31 (D. Mass. 1987).

¹⁷⁵ See, e.g., *United States v. Nicolet, Inc.*, 712 F. Supp. 1193, 1201 (E.D. Pa. 1989) (considering parent-subsidiary liability for hazardous waste cleanups under CERCLA).

¹⁷⁶ See generally Organ, *supra* note 6, at 1055-56.

¹⁷⁷ See *Boyle*, 487 U.S. at 505.

¹⁷⁸ See *id.* at 507.

¹⁷⁹ *Id.* at 500.

¹⁸⁰ See *id.* at 507.

¹⁸¹ See *id.*

government contract terms enough to impede a uniquely federal interest.¹⁸² Similarly, a PRP may refuse to enter into a consent decree with the EPA to clean up a site. A PRP does not have the negotiating leverage of a normal government contractor in that the PRP can be ordered to conduct the cleanup if it refuses to settle, but there is a strong federal interest in settling these cases to commence cleanup quickly.¹⁸³ If the PRP decides to settle or receives a UAO, it would know that the method specified by the EPA may not be sufficient to protect against tort claims. The PRP would then have no opportunity to protect itself against tort liability because the EPA has exclusive authority to determine which methods are necessary to protect human health.¹⁸⁴ Under what is termed the "government contractor defense," government contractors are immune from tort liability in certain instances where uniquely federal interests are at stake if the duty on the federal government contractor is contrary to the duty that the suit attempts to apply under state law.¹⁸⁵

The unique nature of the situation presented by this Note may link a PRP's potential liability to that of a government contractor and make the government contractor defense applicable.¹⁸⁶ Of course, the main problem with such an analogy is the connection between the PRP and the hazardous waste that needs to be cleaned up.¹⁸⁷ But as the holding in *Iron Mountain Mines, Inc.* made clear, CERCLA does not require a tight connection in order

¹⁸² See *id.*

¹⁸³ See Organ, *supra* note 6, at 1057.

¹⁸⁴ See 42 U.S.C. § 9606 (1994).

¹⁸⁵ See generally Seymour, *supra* note 83.

¹⁸⁶ This discussion is an application of the government contractor defense to the PRP. For a discussion of the liabilities and indemnifications for an RAC, see *supra* notes 88-90 and accompanying text.

¹⁸⁷ In fact, at least one court found that the government contractor defense does not apply when a defendant's actions, such as illegally discharging contaminants, violate both federal environmental law and state tort law. See *Crawford v. National Lead Co.*, 784 F. Supp. 439, 447 (S.D. Ohio 1989). The defendant in *Crawford* operated a uranium plant owned by the United States Department of Energy and was sued under tort law for environmental effects of the plant. See *id.* at 441-42, 446-47. The defendant argued that it should be exempt from tort liability because it specifically followed EPA specifications and orders. See *id.* at 445. The court held that because the same actions violated both federal and state law, there was no conflict between the two. See *id.* at 447. There being no conflict, the court held that the government contractor defense was unavailable. See *id.*

to be labeled a PRP.¹⁸⁸ The court in *Iron Mountain Mines, Inc.* described the following scenario: "CERCLA may impose liability on parties who had little culpability in creating the contamination problem at issue. This is frequently the case when a later owner becomes responsible for pollution released many years earlier, sometimes under different technology and under different industrial standards."¹⁸⁹ Thus, once the cleanup begins, the loosely connected PRP is essentially a government contractor for cleanup. Manufacturing design is analogous to remedy selection. Culpability in remedy selection, rather than production of hazardous waste, should drive liabilities stemming from the consent decree or UAO.

Thus, a uniquely federal interest in such government contract cases is at stake because of the EPA's design of the remedy. The conflict between the federal interest in CERCLA cleanups and state tort law¹⁹⁰ mandates that the *Boyle* test be applied to determine if the government contractor defense is applicable.¹⁹¹ The *Boyle* test considers whether the federal government approved "reasonably precise specifications" for the product.¹⁹² The extent that the contractor exercised discretion over the allegedly defective design may be determinative as the defense clearly requires more than a "rubber stamp" by the government agency.¹⁹³ A key distinction is made between when the government delegates the design discretion to the contractor with minimal or general standards and when the government actually chooses a

¹⁸⁸ See *United States v. Iron Mountain Mines, Inc.*, 881 F. Supp. 1432, 1445 (E.D. Cal. 1995); see also Lisa A. Lee, Comments and Casenotes, *Guilty for Having Done Nothing: Passive Past Owners Face CERCLA Liability*, 1 MO. ENVTL. L. & POL'Y REV. 88 (1993); *supra* note 100 and accompanying text.

¹⁸⁹ *Iron Mountain Mines, Inc.*, 881 F. Supp. at 1445-46.

¹⁹⁰ For conflict analysis, see *supra* notes 140-69 and accompanying text.

¹⁹¹ See *Richland-Lexington Airport Dist. v. Atlas Properties, Inc.*, 854 F. Supp. 400, 423 (D.S.C. 1994).

¹⁹² See *id.* at 420. The *Boyle* test has two other elements. First, the work of the contractor must conform with government specifications. See *id.* at 420, 423-24. It is clear that a PRP should be held liable in state tort claims if its failure to follow the specifications provided by the EPA results in personal harm or property damage. Second, the contractor must have warned the federal government about any dangers involved in the specifications of which the government agency was not aware. See *id.* at 420. Likewise, any failure of the PRP to inform the EPA of unaware dangers should go towards a negligence standard of culpability in a state tort claim. In either instance, even the broadest application of the government contractor defense should not apply to the PRP faced with a state nuisance or trespass claim.

¹⁹³ See *Trevino v. General Dynamics Corp.*, 865 F.2d 1474, 1480 (5th Cir. 1989).

design feature.¹⁹⁴ The government contractor defense is inapplicable when the extent of government involvement is an exercise of the right of final approval over design specifications.¹⁹⁵ The court in *Trevino v. General Dynamics Corp.*¹⁹⁶ made the point that if the contractor has discretion to deviate from the government's specifications, then discretion over the design choices is exercised by the contractor, not the government.¹⁹⁷

Other courts, however, do not find that contractor participation blocks the application of the government contractor defense. Government approval is implicit when the agency is intimately involved at various stages of the design and development process.¹⁹⁸ *Kleemann v. McDonnell Douglas Corp.*¹⁹⁹ considered a "continuous exchange" between the contractor and the government as the dispositive factor of the first prong of the *Boyle* test.²⁰⁰ The back and forth discussions between the government agency and its contractor in the review and acceptance of final design plans constituted the requisite "continuous exchange."²⁰¹

Such a description of a continuous exchange is particularly analogous to remedy selection for hazardous waste cleanup.²⁰² Provisions in the Model Consent Decree display a continuous exchange.²⁰³ Monthly meetings and continuous progress reports are required.²⁰⁴ The court in *Kleemann* relied on the fact that government involvement in the process makes it more likely that information is shared with respect to the potential dangers associated with the result of the contract.²⁰⁵ Awareness of potential damages is the primary responsibility of the EPA in any hazardous waste cleanup as the EPA is specifically tasked with ensuring that human health and the environment are protected.²⁰⁶ Thus, the PRP/EPA relationship in a CERCLA cleanup

¹⁹⁴ See *id.*

¹⁹⁵ See *id.*

¹⁹⁶ *Id.* at 1474.

¹⁹⁷ See *id.* at 1481.

¹⁹⁸ See *Kleemann v. McDonnell Douglas Corp.*, 890 F.2d 698, 701 (4th Cir. 1989).

¹⁹⁹ See *id.* at 698.

²⁰⁰ See *id.* at 702.

²⁰¹ See *id.*

²⁰² For a discussion of the cleanup process and continuous exchange involved in the EPA's supervision of sites, see *supra* note 44 and accompanying text.

²⁰³ See Revised Model CERCLA RD/RA Consent Decree, 60 Fed. Reg. 38,817 (1995).

²⁰⁴ See *id.* at 38,826.

²⁰⁵ See *Kleemann*, 890 F.2d at 701.

²⁰⁶ See 42 U.S.C. § 9606(c) (1994).

mandates a broad application of the government contractor defense springing from a unique federal interest in hazardous waste cleanups. The "uniquely federal interest" analysis confirms the "actual conflict" conclusion that the PRP is immune from state tort claims charging that the PRP negligently used an inadequate remedy to clean up a CERCLA hazardous waste site. Nonetheless, at least one court has failed to recognize this conflict.²⁰⁷ As a result, PRPs, unsure of the status of the law and unwilling to face litigation risks, have been forced to settle with tort plaintiffs for negligent remedy selection by the EPA.

IV. PROPOSAL FOR LEGISLATIVE REFORM

Congress may pass a reauthorization bill that will reform CERCLA in a number of ways.²⁰⁸ The starting point for congressional consideration is likely to be the "Reform of Superfund Act of 1995," introduced in October 1995 by Representative Michael Oxley (R-OH).²⁰⁹ The bill would do nothing to resolve the conflict between federal cleanup standards and state tort law as it provides for "exclusive" federal cleanup remedies but does not amend the broad savings clause.²¹⁰ One focus of the bill is to change aspects of remedy selection and implementation.²¹¹ The general standard for remedy selection would be that "[r]emedies . . . shall be those necessary to protect human

²⁰⁷ See *Feikema v. Texaco, Inc.*, 16 F.3d 1408, 1416 (4th Cir. 1994).

²⁰⁸ See Gary Lee, *GOP Pushes Superfund Rewrite; Democrats Say Plan Would Free Industry from Cleanup Responsibility*, WASH. POST, Oct. 27, 1995, at A9.

²⁰⁹ H.R. 2500, 104th Cong. (1995). The bill was delayed in part because of a desire by Congressional Republicans to avoid giving Democrats a campaign issue in 1996. See Abrams, *supra* note 30, at 581 n.8.

²¹⁰ See H.R. 2500 § 102. The bill provides that "the standards set forth in this section shall govern the degree of cleanup, remedy selection, and on-site management of hazardous substances in lieu of any other Federal, State or local standards." *Id.* (amending 42 U.S.C. § 9621 (1994)).

²¹¹ See *id.* Factors to be considered in evaluating potential remedial action would include anticipated future uses of land, technical feasibility, and reasonableness of costs. See *id.* (amending 42 U.S.C. § 9621(f) (1994)). The EPA would be required to demonstrate and certify that the selected remedy represents a cost-effective risk reduction and that the incremental cost of the chosen alternative is justified and reasonably related to the incremental risk reduction benefits of the remedy. See *id.* Other prominent provisions not related to remedy selection include liability exemptions for certain sites created before 1987 and government refunds to private companies conducting cleanups. See Lee, *supra* note 208, at A9.

health and the environment from realistic and significant risks through cost-effective and cost-reasonable means.”²¹² The bill proposes a system of generic remedies and waivers that are designed to create a “results-oriented approach.”²¹³

A more fundamental results-oriented approach is necessary to create a system of incentives that will ensure the dual purposes of efficient hazardous waste cleanup and victim compensation for environmental torts such as nuisance and trespass. The bill, as does the law itself, seems purposely ambivalent to the inherent conflict between the federally mandated cleanup methods and state tort claims based on negligent remedy selection. A CERCLA reform bill should contain more threshold changes to the law to hold the EPA responsible under tort law for its remedy selection responsibilities and to offer incentives to PRPs to choose their own remedies and conduct their own cleanups. Such a policy avoids holding the PRP liable for the EPA’s mistakes and allows the PRP flexibility in determining the best way to clean up hazardous waste to avoid affecting others.

A. *Waiver of EPA’s Sovereign Immunity*

The bill should codify the holding in *Iron Mountain Mines, Inc.* that CERCLA waives sovereign immunity for CERCLA costs and damages when the EPA takes over a site for cleanup and becomes the “owner or operator” for purposes of CERCLA liability. For the reasons outlined in this Note, contrary interpretations by other courts are misguided. Further, this Note demonstrates that the EPA is protected by sovereign immunity from tort claims when it takes over a site under the discretionary acts exception to the FTCA, and as a result, such sovereign immunity should be explicitly waived with respect to torts that stem from the cleanup of the site. Thus, the EPA would be responsible under tort law for the decisions it makes with respect to hazardous waste cleanups. This proposal is an extension of the idea behind the EPA’s current authority to indemnify contractors for tort claims brought for negligent remedy implementation.²¹⁴ This proposal takes this idea further, making it possible for plaintiffs to sue the EPA for negligent remedy selection. Waiver is necessary because the law, as correctly applied, offers

²¹² H.R. 2500 § 102 (amending 42 U.S.C. § 9621(b) (1994)).

²¹³ *Id.* (amending 42 U.S.C. § 9621(h) (1994)).

²¹⁴ *See* 42 U.S.C. § 9619(a)(2) (1994).

the victim of the mishandling of hazardous waste no compensation for improper remedy selection. There would still be the problem of allocating responsibility between the underlying hazardous waste and the EPA cleanup, but information is improving and, at the least, the victim would have a chance to recover damages for the improper cleanup of hazardous waste sites.

The potential for huge tort claims against the EPA would force the EPA to select and implement the most health-protective, and thus the most expensive, remedy methods. Since PRPs must reimburse the EPA for these expensive costs,²¹⁵ PRPs would be presented with huge incentives to clean up the site itself to avoid such high costs. This proposal will amplify the effect of cost incentives in encouraging PRPs to get involved early in the consent decree process.²¹⁶ There remains the problem of a PRP with relatively little culpability facing the choice of entering into a consent decree or being held jointly and severally liable for these higher contribution costs incurred by the EPA. Such a PRP, however, would rather face these choices than be held liable for large tort settlements because of remedy selection mistakes made by the EPA.

B. Results-Oriented Consent Decrees and UAOs

The bill should require the EPA to develop a revised Model Consent Decree and to use UAOs that provide PRPs with specific hazardous waste levels and timetables that must be met. If the timetables are not met, the EPA should be able to take over the cleanup efforts and levy large penalties and damages. A results-oriented approach would remove the preemption problems considered at length in this Note. The EPA would no longer mandate under penalty of federal law that a specified cleanup method be used. This approach allows PRPs to discover cost-effective ways to meet required thresholds with the additional knowledge that they face potential tort liability for selecting and implementing adequate cleanup methods. Reliance would be placed on tort claims, rather than on the EPA, to ensure that the remedies do not endanger public health. The EPA's primary role would be to set proper threshold amounts of hazardous waste and timetables for cleanup.

PRPs conducting cleanups could still sue other PRPs for cleanup cost

²¹⁵ This includes cleanup costs but not tort liability damages.

²¹⁶ See John, *supra* note 3, at 971-72.

contribution but would be alone in facing potential tort liability for remedy selection. Of course, the same damage allocation problem would exist as under the current system because PRPs liable for inadequately selecting or implementing a remedy would not necessarily be liable for torts based on the underlying waste. Damages for torts based on underlying hazardous waste would still be allocated according to traditional tort law.

Also, the results-oriented approach would positively counter other CERCLA problems not addressed in this Note, such as the likely significant decrease of EPA funding for CERCLA enforcement²¹⁷ and delays in successful cleanup implementation.²¹⁸ The proposal would provide a revenue source from the penalties and a significant incentive to meet the required thresholds, while at the same time balancing the risk of state tort claims. Such a proposal reaches the main goals of CERCLA by mandating necessary cleanups while leaving tort claims to state law, and it does so with increasingly politically popular market-based incentives.

V. CONCLUSION

Tort claims brought by victims of hazardous waste cleanups against PRPs are preempted by CERCLA to the extent that they are based on negligent remedy selection or implementation by the EPA. When the EPA takes over a hazardous waste site, claims against the PRP based on the cleanup should be preempted because the PRP is not involved. When the PRP conducts the cleanup according to the methods specified by the EPA, claims against the PRP based on the cleanup should be preempted to the extent that they are based on negligent remedy selection. This preemption, while not recognized by all courts, is based on the actual conflict that exists between PRP compliance with EPA mandated remediation procedures and tort claims brought against the PRP alleging that its cleanup method was inadequate. Recognition of this preemption requires that damages be allocated according to whether they were caused by underlying hazardous waste or negligent remedy selection and implementation. In addition to properly allocating respective fault in these tort claims, CERCLA should be amended to waive the EPA's sovereign immunity when designing and implementing cleanups. CERCLA also should be amended to require the

²¹⁷ See Lee, *supra* note 188, at A9.

²¹⁸ See *id.*

EPA to produce results-oriented consent decrees and UAOs to avoid cleanup preemption problems when a PRP conducts the cleanup. The combination of the cost incentive brought by the immunity waiver and new results-oriented mandates from the EPA will result in a more efficient balancing of cleanup costs and potential tort claims in cleanup decisions.