

THE RECOVERABILITY OF ATTORNEY FEES AS COSTS UNDER CERCLA

South Carolina Environmental Law Journal *Winter, 1993*

Robert A. Mullins

I. INTRODUCTION

Federal and state environmental authorities may force owners of contaminated property to clean up the property. Sometimes the owners of the property are the ones who created some or all of the contamination. However, often owners of contaminated property did not participate in the activity resulting in the contamination. Moreover, contamination may result from activities conducted on adjacent or nearby property. Consequently, a property owner may not even know the property is contaminated. Usually there are other parties who have contributed to the contamination. However, these third parties, referred to as Potentially Responsible Parties (PRP), are often unwilling or unable to contribute to cleanup efforts.

Under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), (see endnote 1) private parties may sue PRPs to recover response costs incurred in cleaning up or responding to the release or threatened release of hazardous substances. (see endnote 2) Response actions include excavation of contaminated soil, treatment of groundwater, containment of hazardous substances, drainage of contaminated areas, securing contaminated sites, investigation and assessment of the presence of hazardous substances, securement of alternative water supplies, and relocation of residences. These often substantial costs can be recovered from responsible parties. However, Congress has not clearly indicated whether it intended response costs to include the award of attorney fees. Thus, a party may have to bear substantial nonrecoverable litigation costs in forcing a responsible party to pay response costs incurred in cleaning up the responsible party's waste.

Without an award of attorney fees to the plaintiff in a private-party response action, the plaintiff bears the burden not only of executing the cleanup but also of incurring legal fees in suing responsible parties for their share of cleanup costs. Because attorney fees incurred in bringing a response action may be substantial, (see endnote 3) the plaintiff is left bearing a profound financial burden. Can a party who has remedied contamination without the participation of other responsible parties recover the cost of attorney fees incurred in forcing responsible parties to contribute to the cleanup costs? Can landowners incurring costs in responding to the migration of hazardous waste onto their property recover attorney fees in forcing responsible parties to reimburse them for their response costs? The answer to these questions is found only by asking an additional question: Does CERCLA authorize the award of attorney fees in private-party response actions? Courts addressing this issue are divided. Courts in the Fourth, Sixth, Seventh, Eighth, and Tenth Circuits have held that attorney fees are recoverable in private-party response actions. However, Courts in the First, Second, Third, Sixth, and Ninth Circuits have held that attorney fees are not recoverable.

After outlining private-party response actions, this article will examine the issue of attorney fees in these actions. Next, the article will address the recoverability of attorney fees by the government under CERCLA, and the statutory language applicable to private parties seeking attorney fees under CERCLA. The arguments supporting the award of attorney fees and the arguments characterizing attorney fees as nonrecoverable response costs will then be presented. Finally, arguments based on statutory language and policy implications will be summarized and analyzed.

II. PRIMA FACIE CASE UNDER SECTION 9607(a)--PRIVATE PARTY RESPONSE ACTION

A. ELEMENTS

CERCLA establishes a private right of action for recovery of response costs. (see endnote 4) To establish a prima facie case in a CERCLA private-party response action, the plaintiff must show that:

- (1) The defendant is a responsible party;
- (2) There has been a release or threatened release of a hazardous substance at a facility; (see endnote 5)
- (3) The plaintiff incurred response costs in responding to the release or threatened release; and
- (4) The response costs conform to the (NCP). (see endnote 6)

1. RESPONSIBLE PARTY

Proving a defendant is a responsible party is the first step in establishing a cause of action for the recovery of response costs under CERCLA. CERCLA lists four categories of parties which may be liable for threatened or actual releases of hazardous substances, pollutants, or contaminants. These four categories are:

- (1) Current owners and operators of facilities;
- (2) Owners and operators of facilities at the time of disposal;
- (3) Generators who dispose of hazardous waste at the facility; and
- (4) Transporters of hazardous waste to the facility. (see endnote 7)

Responsible parties are strictly liable for:

- (A) All costs of removal or remedial action incurred by the United States government or a State or an Indian tribe not inconsistent with the national contingency plan;
- (B) Any other necessary costs of response incurred by any other person consistent with the national contingency plan;
- (C) Damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
- (D) The cost of any health assessment or health effects study carried out under § 9604(i) of this title. (see endnote 8)

Subsection (B) establishes a cause of action for a private party response action. It provides that a private party may recover necessary response costs from responsible parties if those costs are consistent with the National Contingency Plan (NCP) established by CERCLA. Responsible parties include current owners and operators of facilities, owners and operators of a facility (see endnote 9) at the time hazardous wastes were disposed of, generators of hazardous wastes who have disposed of their waste at the facility, and transporters that have transported hazardous waste to the facility.

2. RELEASE OR THREATENED RELEASE OF A HAZARDOUS SUBSTANCE

This is the second element of a prima facie case under CERCLA. The term "release" is very broad and includes "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment...." (see endnote 10) For example, a release occurs when asbestos fibers are blown from a site by the wind, (see endnote 11) or when a hazardous substance migrates by drainage or leaches from a septic system. (see endnote 12) There is no quantitative requirement under CERCLA for releases. Thus, extremely small concentrations of hazardous material may give rise to CERCLA liability. (see endnote 13)

The substance released must be a hazardous substance. The term "hazardous substance" encompasses a broad range of substances. (see endnote 14) It includes any substance designated by the Environmental Protection Agency (EPA) as hazardous or toxic under section 311(b)(2)(A) of the Clean Water Act (CWA), (see endnote 15) any toxic pollutant listed under section 307(a) of the CWA, (see endnote 16) any substance identified or listed under section 3001 of the Resource Conservation and Recovery Act (RCRA), (see endnote 17) any hazardous air pollutant listed under section 112 of the Clean Air Act (CAA), (see endnote 18) and any hazardous chemical substance identified in section 7 of the Toxic Substance Control Act (TSCA). (see endnote 19) Petroleum and natural gas are expressly excluded. (see endnote 20)

3. PLAINTIFF-INCURRED RESPONSE COSTS

To satisfy the third element of a prima facie case, the plaintiff must show that it incurred necessary response costs. Although CERCLA does not specifically define response costs, it defines "respond" and "response" to include remove, removal, remedy, and remedial action as well as related enforcement activities. (see endnote 21) Removal and remedial actions differ. Removal costs are those costs incurred in response to an immediate threat to public health or the environment. (see endnote 22) Removal actions are short-term measures necessary to prevent, minimize, or mitigate damage to the environment resulting from a release or threatened release of a hazardous substance. (see endnote 23) Removal actions include: "[S]uch actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances. . . or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment . . ." (see endnote 24)

The following list specifies some appropriate removal actions for certain situations:

- (1) Fences, warning signs, or other security or site control precautions;
- (2) Drainage controls;

- (3) Stabilization of berms, dikes, or impoundments;
- (4) Capping of contaminated soils or sludges;
- (5) Using chemicals and other materials to retard the spread of the release or to mitigate its effects;
- (6) Excavation, consolidation or removal of highly contaminated soils from drainage or other areas.
- (7) Removal of drums, barrels, tanks, or other bulk containers that contain or may contain hazardous substances or pollutants or contaminants;
- (8) Containment, treatment, disposal, or incineration of hazardous materials; and
- (9) Provision of alternative water supply. (see endnote 25)

Removal actions may also include the temporary relocation of residents. (see endnote 26)

Unlike removal actions, remedial actions attempt to permanently remedy the contamination by providing a long-term solution to the problem. (see endnote 27) A party's remedial actions must be consistent with any permanent cleanup and may be undertaken in lieu of or in addition to any removal actions. A party may also take remedial action to prevent or minimize the release of hazardous substances in order to stop its migration. (see endnote 28) Under CERCLA, the term remedial action includes: "[S]torage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances or contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive waste, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or welfare . . ." (see endnote 29)

EPA regulations subject remedial actions to more stringent NCP requirements than removal actions. (see endnote 30) A party must conduct numerous site evaluations before work can begin. These evaluations include a remedial preliminary assessment (see endnote 31) and a remedial site inspection. (see endnote 32) After the initial evaluation, a party must then conduct a remedial investigation and feasibility study in order to assess site conditions and evaluate remedial alternatives. This study determines the nature of and threat posed by the hazardous substances and materials, the threat to human health or the environment, and the appropriate field investigations necessary to prepare potential response actions. (see endnote 33) Finally, a party may take remedial action in accordance with section 300.435 of Title 40 of the Code of Federal Regulations.

In addition to the specific actions described above, the following are generally recoverable as response costs:

- (1) Preliminary investigation, assessment, and evaluation of hazardous substances present at the site; (see endnote 34)
- (2) Cleanup, removal, and remedial activities including actual cleanup costs and costs associated with cleanup; (see endnote 35) and
- (3) Health and welfare measures including provision of alternative water supplies (see endnote, 36) relocation of residences and businesses, (see endnote 37) and the monitoring required to assure cleanup. (see endnote 38)

Supervisory costs may be recoverable, (see endnote 39) but economic costs for loss of property or diminution in value are generally not recoverable (see endnote 40). Medical monitoring and testing are usually not recoverable, but may be recoverable if they relate to public health. (see endnote 41) Punitive damages are not recoverable in private party response actions. (see endnote 42)

4. RESPONSE COSTS CONSISTENT WITH THE NCP

The response costs incurred must be consistent with the NCP in order to be recoverable. (see endnote 43) However, interpretations of the term "consistent" differ depending on the procedural posture of the case. Courts confronted with only a threshold question of liability usually reach decisions without requiring the plaintiff to show consistency with the NCP if consistency is specifically alleged in the plaintiff's complaint (see endnote 44). A court may not require compliance with the NCP if the response costs sought are only for initial investigation and monitoring costs incurred in determining the degree of contamination (see endnote 45). However, a plaintiff must show consistency if seeking damages as response costs (see endnote 46) or if the plaintiff has incurred substantial costs. (see endnote 47) The NCP in effect at the time the response costs were incurred controls the case. (see endnote 48) Courts do not require strict compliance with the NCP. A private party response action is consistent under the 1990 NCP if it is in substantial compliance with the NCP when evaluated as a whole. (see endnote 49)

B. CAUSATION AND JOINT AND SEVERAL LIABILITY

The necessary causation under CERCLA is minimal because strict liability applies. (see endnote 50) CERCLA incorporates common law principles of joint and several liability. Thus, if two or more defendants are responsible for indivisible harm, each is liable for the whole harm. (see endnote 51) A court will apportion damages among several defendants only if the harm is divisible and there is a reasonable basis for apportionment (see endnote 52).

If the plaintiff establishes a prima facie case, the defendant will be strictly liable for response costs unless the defendant can successfully raise one of the defenses discussed below. If the plaintiff can show that its response costs were necessary and consistent with the NCP, it does not need to show that the release of a hazardous substance caused any harm to the plaintiff's property. (see endnote 53) The hazardous substance does not need to be traceable from the defendant to the plaintiff (see endnote 54) nor be contained in the defendant's waste. (see endnote 55) CERCLA requires only that the plaintiff show the defendant previously released a hazardous substance at the site and, consequently, the plaintiff incurred response costs. (see endnote 56) Alternatively, if the plaintiff can show that the waste found at the site is the same type of waste the defendant has previously deposited or transported to the site, the plaintiff does not need to show that the waste at issue actually belonged to the defendant. (see endnote 57) However, some courts may require that if two sources of contamination contribute to the harm at the site, the defendant's release must be a substantial factor in causing the plaintiff to incur response costs. (see endnote 58)

C. DEFENSES

There are three basic defenses to CERCLA liability. (see endnote 59) To escape liability a defendant must show by a preponderance of the evidence that the release or threatened release of a hazardous substance and the resultant damages were caused solely by:

- (1) An act of God;
- (2) An act of war; or
- (3) An act or omission of a third party.

To satisfy the requirements of this defense one must show (i) that the third party was not an employee or agent, (ii) that there was no direct or indirect contractual relationship between the parties, and (iii) that:

- (a) It exercised due care, and
- (b) Took precautions against foreseeable acts or omissions of the third party. (see endnote 60)

Although equitable issues may be considered in the apportionment of liability among defendants, they are not a defense to CERCLA liability. (see endnote 61)

D. SUMMARY

To establish a prima facie case to recover response costs under CERCLA, a private party plaintiff must show that, (1) the defendant is a responsible party; (2) there was a release or threatened release of a hazardous substance at a facility; (3) the plaintiff incurred response costs; and (4) the response measures were consistent with the NCP. The necessary causation is minimal and strict liability applies subject to three statutory defenses. However, in proving a prima facie case, the plaintiff often incurs substantial attorney fees. Therefore, it is important for a potential plaintiff to determine whether attorney fees are recoverable before instituting a private party response action.

III. ATTORNEY FEES

A. POLICY IMPLICATIONS AND THE AMERICAN RULE

As previously discussed, courts disagree on whether a private party suing a responsible party for response costs can also recover attorney fees. The resolution of this issue depends on whether CERCLA authorizes the award of attorney fees in private party response actions. However, the policy behind awarding attorney fees to plaintiffs and the American Rule must be considered to resolve this issue.

Many policy arguments concerning attorney fees in private party response actions favor allowing their recovery. Because CERCLA is essentially a remedial statute designed to protect and preserve public health and the environment, awarding attorney fees to a successful private party furthers the objectives of CERCLA. The paramount objectives of CERCLA include the prompt cleanup of contaminated sites and the imposition of response

costs on responsible parties. (see endnote 62) Because attorney fees in complex environmental cases are often substantial, refusing to allow the recovery of these costs may discourage a plaintiff from initiating cleanup and suing the responsible party for its share of the costs. Moreover, denying recovery of attorney fees forces the party initiating the cleanup to bear an unfair portion of the costs.

On the other hand, the American Rule prohibits the recovery of attorney fees unless there is specific statutory authority to do so. (see endnote 63) Under a strict application of the American Rule, CERCLA must expressly provide for the recovery of attorney fees in response actions for such costs to be recoverable. (see endnote 64) Therefore, much of the arguments surrounding the recovery of attorney fees by private parties rests on judicial determinations of whether there is specific statutory authority under CERCLA to provide for such recovery.

Courts have struggled with policy and equitable considerations in interpreting CERCLA's unclear statutory scheme. (see endnote 65) Courts have criticized CERCLA for "inartful drafting and numerous ambiguities attributable to its precipitous passage. Problems of interpretation have arisen from the Act's use of inadequately defined terms, a difficulty particularly apparent in the response costs area." (see endnote 66) Courts uniformly hold that there is specific statutory authority for the government to recover attorney fees in government enforcement actions. (see endnote 67) Therefore, the examination of the statutory argument behind the award of attorney fees in private-party actions should begin with the recovery of attorney fees in government enforcement actions.

B. SECTION 9607 - RECOVERY OF ATTORNEY FEES BY THE GOVERNMENT

Section 9607(a)(4)(A) of CERCLA allows the government to recover attorney fees in a removal or remedial action (see endnote 68). The United States, a state, or an Indian tribe may recover from responsible parties all costs of removal or remedial action consistent with the NCP. (see endnote 69) Section 9601(23) of CERCLA defines removal as including action taken under section 9604(b). (see endnote 70) Section 9604(b) specifically permits the government to recover legal costs. (see endnote 71) According to section 9604(b), the government "may undertake such planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations as [it] may deem necessary or appropriate to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this chapter." (see endnote 72) Many courts addressing this issue uniformly hold that this language allows the government to recover attorney fees and litigation costs as costs of removal and remedial action taken pursuant to section 9607(a). (see endnote 73)

C. STATUTORY LANGUAGE

The next step in determining whether attorney fees are recoverable in private-party response actions is to examine the statutory language. Section 9607(a) of CERCLA expressly establishes a private right of action for recovery of response costs. (see endnote 74) The section provides that responsible parties shall be liable for "any . . . necessary costs of response incurred by any other person consistent with the National Contingency Plan." (see endnote 75) Thus, the question becomes whether attorney fees are necessary costs of response.

Although CERCLA does not define "necessary costs of response," it defines "respond" and "response." The terms "respond" and "response" are defined to mean "remove, removal, remedy and remedial action, all such terms (including the terms 'removal' and 'remedial action') including enforcement activities related thereto." (see endnote 76) Thus, response actions include removal and remedial actions taken pursuant to section 9607(a)(4)(B). Removal actions are defined in section 9601(23) (see endnote 77) and remedial actions are defined in section 9601(24). (see endnote 78) Although attorney fees are not mentioned in the definitions of removal or remedial actions, the definition of respond or response in section 9601(25) states that response actions "include enforcement activities related thereto." (see endnote 79) Thus, the controversy over whether private parties can recover attorney fees in response actions focuses on the "enforcement activities related thereto" language. (see endnote 80) Whether a court considers attorney fees part of the cost of enforcement activity determines whether the court will award attorney fees to the plaintiff.

D. ATTORNEY FEES RECOVERABLE

District courts in the Fourth, (see endnote 81) Sixth, (see endnote 82) Seventh, (see endnote 83) Eighth, (see endnote 84) Ninth, (see endnote 85) and Tenth (see endnote 86) Circuits have awarded attorney fees to successful plaintiffs in private party response actions. (see endnote 87) The courts of appeal in the Sixth (see endnote 88) and Eighth (see endnote 89) Circuits, two of the four circuit courts of appeal to address this issue, also have upheld the award of attorney fees.

Proponents of awarding attorney fees under CERCLA argue that the definition of "response action" includes private party response actions in the definition of "enforcement activities." (see endnote 90) Attorney fees and expenses

are unavoidable in private party response actions and thus constitute necessary costs recoverable under section 9607(a)(4)(B). Even if the statutory language is ambiguous, policy implications support attorney fee awards. (see endnote 91)

1. ENFORCEMENT ACTIVITIES INCLUDE ATTORNEY FEES INCURRED IN BRINGING PRIVATE PARTY RESPONSE ACTIONS

A. THE EIGHTH CIRCUIT LEADS THE WAY

In *General Electric Co. v. Litton Industrial Automation Systems, Inc.* (see endnote 92) the Eighth Circuit Court of Appeals held that the language of CERCLA is sufficiently explicit to allow private parties to recover attorney fees. The court reasoned that attorney fees incurred by plaintiffs in private party response actions are enforcement activities and, thus, recoverable as necessary response costs under section 9607(a)(4)(B) [section 107(a)(B)(4)]. (see endnote 93) The Missouri Department of Natural Resources required General Electric Co. (GE) to cleanup a nineteen acre parcel of contaminated land it owned in Springfield, Missouri. Royal McBee Corp. (Royal McBee) and its corporate successor, Litton Industries, Inc. (Litton), owned the Springfield land prior to GE. The contamination occurred during Royal McBee's operation of a typewriter plant on the property. Royal McBee allegedly dumped cyanide-based electroplating wastes, sludge, and other pollutants on the land from 1959 to 1962. GE sued Litton to recover its CERCLA response costs incurred in cleaning up the site. The district court ordered Litton to pay GE \$940,000 as reimbursement for the response costs incurred and more than \$419,000 in attorney fees and expenses.

The Eighth Circuit affirmed the award and addressed the attorney fees issue in detail. The court recognized that under the American Rule, attorney fees are not recoverable absent explicit congressional authorization, but "CERCLA authorizes with a sufficient degree of explicitness, the recovery by private parties of attorney fees and expenses." (see endnote 94) The court based its decision on the language found in the definition of "response" in section 9601(25) which states that response actions "include enforcement activities related thereto." (see endnote 95) The Eighth Circuit reasoned that a private party response action is an enforcement activity designed to force the responsible party to reimburse the plaintiff for response costs. The court observed that "[a]ttorney fees and expenses necessarily are incurred in this kind of enforcement activity and it would strain the statutory language to the breaking point to read them out of the 'necessary costs' that section 9607(a)(4)(B) allows private parties to recover." (see endnote 96)

B. OTHER COURTS FOLLOW THE EIGHTH CIRCUIT

Other courts followed the Eighth Circuit's decision. (see endnote 97) The District Court for the Central District of California addressed attorney fees in *Pease & Curren Refining, Inc. v. Spectrolab, Inc.* (see endnote 98) The case arose from an accident at Pease & Curren Refining, Inc.'s (Pease & Curren) refining plant. In early 1989, Spectrolab, Inc. (Spectrolab) requested Pease & Curren to handle nine fifty-five gallon drums of waste allegedly containing a palladium and silver compound in a nitric acid medium from Spectrolab's facility in California. Pease & Curren refused to transport the waste because it was stored in rusty tin drums instead of the required steel drums. After Spectrolab placed most of the waste in steel drums, Pease & Curren transferred the remaining rusty tin drums as well as the steel drums. Pease & Curren then attempted to salvage silver and palladium from residual sludge present in the tin drums. The material exploded and killed a Pease & Curren employee. The Orange County Health Care Agency ordered Pease & Curren to remove all the remaining Spectrolab waste. After incurring over \$39,000 in removal expenses, Pease & Curren sued Spectrolab to recover removal costs and attorney fees pursuant to CERCLA. (see endnote 99)

The court held that attorney fees are recoverable in private party response actions. (see endnote 100) The court found that Congress implicitly provided for private parties' attorney fees as a necessary part of response costs. (see endnote 101) Concluding that response includes "enforcement activities related thereto" under section 9601(25), the court interpreted the plain meaning of enforcement activities to include attorney fees. (see endnote 102) The court emphasized that the primary rule of statutory interpretation "is to ascertain and give effect to the plain meaning of the language used." (see endnote 103) Courts should interpret statutes to avoid meanings that would render "words superfluous, defy common sense, or lead to mischief or absurdity." (see endnote 104) Consequently, a court should interpret "enforcement activities" to include attorney fees in private party response actions. The court found that it could not "ascertain any other logical interpretation which would give effect to this phrase; if this Court were to rule otherwise, the phrase 'enforcement activities' would be superfluous." (see endnote 105)

The District Court for the Northern District of Illinois followed the Eighth Circuit in *BTR Dunlop, Inc. v. Rockwell Int'l Corp.* (see endnote 106) The court observed that "[t]he term 'enforcement activities' may not be commonly

used in fee-shifting statutes, but its meaning is not hard to divine. This court thus concludes that. . . Congress has explicitly authorized fee-shifting by explicitly authorizing a party's recovery of the costs of 'enforcement activities' . . ." (see endnote 107) The court reasoned that because Congress amended CERCLA to permit private parties to recover the costs of enforcement activities, "it is difficult to imagine what it might have had in mind other than the recovery of attorney." (see endnote 108)

Courts that award attorney fees in private party response actions stress that the statutory language is sufficiently explicit to allow their recovery. Unlike *Aleyska Pipeline Service Co. v. Wilderness Society* and situations in which there is no statutory language, a private party CERCLA claim can point to a specific statutory provision which allows recovery of all necessary response costs, (see endnote 109) including enforcement activities. (see endnote 110) Because the definition of response costs applies equally to the government and private parties under section 9607, a private party may recover the necessary costs of enforcement activities, including attorney fees under section 9607. (see endnote 111) In *Chesapeake & Potomac Telephone Co. v. Peck Iron & Metal Co.* (see endnote 112) the court reasoned: "If Congress did not contemplate that private parties could perform "enforcement activities," it would have defined only the terms applicable to governmental entities - i.e., "'remove or removal' and 'remedy' or 'remedial action,'" see CERCLA §§ 107(a)(4)(A), 101(23) and (24) - to include "enforcement activities," or it would have defined enforcement activities as applying only to actions brought by the federal government. It did not; instead, it included "enforcement activities" as a defined element of a private "response." (see endnote 113)

Thus private parties may recover attorney fees as costs of enforcement activities." (see endnote 114)

In summary, courts that award attorney fees in private party response actions emphasize that under section 9607, private parties may recover all necessary costs of response from responsible parties. Under section 9601(25) response costs include removal and remedial action and related enforcement activities. The key finding of the courts is that enforcement activities necessarily include attorney fees. Because enforcement activities must mean something other than removal or remedial action, it is logical that they include legal costs incurred in forcing a responsible party to pay for response costs. The analysis can be summarized in another way. Because the statute provides for attorney fees in government enforcement actions, courts should interpret the statute as providing for attorney fees in private enforcement actions because attorney fees are a necessary cost of response. Because the definition of response costs in section 9601(25) applies equally to the government and private parties, a private party should be able to recover attorney fees in a response action.

2. POLICY IMPLICATIONS SUPPORT AWARDED ATTORNEY FEES

Examining the purposes of CERCLA bolsters support for awarding attorney fees as part of the response costs. Congress created CERCLA as a remedial statute to protect and preserve public health and the environment. Thus, courts are obligated to construe its provisions liberally to avoid frustration of its legislative purposes." (see endnote 115) Two of CERCLA's predominant purposes are the prompt cleanup of hazardous waste sites and the imposition of all cleanup costs on responsible parties." (see endnote 116) Only responsible parties should bear the cost of remedying contamination they have created."(see endnote 117) The goals of prompt cleanup and imposition of cleanup costs on the responsible party are often undermined if a private party cannot recover its attorney fees. Failing to award attorney fees may discourage private actions because litigation costs often equal or exceed response costs." (see endnote 118) The legislative purpose of CERCLA demands the recovery of attorney fees as response costs in an enforcement action."(see endnote 119)

Innocent purchasers of property that clean up contamination to prevent its migration and subsequently seek recovery from responsible parties are unable to recoup a substantial portion of their expenses if attorney fees are not recoverable. (see endnote 120) For example, GE was required to spend \$940,000 to remediate property contaminated by Royal McBee. Royal McBee's successor corporation, Litton Industries, refused to participate in the cleanup. GE spent over \$419,000 in attorney fees to force Litton to reimburse it for its response costs. If not for the recovery of attorney fees, GE would have born a significant expense in obtaining reimbursement from Litton.

The District Court for the Eastern District of Virginia in *Chesapeake & Potomac Telephone Co. of Virginia* emphasized that responsible statutory interpretation is not to be conducted in a vacuum. (see endnote 121) When Congress enacts legislation to effectuate a clearly stated purpose, "the court would shirk its responsibility if it were to ignore that purpose in construing the statute's particular terms."(see endnote 122) The court further explained: "The Court simply recognizes that thorough analysis of a statute includes consideration of its purpose, if one has been clearly articulated. Insofar as the overriding goal of a piece of legislation inevitably provides clues regarding construction of its particular terms, a court would be remiss in casting it aside as irrelevant to the interpretative process. A court should utilize all of the interpretive tools at its disposal when engaging in statutory analysis. While the court is well aware of the time-honored principle that statutory interpretation begins with the plain meaning of

the terms of the statute at issue, the split in authority on this question illustrates that 'plain meaning' guidance alone might not always be sufficient to permit meaningful statutory analysis."(see endnote 123)

Thus, the Chesapeake court concluded that the clear purpose of CERCLA, to facilitate the expeditious cleanup of hazardous waste and put the cost of doing so upon responsible parties, supports the interpretation of CERCLA to allow recovery of private party attorney fees.

The United States District Court for the District of Kansas in *Bolin v. Cessna Aircraft Co.* (see endnote 124) also specifically relied on policy considerations to hold that attorney fees are recoverable in private party response actions. (see endnote 125) The court emphasized that Congress intended section 9607 private party response actions to provide a powerful incentive for private parties to "expend their own funds initially without waiting for the responsible persons to take action." (see endnote 126) The court could "conceive of no surer method to defeat this purpose than to require private parties to shoulder the financial burden of the very litigation that is necessary to recover these costs." (see endnote 127)

In summary, the argument in support of attorney fee recovery emphasizes the policy objectives of obtaining prompt cleanup and imposing all cleanup costs on the responsible party. If attorney fees are not recoverable, plaintiffs will not have a strong incentive to bring private-party response actions and responsible parties will not be held accountable for all response costs. Even courts which deny private-party attorney fees often concede that it might be good public policy to allow private parties to recover their attorney fees in private party actions. (see endnote 128)

E. ATTORNEY FEES NOT RECOVERABLE

The First (see endnote 129) and Ninth (see endnote 130) Circuit Courts of Appeal and district courts in the Second, (see endnote 131) Third, (see endnote 132) Sixth, (see endnote 133) Ninth, (see endnote 134) and Tenth (see endnote 135) Circuits have held that attorney fees are not recoverable as response costs in private party response actions.

Courts holding that attorney fees are not recoverable have generally relied on the two following arguments: (1) the legislative history behind the amendment of "respond" or "response" to "include enforcement activities related thereto" emphasizes the government's ability to recover enforcement costs, not private parties; and (2) CERCLA does not explicitly provide for the recovery of private-party attorney fees.

1. LEGISLATIVE HISTORY SUPPORTS RECOVERY OF ATTORNEY FEES BY THE GOVERNMENT, NOT PRIVATE PARTIES

One of the basic arguments used in denying attorney fees is based on the legislative history of the definition of response actions under section 9601. Congress amended the definition of "response" action with the Superfund Amendments and Reauthorization Act of 1986 (SARA). (see endnote 136) Before the amendment, the definition provided that, "'respond' or 'response' means 'remove, removal, remedy and remedial action.'"(see endnote 137) As amended, the definition provides that, "The terms 'respond' or 'response' means (sic) remove, removal, remedy and remedial action, all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto." (see endnote 138) Thus, SARA amended "response" to include "enforcement activities."

Although proponents for the award of attorney fees cite this language as support for congressional authorization for such fees, the Eastern District of Pennsylvania in *Fallowfield Development Corp. v. Strunk* (see endnote 139) focused on the legislative history of the amendment to hold that attorney fees were not recoverable in private party actions. The Fallowfield court emphasized the legislative history reflected in the comments about the addition of the "enforcement activities related thereto" language which were before the Committee of Energy and Commerce (Committee). The Committee noted in reference to the amendments to section 9681 that "[t]he section also modifies the definition of 'response action' to include related enforcement activities. The change will confirm the EPA's authority to recover costs for enforcement actions taken against responsible parties."(see endnote 140) Relying on these comments, the Fallowfield court concluded that when Congress expanded the definition of response costs to include enforcement costs, Congress intended to make it clear that the EPA could recover costs for enforcement actions, but did not intend for private parties to obtain attorney fees for private-party response actions. (see endnote 141)

Other courts have come to the same conclusion. Each court has stressed that instead of amending section 9607 to allow the recovery of attorney fees by private parties, (see endnote 142) Congress merely amended "response actions" to "include enforcement actions related thereto" in order to clarify the government's ability to recover attorney fees. (see endnote 143)

Plaintiffs have tried to overcome these arguments and the comments of the Committee by arguing that the subsequent Conference Committee Report omits the explicit reference to the EPA found in the Energy and Commerce Committee's comments. (see endnote 144) Relying on this argument, the District Court for the Northern District of Illinois in *BTR Dunlop, Inc. v. Rockwell International Corp.* (see endnote 145) reasoned that Congress intended "enforcement activities related thereto" to include private-party enforcement activities and not just those of the government. (see endnote 146) The District Court for the Eastern District of California, however, explicitly rejected this argument in *Santa Fe Pacific Realty Corp. v. United States*, (see endnote 147) holding that attorney fees were not recoverable in private-party response actions. The Santa Fe court explained that even if it concluded that "enforcement activities related thereto" in the definition of "response actions" included response actions of private parties as well as the EPA, this finding would be insufficient in the absence of explicit congressional intent to allow the award of attorney fees. (see endnote 148) Moreover, although section 9604 explicitly provides for the government's legal expenses, no such analogous provision exists for private parties. (see endnote 149)

The argument against the recovery of attorney fees emphasizes that only the government may bring enforcement actions under section 9607. Even though private parties may recover response costs under section 9607, they cannot bring an action against other private parties to enforce CERCLA's cleanup provisions. (see endnote 150) The government, on the other hand, is specifically allowed to bring an enforcement action under section 9607, recover its response costs under section 9607, and recover attorney fees under section 9604. Private parties, however, cannot incur enforcement costs as defined in section 9604 (b); thus, they cannot recover attorney fees in a section 9607 action. (see endnote 151) Although the definition of response costs in section 9601(25) specifically includes enforcement activities, there is no specific provision for private parties to recover attorney fees incurred as enforcement activities. On the other hand, section 9604(b) contains explicit statutory language allowing the government to recover legal costs. (see endnote 152) Thus, parties seeking to preclude recovery of attorney fees thus argue that private parties do not incur enforcement costs as contemplated by CERCLA.

Section 9603(a)(1) of CERCLA provides an alternative means for private parties to force responsible parties to clean up contaminated sites. Under section 9659(a)(1), private parties may bring citizen suits against other private parties for violations of CERCLA standards, regulations, conditions, requirements, or orders. (see endnote 153) Under section 9659(c), federal district courts have the authority to force compliance with the provisions of CERCLA, order injunctive relief, (see endnote 154) and award the plaintiff reasonable attorney fees. (see endnote 155) Congress, in enacting SARA, specifically provided for citizen suits to act "as both a goad and an alternative to the [EPA's] own inadequate enforcement efforts." (see endnote 156) Thus, private parties may bring enforcement actions under section 9659 and not under section 9607. (see endnote 157) Therefore, private parties do not incur "enforcement costs" as contemplated by CERCLA. (see endnote 158)

In summary, the argument against awarding attorney fees emphasizes that the amendments adding the language "enforcement activities related thereto" to the definition of "response" were meant to clarify the government's ability to recover costs incurred in forcing parties to take removal or remedial action under section 9607(a)(1)-(4)(A). According to this view, private party response actions are not considered enforcement actions. Private parties can bring enforcement actions only under section 9659 for which CERCLA does not provide recovery of attorney fees.

2. CERCLA DOES NOT EXPLICITLY ALLOW ATTORNEY FEES IN PRIVATE-PARTY RESPONSE ACTIONS.

An alternative argument rejecting the recovery of attorney fees under CERCLA is CERCLA's lack of an express provision authorizing the recovery of private-party attorney fees. (see endnote 159) This argument emphasizes the American Rule of attorney fees, which holds that absent explicit congressional authorization, attorney fees are not recoverable as costs of litigation. (see endnote 160) Courts cannot create a right to recover attorney fees where Congress has not expressly stated that such a right exists. (see endnote 161) This rationale can be traced back to the United States Supreme Court opinion of *Alyeska Pipeline Co. v. Wilderness Society*, (see endnote 162) in which the Supreme Court denied attorney fees absent express congressional intent. The Court explained: "[t]he encouragement of private action to implement public policy has been viewed as desirable in a variety of circumstances. But the rule followed in our courts with respect to attorney fees has survived. It is deeply rooted in our history and in congressional policy; and it is not for us to invade the legislature's province by redistributing litigation costs . . ." (see endnote 163)

CERCLA does not expressly state that attorney fees are recoverable in private-party response or enforcement actions.

Relying on the above rationale, the Ninth Circuit Court of Appeals recently reversed a decision by the District Court

for the Northern District of California that allowed attorney fees. In *Stanton Road Associates v. Lohrey Enterprises*, (see endnote 164) the court explained. "We cannot imply authority to award attorney fees because we determine that such a rule would enhance public policy . . . If Congress determines that an exception to the American Rule is appropriate in private response actions, it will do so in explicit terms as it has previously done in other parts of CERCLA. See 42 U.S.C. §§ 9604(b)[§104(b)]; 9659(f)[§310(f)]. Because Congress has not explicitly authorized an award of legal expenses as necessary response costs, the district court had no authority to award attorney fees to Stanton Road." (see endnote 165)

Because Congress did not expressly authorize attorney fees, the Ninth Circuit held that private parties could not recover attorney fees as part of the response costs incurred in cleaning up contaminated property in accordance with CERCLA. (see endnote 166)

In *Abbott Laboratories v. Thermo Chem., Inc.*, (see endnote 167) the District Court for the Western District of Michigan followed the same rationale. The court explained that "[t]his Court will not create a right to recovery of attorney fees where Congress has not expressly stated such to exist." (see endnote 168) Only in CERCLA's citizens suit provision of section 9659 are private parties expressly allowed to recover attorney fees. (see endnote 169)

Several courts have reasoned that Congress did not intend to allow recovery of private-party attorney fees because SARA comprehensively overhauled CERCLA, yet did not expressly provide for such fees. (see endnote 170) When faced with this issue in *Regan v. Cherry Corp.*, (see endnote 171) the District Court for the District of Rhode Island found that: "[i]f Congress had intended to permit citizens seeking response costs to recover their attorney fees, it would simply have amended § 107 to allow the recovery of these litigation costs. SARA was a comprehensive overhaul of CERCLA. Therefore, it would have been a simply [sic] matter to amend § 107 to allow recovery of attorney fees." (see endnote 172)

Under this argument, Congress could have easily amended CERCLA with SARA to allow private parties to recover attorney fees; however, Congress did not choose to do so.

A federal court for the District of Minnesota challenged this reasoning in *Gopher Oil Co. v. Union Oil*. (see endnote 173) The court reasoned that "[a]lthough Congress could have specifically provided for recovery of attorney fees when it enacted SARA, the case law was not particularly well developed prior to SARA and thus Congress may not have been aware that courts would interpret CERCLA as disallowing the recovery of attorney fees." (see endnote 174)

Nonetheless, many consider the reasoning of the Gopher Oil court irrelevant today because Congress has not yet explicitly provided for the award of attorney fees. (see endnote 175) In *Santa Fe Pacific Really Corp. v. United States*, (see endnote 176) the District Court for the Eastern District of California held that even the policy considerations supporting the award of attorney fees in private-party response actions are not enough to overcome the lack of express congressional authorization. (see endnote 177) The court explained "[i]t is not for this court to impose a fee shifting provision simply because it may be consistent with the statutory scheme or purposes of CERCLA. 'The power to declare what the law is, or has been, belongs to the judicial branch of government.'" (see endnote 178) Policy implications, no matter how compelling, are insufficient standing alone to overcome the lack of explicit congressional authorization. (see endnote 179)

Courts rejecting the recoverability of attorney fees emphasize that Congress knew how to explicitly provide for attorney fees but failed to do so. These courts have stressed that CERCLA does not explicitly provide for attorney fees under section 9607, but does provide for attorney fees in citizen suit actions under section 9659 (see endnote 180) as well as for response actions taken by the United States pursuant to section 9604. (see endnote 181) This explicit provision for attorney fees in citizens suits and response actions by the United States without explicit provision for private-party attorney fees under section 9607 demonstrates congressional intent to deny attorney fees under section 9607. (see endnote 182) Moreover, Congress has had the opportunity to amend CERCLA to allow private-party attorney fees, but has failed to do so. (see endnote 183)

The argument against awarding attorney fees does not ignore the recoverability of private parties' necessary response costs under section 9607 nor does the argument ignore that "response" includes removal and remedial actions and "enforcement activities related thereto." The argument simply contends that this language is insufficient to authorize awarding attorney fees to private parties. The "enforcement activities" language is not sufficiently explicit when compared to the express language of section 9659(f), and section 9604(b), providing for the recovery of attorney fees in citizen suits and the government enforcement actions. (see endnote 184) The term "enforcement activities" is "outside even the most exhaustive lexicon of customary fee shifting language." (see endnote 185) Moreover, the discrepancy among district courts addressing this issue demonstrates, according to the Ninth Circuit in *Stanton Road Associates*, that the term "enforcement activities" does not provide for

awarding attorney fees in private-party response actions. (see endnote 186)

In summary, Congress does not explicitly provide for private party attorney fees in section 9607. Likewise, Congress did not amend section 9607 to allow attorney fees during the comprehensive SARA revisions of 1986. Moreover, the argument against attorney fees emphasizes that private parties cannot bring an enforcement action forcing a responsible party to remediate contamination under section 9607. Thus, the fact that Congress knew how to provide for attorney fees and did so for government enforcement actions and citizen suits evidences Congress's intent not to allow attorney fees in private-party response actions.

IV. ANALYSIS

The courts are decidedly split over whether attorney fees are recoverable in section 9607(a)(1-4)(B) private-party response actions. The four circuit courts of appeals that have addressed the issue are evenly split. The Sixth and Eighth Circuits have held that attorney fees are recoverable, while the First and Ninth Circuits have held that they are not. The arguments for both sides are compelling, with the decisive factor being the weight a particular court gives to each argument and its respective elements. The most compelling argument supporting the award of attorney fees relies on the policy implications of supporting such an award. On the other hand, the most compelling argument against the award of attorney fees is the lack of explicit statutory language providing for an award of attorney fees.

The following summary analyzes the factors considered by the courts in addressing the attorney fees issue. First, the statutory factor will be addressed. More specifically, the discussion will examine whether the inclusion of "enforcement activities related thereto" in the definition of "response" explicitly or implicitly provides for the recovery of attorney fees. Finally, the discussion will examine the relevant policy objectives in determining whether attorney fees are recoverable in private party response actions.

A. DOES THE INCLUSION OF THE LANGUAGE "ENFORCEMENT ACTIVITIES RELATED THERETO" IN THE DEFINITION OF RESPONSE ACTIONS PROVIDE FOR AWARDING ATTORNEY FEES?

Section 9607(a) of CERCLA explicitly provides that a private party may recover its "necessary costs of response" from responsible parties." (see endnote 187) It does not, however, expressly state whether attorney fees are "necessary costs of response." To find the meaning of response costs, one must look to the definition of "response" in section 9601(25). (see endnote 188) "Response" is defined as "remove, removal, remedy, and remedial action;" all such terms (including the terms "removal" and "remedial action") include "enforcement activities related thereto." (see endnote 189) Thus, according to the definition of "response," response costs should include all costs incurred in undertaking removal and remedial action and in undertaking related enforcement activities. The next determination then must be whether "enforcement activities" includes attorney fees incurred in private-party response actions.

1. CERCLA DOES NOT CONTAIN ANY EXPLICIT LANGUAGE PROVIDING FOR THE AWARD OF ATTORNEY FEES IN PRIVATE PARTY RESPONSE ACTIONS.

The statutory definition of "response" does not include any language which explicitly states that private parties may recover attorney fees. In denying attorney fees, courts point out that the absence of such language conclusively indicates that attorney fees are not recoverable. (see endnote 190) Merely stating that response actions include "enforcement activities" is not the equivalent of stating that attorney fees are recoverable. According to the *Alyeska* (see endnote 191) and *Runyon* (see endnote 192) opinions espousing the American Rule, attorney fees are not recoverable absent express congressional authorization. (see endnote 193)

In *Alyeska*, the *Wilderness Society*, the *Environmental Defense Fund, Inc.*, and the *Friends of the Earth* sued the Secretary of Interior under section 28 of the Mineral Leasing Act of 1920 (see endnote 194) and the National Environmental Policy Act of 1969 (see endnote 195) to prevent the issuance of construction permits for the trans-Alaska oil pipeline. (see endnote 196) Subsequently, the State of Alaska and *Alyeska Pipeline Service Co.* were allowed to intervene. The Court of Appeals for the D.C. Circuit awarded attorney fees to the respondents against petitioner, *Alyeska*, based upon the court's equitable powers and the theory that the respondents were entitled to attorney fees because they were performing services of a "private attorney general." (see endnote 197) The United States Supreme Court reversed the D.C. Circuit holding that in the absence of statutory authority, the American Rule is not subject to an exception based on the federal court's equitable powers or on the theory that the plaintiffs were performing the services of a "private attorney general." (see endnote 198) The Court found that equity is insufficient to overcome the absence of explicit language; therefore, courts cannot overcome this deficiency by relying on their equitable powers. (see endnote 199)

An additional argument against the recoverability of attorney fees is CERCLA's explicit provisions for attorney fees in other sections. Section 9604 of CERCLA expressly provides for the government to recover its legal costs when pursuing enforcement and cost-recovery actions. (see endnote 200) Likewise, section 9659(f) explicitly allows private parties to recover attorney fees in citizen suits. (see endnote 201) "In light of the statutory reference to the government's right to recover attorney fees and the explicit award of attorney fees to the prevailing party in citizen suits, the silence of Congress with respect to the recovery of attorney fees in private cost recovery actions is conspicuous." (see endnote 202) The conclusion follows that Congress knew how to explicitly provide for attorney fees in other sections of CERCLA, but chose not to do so for private party response actions. (see endnote 203)

On the other hand, courts awarding attorney fees reason that CERCLA is sufficiently explicit in its language to allow the recovery of attorney fees. In response to the argument that there is no explicit statutory language to allow attorney fees, these courts point out that *Alyeska* is distinguishable. Unlike *Alyeska*, the plaintiff in a private-party response action under CERCLA can point to a specific statutory provision which entitles a plaintiff to recover all necessary response costs. (see endnote 204) Private parties may recover the "necessary costs of response." "Response" includes removal or remedial action and "enforcement activities related thereto." Assuming that private-party response actions are "enforcement activities," private parties may recover their necessary costs, including attorney fees, in bringing a private-party response action. Therefore, there is at least some statutory language providing for attorney fees.

Alternatively, parties seeking to recover attorney fees argue that even the United States Supreme Court in *Alyeska* recognized that there were exceptions to the American Rule. One of these exceptions is the "bad faith exception," which allows an award of attorney fees against a party who has acted in bad faith, vexatiously, wantonly or for oppressively reasons. (see endnote 205) Additionally, there is the "common fund exception." This exception allows a trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others as well as himself to recover attorney fees from the fund, property itself, or directly from the other parties enjoying the benefit of the action. (see endnote 206) Finally, the "court sanction exception" allows the recovery of attorney fees from a party which wilfully disobeys a court order. (see endnote 207) Therefore, courts have the authority to make an exception to the American Rule. Since there is some support in the statutory language for an award of attorney fees in private party response actions, courts should be free to consider the equitable policy considerations of allowing the recovery of attorney fees.

Nonetheless, arguments on both sides of the issue concede that CERCLA does not expressly provide for attorney fees in private-party response actions. Given this lack of express language, the question becomes whether the inclusion of the language "enforcement activities related thereto" includes private party attorney fees.

2. ARE ATTORNEY FEES INCLUDED AS ENFORCEMENT ACTIVITIES RELATED TO RESPONSE ACTIONS?

CERCLA does not define "Enforcement activities"; however, a definition of "enforce" according to Webster's Dictionary is "to compel." (see endnote 208) One touchstone principal of statutory construction is "to ascertain and give effect to the plain meaning of the language used." (see endnote 209) Given that "response" means "remove, removal, remedy, and remedial action" and all of these terms include "enforcement activities related thereto," "enforcement activities" must include something other than "remove, removal, remedy and remedial action." Therefore, "enforcement activities" must include activities related to enforcing removal or remedial actions. Thus, two critical issues determine whether attorney fees are included as "enforcement activities". First, are private-party response actions "enforcement activities"? Second, are attorney fees part of as "enforcement activities"?

The argument against recoverability of attorney fees stresses that enforcement activities include only those actions taken to compel responsible parties' remedial action. Sections 9604, and 9606, and the citizen suit provision of section 9659 are the only parts of CERCLA providing for actions to enforce compliance with CERCLA cleanup standards. (see endnote 210) CERCLA provides for attorney fees in each of these enforcement actions. (see endnote 211)

The argument for awarding attorney fees points out that enforcement activities also include actions taken by private parties to recover their response costs under section 9607. (see endnote 212) Enforcement activities can be interpreted broadly enough to include actions taken to compel responsible parties to reimburse plaintiffs for their response actions under section 9607 because enforcement actions logically include actions taken to compel a responsible party to pay response costs. (see endnote 213) This interpretation becomes particularly viable when viewed in light of CERCLA's remedial purpose to protect and preserve public health and the environment. Therefore, in the absence of specific congressional intent to the contrary, CERCLA should be construed liberally to avoid frustration of its legislative purpose. (see endnote 214) Moreover, the definition of response costs in section 9601(25) includes "enforcement activities related thereto," and nowhere in the statute is section 9601(25) expressly limited to the government. (see endnote 215) The "enforcement activities related thereto" language

should apply to private-party response actions. Thus, private parties should be able to recover costs of enforcement activities under section 9607.

However, the legislative history sheds little light on whether private-party response actions are "enforcement activities." Although comments by the Committee of Energy and Commerce concerning the amendment of response costs to include enforcement activities suggest that the amendment will "confirm the EPA's authority to recover costs for enforcement actions taken against responsible parties," (see endnote 216) the Conference Committee Report omits this express reference to the EPA. (see endnote 217) Moreover, the government could recover its costs under section 9604(b)(1) before the SARA amendments. Thus, "the conclusion that the phrase 'enforcement costs' has no relevance to private parties assumes that Congress expended effort to alter section 9601(25), in 1986 with the intent of creating a redundant provision." (see endnote 218) Legislative history, far from being conclusive, creates more ambiguity.

Nevertheless, assuming that private-party response actions are "enforcement activities," the next question is whether the "enforcement activities" language includes attorney fees. The argument against awarding attorney fees concludes that it does not. First, under the American Rule, Congress must explicitly authorize attorney fees. The inclusion of the words "enforcement activities" does not explicitly state that attorney fees are authorized. (see endnote 219) If Congress wanted to be explicit, it could have provided that "response" includes "attorney fees incurred thereto." (see endnote 220) Second, Congress explicitly authorized courts in CERCLA citizen-suit actions to "award costs of litigation (including reasonable attorney fees and expert witness fees)." (see endnote 221) Congress also explicitly authorized the government to recover its attorney fees under section 9604(b). Section 9607 contains no such explicit language authorizing private parties to recover attorney fees. (see endnote 222)

On the other hand, the argument in support of attorney fees concludes that attorney fees are necessarily or implicitly included as "enforcement activities." A private party's ability to recover its "necessary costs of response" under section 9607(a)(4)(B), and the term "response" including removal and remedial action and "enforcement activities related thereto" should sufficiently authorize recovery of attorney fees under the American Rule. (see endnote 223) Attorney fees are necessarily incurred in enforcing the provisions of section 9607(a)(4)(B); therefore, they should be recoverable as response costs. (see endnote 224) Moreover, section 9604(b) which courts have found allows the government to recover its attorney fees, is not explicitly clear. Section 9604(b) can be read to authorize the government to "undertake legal studies or investigations to plan and direct response actions, and to recover the costs of such response actions." (see endnote 225) If section 9604(b) is read this way, it provides for the recovery of response costs, but does not explicitly state that legal services incurred in relation to such response actions are recoverable. (see endnote 226) If courts interpret this language to allow government attorney fees, they should interpret the "enforcement activities related thereto" language to authorize private-party attorney fees.

In summary, although response costs include "enforcement activities related thereto," (see endnote 227) CERCLA does not define "enforcement activities." Therefore, this language may suggest that "enforcement activities" should be limited to enforcement actions taken by the government or private parties under citizen suits. However, the language may also suggest that "enforcement activities" should include private-party actions taken to force responsible parties to pay response costs under section 9607. What is clear is that the language "enforcement activities" does not explicitly include attorney fees. Therefore, the critical factor becomes policy implications.

B. WHAT ARE THE POLICY IMPLICATIONS INVOLVED IN DETERMINING WHETHER ATTORNEY FEES ARE RECOVERABLE

The policy objectives behind CERCLA provide much of the impetus and strength behind the argument supporting the award of attorney fees. Two of CERCLA's main purposes are (1) the prompt cleanup of hazardous waste sites, and (2) imposition of all cleanup costs on the responsible party. (see endnote 228) In enacting CERCLA, Congress intended that the parties responsible for dumping hazardous waste would "bear the cost and responsibility for remedying the harmful conditions they created." (see endnote 229) A court undermines these purposes if it does not allow the plaintiff in a private-party response action to recover attorney fees. (see endnote 230) The failure to award attorney fees will "act as a huge and, in many cases, insurmountable obstacle to those seeking to bring private recovery actions under CERCLA." (see endnote 231)

The following hypothetical, based on facts similar to *General Electric Co. v. Litton Indus. Automation Sys., Inc.* (see endnote 232) emphasizes the policy implications of allowing recovery of attorney fees and the implications of denying such fees.

A purchases a 20 acre parcel of land in 1960 and builds a typewriter manufacturing plant on the premises. During operation of the plant, hazardous waste, such as cyanide-based electroplating wastes and other pollutants, are

dumped onto the tract. In 1972, the typewriting plant closes and B approaches A to purchase the property. A represents to B that no hazardous waste or pollutants have been disposed of on the property. (see endnote 233) B purchases the property. In 1980 B discovers substantial contamination.

The state environmental protection department enters the picture and asserts that B, as the current owner of contaminated property, is responsible for cleaning it up. B faces two choices. It may clean up the property and seek reimbursement from A under section 9607 of CERCLA. Alternatively, B may refuse to clean up the property on the basis that it did not dispose of hazardous waste at the site and that A is the responsible party.

If B cleans up the property before litigating A's responsibility, several problems may arise. First, environmental remediation can cost a substantial amount of money. Assume that B spends \$600,000 to have the site remediated under CERCLA standards. If A refuses B's request to reimburse it for response costs, B must sue A to recover those costs. Environmental litigation is invariably complex and may involve substantial costs. Assume that B spends \$300,000 in litigating A's responsibility.

What difference does the award of attorney fees make in this hypothetical? If the court awards attorney fees, the policy objectives of CERCLA are met. The property is cleaned up promptly and the responsible party, A, incurs the cleanup costs; as well as B's attorney fees, which A forced B to incur. If attorney fees are not awarded, B is left without a complete remedy. A, on the other hand, can litigate the matter, and only after several years of litigation, be forced to reimburse B for its remediation costs. Therefore, the law would actually punish B for cleaning up the property promptly because B must bear \$300,000 in litigation costs.

If, on the other hand, B litigates A's responsibility before remediation of the property, several policy implications exist. First, the remediation of the property will not be prompt. Environmental litigation often takes several years, and during that time, there will be no cleanup. Not only does this frustrate CERCLA's objective of cleaning up contamination promptly, it also means that B will be stuck with contaminated property which becomes virtually inalienable until it is remedied.

It becomes obvious that if attorney fees are not awarded, there will be little impetus for the fulfillment of CERCLA's policy objectives. If B is not awarded attorney fees, it is not in B's interest to clean up the property before litigating A's responsibility. Therefore, cleanup ultimately will be delayed if B chooses to litigate A's responsibility. Second, if B cannot recover its attorney fees from the responsible party, B will in effect be punished; and A will not bear the full cost and responsibility for remediating the contamination that it created.

Some courts have found the policy implications sufficient to overcome the lack of explicit language authorizing attorney fees in private party response actions. (see endnote 234) The first step in statutory interpretation consists of discerning the plain meaning of the terms of the statute. (see endnote 235) Where the plain meaning is not sufficiently clear or is ambiguous, the court must consider the legislature's intent and purposes. (see endnote 236) The policy implications weigh in favor of awarding attorney fees. On the other hand, courts holding attorney fees are not recoverable assert that even if the statutory language is ambiguous, the American Rule constrains courts in their analysis of legislative intent and policy implications. (see endnote 237) According to this argument, courts are precluded from implying that attorney fees are recoverable because under the *Alyeska* (see endnote 238) and *Runyon* (see endnote 239) opinions of the United States Supreme Court, the American Rule requires Congress to explicitly authorize awarding attorney fees. (see endnote 240)

V. CONCLUSION

There exists a sharp division among the courts as to whether attorney fees are recoverable in a private party response action brought under section 9607(a)(1)-(4)(B) of CERCLA. District courts in the Third and Sixth Circuits, as well as the First and Ninth Circuit Court of Appeals have held that attorney fees are not recoverable; whereas, district courts in the Second, Ninth, and Tenth Circuits have fallen on both sides of the division. On the other hand, district courts in the Fourth and Eighth Circuit, as well as the Sixth and Eighth Circuit Court of Appeals, have held that attorney fees are recoverable. The statutory language and legislative history do not provide a conclusive answer. CERCLA contains no explicit language providing for the recovery of attorney fees in private party response actions. However, it does contain language which arguably provides that private parties can recover costs of enforcement activities related to removal or remedial actions. Therefore, a strong argument can be made that the statute implies attorney fees are recoverable in private-party response actions as costs of enforcement.

Regardless of whether one concludes that the statutory language and legislative history are sufficiently explicit to allow the recovery of attorney fees, almost all will agree that policy implications weigh in support of awarding attorney fees. If attorney fees are allowed, prompt cleanup will be encouraged and responsible parties will have to

bear the cost and responsibility for remedying the harmful conditions they created.

A party in a private party recovery action should seek attorney fees based on the above argument. It has not been uniformly decided whether attorney fees are recoverable under 9607. The policy argument in favor of attorney fees is strong, but the result is uncertain in light of the American Rule. Courts allowing attorney fees have allowed recovery of fees in the following actions:

1. Search for Potentially Responsible Parties: The search for potentially responsible parties is an enforcement activity within the meaning of CERCLA; thus, attorney fees incurred to fine potentially responsible parties are recoverable. (see endnote 241)
2. Investigation of Site: Attorney fees in investigating a hazardous waste site are recoverable as enforcement activity under the meaning of CERCLA. (see endnote 242)
3. Negotiating Consent Decrees: Attorney fees may be recoverable when incurred in negotiating consent decrees.

ENDNOTES:

1. 42 U.S.C.A. §§ 9601-9675 (West 1983 & Supp. 1993). The primary purpose of CERCLA is the cleanup of hazardous waste. To achieve this objective, CERCLA establishes (1) federal government authority to respond to threatened or actual releases of hazardous substances, Id. § 9605 (West 1983 & Supp. 1993); (2) strict liability for responsible persons, Id. § 9607(a) (West Supp. 1993); (3) a means for the federal government to seek judicial relief, Id. § 9606 (West 1983 & Supp. 1993); (4) a means for private parties to sue responsible parties for the cleanup of hazardous waste and to recover the response costs incurred, Id. § 9607(a) (West Supp. 1993); and (5) a Hazardous Substance Response Trust Fund (Superfund) to finance response measures by the federal government and private parties which are consistent with the National Contingency Plan (NCP), established by CERCLA, Id. §§ 9604, 9611(a)(1)-(2) (West 1983 & Supp. 1993).

2. Section 107(a) of CERCLA (42 U.S.C.A. § 9607) establishes a private right of action for recovery of response costs. 42 U.S.C.A. § 9607(a) (West Supp. 1993). Private party response actions are different from CERCLA section 117 citizen suits (42 U.S.C.A. § 9659) in which actions are instituted by private parties for CERCLA violations. See 42 U.S.C.A. § 9659(a) (West Supp. 1993) which provides: (1) against any person (including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment of the Constitution) who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter (including any provision of an agreement under section 9620 of this title, relating to Federal facilities); or (2) against the President or any other officer of the United States (including the Administrator of the Environmental Protection Agency and the Administrator of the ATSDR) where there is alleged a failure of the President or of such other officer to perform any act or duty under this chapter including an act or duty under section 9620 of this title (relating to Federal facilities), which is not discretionary with the President or such other officer. Owners of contaminated property have several options for recovery under CERCLA. Private-party plaintiffs may sue under section 9607 to recover the cost of response actions, which are actions designed to provide a short-term remedy for contamination or threat of contamination). However, these parties cannot seek civil penalties or injunctive relief under section 9607. Brewer v. Ravan, 680 F. Supp. 1176, 1180 (M.D. Tenn. 1988); see also New York v. Shore Realty Corp., 759 F.2d 1032, 1049-50 (2d Cir. 1985). The section 9659 citizen-suit provision of CERCLA, on the other hand, allows plaintiffs to seek injunctive relief, which may force the defendant to clean up the property, and civil penalties, but not response costs. Reagan v. Cherry Corp., 706 F. Supp. 145, 148-49 (D.R.I. 1989). Therefore, property owners who discover that their land is contaminated by another party can either clean up the contamination and seek to recover response costs under section 9607 or they can institute a section 9659 action to force the responsible party to clean up the contamination. Hastings Bldg. Prod., Inc. v. National Aluminum Corp., 815 F. Supp. 228, 230 (W.D. Mich. 1993).

3. See General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415 (8th Cir. 1990), cert. denied, 499 U.S. 937 (1991), reh'g denied, 111 S. Ct. 1697 (1991) (explaining Plaintiff General Electric spent \$940,000 in remedying the site and \$419,000 in attorney fees and costs to force Litton to reimburse it for cleaning up Litton's waste). The District Court for the District of Maryland also commented on the expense of environmental litigation, explaining: "Given the complexity of the statutory scheme in this area, the current billing practices of the law firms that are able to devote the time and expertise into litigating these cases, as well as the length of time which litigation of this complexity must take, the only conclusion to be drawn is that environmental litigation is an extremely expensive business." HRW Sys., Inc. v. Washington Gas Light Co., 823 F. Supp. 318, 346 (D. Md. 1993). 4. 42 U.S.C.A. § 9607(a) (West Supp. 1993).

5. The term "facility" encompasses "(A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." 42 U.S.C.A. § 9601(9) (West Supp. 1993). To show that an area is a facility, a plaintiff must show that a hazardous substance is present or has otherwise come to be located there. United States v. Conservation Chem. Co., 619 F. Supp. 162, 185 (W.D. Mo. 1985) (finding that a drag racing strip is a facility because of the presence of contaminating oil). See New York v. General Elec. Co., 592 F. Supp. 291, 296-97 (N.D.N.Y. 1984) (finding asbestos fibers on the ground of a real estate subdivision may render the area a facility); see also United States v. Metate Asbestos Corp., 584 F. Supp. 1143, 1148 (D. Ariz. 1984).

6. See generally Donahey v. Bogle, 987 F.2d 1250, 1255 (6th Cir. 1993), cert. denied, 114 S. Ct. 636 (1993); B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1198 (2d Cir. 1992); Abbott Lab. v. Thermo Chem. Inc., 790 F. Supp. 135, 138 (W.D. Mich. 1991); United States v. Gurley Ref. Co., 788 F. Supp. 1473, 1477 (E.D. Ark. 1992); Amcast Indus. Corp. v. Detrex Corp., 779 F. Supp. 1519, 1536 (N.D. Ind. 1991), aff'd in part, 2 F.3d 746 (7th Cir. 1993), cert. denied, 114 S. Ct. 691 (1994); CPC Int'l., Inc. v. Aerojet-Gen. Corp., 777 F. Supp. 549 (W.D. Mich. 1991).

7. 42 U.S.C.A. § 9607(A)(West Supp. 1993).

8. Id. § 9607(a)(4) (West Supp. 1993).

9. See supra note 6.

10. 42 U.S.C.A. § 9601(22) (West Supp. 1993).

11. United States v. Metate Asbestos Corp., 584 F. Supp. 1143, 1149 (D. Ariz. 1984).

12. See Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837 (4th Cir. 1992), cert. denied, 113 S. Ct. 377 (1992); Stanley Works v. Snyder General Corp., 781 F. Supp. 659 (E.D. Cal. 1990); United States v. Conservation Chem. Co., 619 F. Supp. 162, 185-86 (W.D. Mo. 1985). But see Snediker Developers Ltd. Partnership v. Evans, 773 F. Supp. 984 (E.D. Mich. 1991).

13. See Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 668-69 (5th Cir. 1989); La.-Pac. Corp. v. Asarco, Inc., 735 F. Supp. 358, 361 (W.D. Wash. 1990); United States v. W. Processing Co., 734 F. Supp. 930, 942 (W.D. Wash. 1990).

14. 42 U.S.C.A. § 9601(14) (West Supp. 1993).

15. 33 U.S.C.A. § 1321(b)(2)(A) (West 1986 & Supp. 1993).

16. Id. § 1317(a) (West 1986).

17. 42 U.S.C.A. § 6921 (West 1983 & Supp. 1993).

18. Id. § 7412(a)-(b) (West 1983 & Supp. 1993).

19. 15 U.S.C.A. § 2606(f) (West 1982).

20. 42 U.S.C.A. § 9601(14) (West Supp. 1993).

21. Id. § 9601(25) (West Supp. 1993). Enforcement activities are arguably included within response actions, but because this contention is a key argument in supporting an award of attorney fees, it is addressed infra Section III.D.

22. Bolin v. Cessna Aircraft Co., 759 F. Supp. 692, 711 (D. Kan. 1991); Piccolini v. Simon's Wrecking, 686 F. Supp. 1063 (MD. Pa. 1988).

23. Bolin, 759 F. Supp. 692; Piccolini, 686 F. Supp. 1063; see also T & E Indus., Inc. v. Safety Light Corp., 680 F. Supp. 696, 706 (D. N.J. 1988).

24. 42 U.S.C.A. § 9601(23) (West Supp. 1993). The terms "remove" and "removal" are defined as: "[T]he cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in

the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under § 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act.
Id.

25. 40 C.F.R. § 300.415(d) (1993).

26. Id. § 300.415(e).

27. Bolin, 759 F. Supp. at 711; T & E Indus., Inc., 680 F. Supp. at 706.

28. 42 U.S.C.A. § 9601(24) (West Supp. 1993).

29. Id.

30. See 40 C.F.R. § 300.420-.435 (1993).

31. Id. § 300.420(b).

32. Id. § 300.420(c).

33. Id. §300.430(d)(2).

34. See Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 668 (5th Cir. 1989); Tanglewood E. Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568 (5th Cir. 1988); Cadillac Fairview/Cal., Inc. v. Dow Chem. Co., 840 F.2d 691, 695 (9th Cir. 1988); Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887, 892 (9th Cir.1986); Amcast Indus. Corp. v. Detrex Corp., 822 F. Supp. 545, 554 (N.D. Ind. 1992), aff'd in part, 2 F.3d 746(1993), cert. denied, 114 S. Ct. 691 (1994); Bolin v. Cessna Aircraft Co., 759 F. Supp. 692, 711 (D. Kan. 1991) (groundwater testing for the presence of hazardous substances constituted removal activity); Ambrogi v. Gould, Inc., 750 F. Supp. 1233, 1250 (M.D. Pa. 1990) (expenses incurred for air, water, soil testing and monitoring, expert, and investigative fees recoverable if consistent with the NCP); Carlyle Piermont Corp. v. Federal Paper Bd. Co., 742 F. Supp. 814 (S.D.N.Y. 1990); Amland Properties Corp. v. Aluminum Co., 711 F. Supp. 784, 795 (D.N.J. 1989); Southland Corp. v. Ashland Oil, Inc., 696 F. Supp. 994, 1000 (D.N.J. 1988); Brewer v. Raven, 680 F. Supp. 1176, 1179 (M.D. Tenn. 1988) (on site soil testing and water monitoring costs recoverable); Artesian Water Co. v. New Castle County, 659 F. Supp. 1269, 1286-87 (D. Del. 1987), aff'd, 851 F.2d 643 (3d Cir. 1988).

35. Tanglewood E. Homeowners, 849 F.2d at 1575 (cost of dikes and trenches recoverable). See also United States v. Hardage, 750 F. Supp. 1460 (W.D. Okla. 1990), aff'd, 982 F.2d 1436 (10th Cir. 1992), cert. denied, 114 S. Ct. 300 (1993) (holding cost of security fence, mound, slope and site repairs, alternative water supply, well plugging, access agreements, and site maintenance were necessary costs of response, but plaintiff failed to prove that the costs of bedrock studies, expert panel field investigation, oversight of EPA work, man characterization studies, drum disposal, remedial design, and hydrological/hydrogeological studies were necessary costs of response); City of New York v. Exxon Corp., 633 F. Supp. 609 (S.D.N.Y. 1986) (cost incurred for collecting and analyzing groundwater samples and conducting hydrological studies, air quality monitoring, and waste or remediation studies were covered as response costs).

36. Hardage, 750 F. Supp. at 1510; Artesian Water Co., 659 F. Supp. at 1278 (cost of groundwater monitoring recoverable only if existing water supply is contaminated or is threatened with contamination).

37. Tanglewood E. Homeowners, 849 F.2d at 1575.

38. Artesian Water Co., 851 F.2d at 651 (monitoring and evaluation cost covered); Tanglewood E. Homeowners, 849 F.2d at 1575 (relocation cost covered); Carlyle Piermont Corp., 742 F. Supp. at 822 (monitoring costs covered); City of New York, 633 F. Supp. 609 (S.D.N.Y. 1986) (air quality monitoring covered); In re Allegheny Int'l, Inc., 126 B.R. 919 (W.D. Pa. 1991) (monitoring costs covered). But see Lutz v. Chromatex, Inc., 718 F. Supp. 413 (M.D. Pa. 1989) (biological monitoring of residents' physical conditions caused by alleged release of toxic chemicals into their wells not covered as response cost).

39. Amcast Indus. Corp. v. Detrex Corp., 822 F. Supp. 545 (N.D. Ind. 1992), aff'd in part, 2 F.3d 746 (7th Cir. 1993) cert. denied, 114 S. Ct. 691 (1994) (\$55,992.28 in labor expenses and office supplies attributable to response action recoverable); T & E Indus., Inc. v. Safety Light Corp., 680 F. Supp. 696, 706 (D.N.J. 1988) (supervisory costs by T & E's president for monitoring a radiation problem recoverable). Contra Hardage, 750 F. Supp. at 1509 (oversight of EPA work not recoverable).
40. Lutz, 718 F. Supp. at 416; Piccolini v. Simon's Wrecking, 686 F. Supp. 1063, 1068 (M.D. Pa. 1988); Wehner v. Syntex Corp., 681 F. Supp. 651, 653 (N.D. Cal. 1987); Allied Towing Corp. v. Great E. Petroleum Corp., 642 F. Supp. 1339, 1348 (E.D. Va. 1986). Other costs generally not recoverable include transportation expenses, attendance at public meetings, and participation in citizens groups formed to aid in the investigation of cleanup efforts. Ambrogi v. Gould, Inc., 750 F. Supp. 1233, 1250 (M.D. Pa. 1990).
41. Medical monitoring costs are generally not recoverable. See Cook v. Rockwell Int'l Corp., 755 F. Supp. 1468 (D. Cob. 1991); Ambrogi, 750 F. Supp. at 1246 (medical surveillance, health effect studies, and health assessments not recoverable); Werlein v. United States, 746 F. Supp. 887 (D. Minn. 1990). However, some courts allow the recovery of medical monitoring costs. See generally Williams v. Allied Automotive, Autolite Div., 704 F. Supp. 782 (N.D. Ohio 1988) (cost of future medical monitoring recoverable as response cost); Jones v. Inmont Corp., 584 F. Supp. 1425 (S.D. Ohio 1984), reh'g denied, 22 E.R.C. 1447 (S.D. Ohio 1984). Other courts draw a distinction between whether the medical monitoring relates to public health. Woodman v. United States, 764 F. Supp. 1467 (M.D. Ha. 1991) (claim for medical monitoring did not relate to public health but rather to health of each family member, so claim not covered under response costs); Brewer v. Raven, 680 F. Supp. 1176 (M.D. Tenn. 1988) (costs of medical testing and screening conducted to assess the effect of a release of hazardous materials on public health or to identify potential public health problems recoverable, but costs incurred in treatment of personal injury or disease caused by the release not recoverable). But see Bolin v. Cessna Aircraft Co., 759 F. Supp. 692, 713 (D. Kan. 1991) (medical testing expenses not recoverable).
42. Reagan v. Cherry Corp., 706 F. Supp. 145, 151 (D.R.I. 1989). Under 42 U.S.C.A. section 9607(c)(3), if a responsible person fails without sufficient cause to properly provide removal or remedial action upon order of the President pursuant to section 9604 or section 9606, that person may be liable to the government for punitive damages. See United States v. Carolina Transformer Co., 978 F.2d 832 (4th Cir. 1992); United States v. Parsons, 936 F.2d 526 (11th Cir. 1991).
43. 42 U.S.C.A. § 9607(a)(1)-(4)(B) (West Supp. 1993). See also Bunger v. Hartman, 797 F. Supp. 968, 973 (S.D. Ha. 1992); Anspec Co. v. Johnson Controls, Inc., 788 F. Supp. 951 (E.D. Mich. 1992); Barnes Landfill, Inc. v. Town of Highland, 802 F. Supp. 1087 (S.D.N.Y. 1992); Amcast Indus. Corp., 779 F. Supp. at 1536; United States v. Gurley Ref. Co., 788 F. Supp. 1473, 1481 (E.D. Ark. 1992); In re Hanford Nuclear Reservation Litig., 780 F. Supp. 1551, 1555-56 (E.D. Wash. 1991).
44. United States v. Conservation Chem. Co., 619 F. Supp. 162 (W.D. Mo. 1985); United States v. Wade, 577 F. Supp. 1326 (E.D. Pa. 1983). But see Ambrogi, 750 F. Supp. at 1253-54; Artesian Water Co. v. New Castle County, 659 F. Supp. 1269, 1291-92 (D. Del. 1987), aff'd, 851 F.2d 643 (3d Cir. 1988).
45. Carlyle Piermont Corp. v. Federal Paper Bd. Co., Inc., 742 F. Supp. 814 (S.D.N.Y. 1990). See also Donahey v. Bogle, 987 F.2d 1250, 1255 (6th Cir. 1993), cert. denied, 114 S. Ct. 636 (1993).
46. Artesian Water Co., 659 F. Supp. at 1292 (motion for partial summary judgment on liability dependent on incurred response costs being consistent with the NCP). See also Bunger, 797 F. Supp. at 973 (compliance with the NCP must be established before private litigant may recover from responsible party).
47. Amland Properties Corp. v. Aluminum Co., 711 F. Supp. 784 (D.N.J. 1989).
48. Philadelphia v. Stepan Chem. Co., 748 F. Supp. 283 (E.D. Pa. 1990).
49. 40 C.F.R. § 300.700(c)(3)(i) (1993).
50. Bowen Eng'g v. Estate of Reeve, 799 F. Supp. 467 (D.N.J. 1992); United States v. Atlas Minerals & Chems., Inc., 797 F. Supp. 411 (E.D. Pa. 1992); Kelly v. Thomas Solvent Co., 790 F. Supp. 710, 715 (W.D. Mich. 1990).
51. See, e.g., Kelly, 790 F. Supp. at 717; United States v. A & N Cleaners and Launderers, Inc., 788 F. Supp. 1317 (S.D.N.Y. 1992); CPC Int'l, Inc. v. Aerojet-Gen. Corp., 777 F. Supp. 549 (W.D. Mich. 1991); United States v. Northern Plating Co., 670 F. Supp. 742, 748 (W.D. Mich. 1987), aff'd sub nom., United States v. R.W. Meyer, Inc., 889 F.2d 1497 (6th Cir. 1989), cert. denied, 494 U.S. 1057(1990); United States v. Northeastern

Pharmaceutical & Chem. Co., 579 F. Supp. 823, 844-48 (W.D. Mo. 1984), aff'd in part 810 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 810 (S.D. Ohio 1983).

52. United States v. Gurley Ref. Co., 788 F. Supp. 1473 (E.D. Ark. 1992); CPC Int'l, Inc., 777 F. Supp. at 554; United States v. Wade, 577 F. Supp., 1326, 1338 (E.D. Pa. 1983); Chem-Dyne Corp., 572 F. Supp. at 811.

53. Dedham Water Co. v. Cumberland Farms, Inc., 689 F. Supp. 1223, 1224-25 (D. Mass. 1988), rev'd sub nom. , Dedham Water Co. v. Cumberland Farms Dairy, Inc., 889 F.2d 1146 (1st Cir. 1989), clarified, 901 F.2d 3 (1st Cir. 1990), remanded, 770 F. Supp. 41 (D. Mass. 1991), aff'd, 972 F.2d 453 (1st Cir. 1992).

54. United States v. Distler, 803 F. Supp. 46 (W.D. Ky. 1992); Atlas Minerals & Chems., Inc., 797 F. Supp. at 416.

55. Distler, 803 F. Supp. 46; Atlas Minerals & Chems., Inc., 797 F. Supp. 416.

56. City of New York v. Exxon Corp., 766 F. Supp. 177, 191 (S.D.N.Y. 1991).

57. Atlas Minerals and Chems., Inc., 797 F. Supp. at 416.

58. Artesian Water Co. v. New Castle County, 659 F. Supp., 1269 (D. Del. 1987), aff'd, 851 F.2d 643 (3d Cir. 1988).

59. The case law detailing and explaining these defenses is voluminous and beyond the extent of this article. Only the statutory framework of the defenses is presented here.

60. 42 U.S.C.A. § 9607(b) (West 1983). See generally Westwood Pharmaceuticals v. National Fuel Gas Distribution Corp., 964 F.2d 85 (2nd Cir. 1992); United States v. Monsanto, 858 F.2d 160 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989); CPC Int'l, Inc. v. Aerojet-General Corp., 777 F. Supp. 549 (W.D. Mich. 1991); United States v. Fleet Factors Corp., 724 F. Supp. 955 (S.D. Ga. 1988), aff'd, 901 F.2d 1550 (11th Cir. 1990), reh'g denied, 911 F.2d 742(11th Cir. 1990), cert. denied, 498 U.S. 1046(1991).

61. Hatco Corp. v. W.R. Grace & Co., 801 F. Supp. 1309 (D.N.J. 1992); Atlas Minerals, 797 F. Supp. at 417. See United States v. Davis, 794 F. Supp. 67 (D.R.I. 1992).

62. See, e.g., Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal Co., 814 F. Supp. 1281, 1284 (E.D. Va. 1993); BTR Dunlop, Inc. v. Rockwell Int'l Corp., No. 90-C-7414, 1993 WL 326599, at *3 (N.D. Ill. Feb. 16, 1993); General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1422 (8th Cir. 1990), cert. denied, 111 S. Ct. 1390 (1991); Key Tronic Corp. v. United States, 766 F. Supp. 865, 871 (E.D. Wash. 1991), rev'd, 984 F.2d 1025 (9th Cir. 1993), cert. granted, 114 S. Ct. 633 (1993). See infra note 114.

63. Aleyska Pipeline Co. v. Wilderness Soc'y, 421 U.S. 240, 262 (1975). In Aleyska environmental groups sued under the Mineral Leasing Act of 1920, 30 U.S.C.A. § 185 (West 1986 & Supp. 1993), and the National Environmental Policy Act of 1969, 42 U.S.C.A. § 4321 (West 1977), to prevent construction of the trans-Alaska pipeline. The plaintiffs were granted attorney fees on the theory that they were performing services of a private attorney general, but the Supreme Court reversed the award because the statutes lacked explicit congressional authorization for such awards.

64. See T & E Indus., Inc. v. Safety Light Corp., 680 F. Supp. 696, 708 (D.N.J. 1988).

65. See Pease & Curren Ref., Inc. v. Spectrolab, 744 F. Supp. 945, 950 (C.D. Cal. 1990) (explaining that CERCLA is not a paradigm of clarity).

66. Artesian Water Co. v. New Castle County, 851 F. 2d 643, 648 (3d Cir. 1988).

67. One court has explained in dicta that CERCLA does not expressly allow the government to recover its attorney fees in section 9607 enforcement actions. See BTR Dunlop, Inc. v. Rockwell Int'l Corp., No. 90-C-7414, 1933 WL 326599, at *3 (N.D. Ill. Feb. 16, 1993).

68. 42 U.S.C.A. § 9607(a) (West Supp. 1993); United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 851 (W.D. Mo. 1984), aff'd in part 810 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987). See Abbott Lab. v. Thermo Chem, Inc., 790 F. Supp. 135, 141 (W.D. Mich. 1991).

69. 42 U.S.C.A. § 9607(a).
70. Id. §9601(23)(West Supp. 1993). See supra note 21.
71. Id. § 9604(b) (West Supp. 1993).
72. Id. § 9604(b)(l) (West Supp. 1993) (emphasis added).
73. See T & E Indus., Inc. v. Safety Light Corp., 680 F. Supp. 696, 708 (D.N.3. 1988); United States v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984, 1009 (D.S.C. 1984), aff'd in part sub nom., United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989); United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 851, aff'd in part 810 F.2d 726(8th Cir. 1986), cert. denied, 484 U.S. 848 (1987). But see BTR Dunlop, Inc. v. Rockwell Int'l Corp., No. 90-C-7414, 1993 WI. 326599, at *2 (N.D. Ill. Feb. 16, 1993), in which the court observed: "[A] more natural reading is that the statute authorizes the President, among other things, to undertake legal studies or investigations to plan and direct response actions, and to recover the costs of such response actions. Read this way, this section provides for recovery of the costs of response actions, but says nothing explicit about whether the legal services incurred in connection with such response actions are compensable. Section 9607, held up by many courts as an example of how Congress can be when it wants to provide for fee-shifting, is, when carefully parsed, a good deal less explicit..."
74. 42 U.S.C.A. § 9607(a) (West Supp. 1993). See Dedham Water Co. v. Cumberland Farms Dairy, Inc., 889 F.2d 1146, 1150 (1st Cir. 1989), clarified, 901 F.2d 3 (1st Cir. 1990), remanded, 770 F. Supp. 41 (D.Mass. 1991), aff'd, 972 F.2d 453 (1st Cir. 1992).
75. 42 U.S.C.A. § 9607(a)(4)(B) (West Supp. 1993).
76. Id. § 9601(25) (West Supp. 1993).
77. Id. § 9601(23) (West Supp. 1993). See supra note 26.
78. Id. § 9601(24) (West Supp. 1993). See supra p.10.
79. 42 U.S.C.A. § 9601(25) (West Supp. 1993).
80. Prior to 1985 the definition of respond or response did not include this language. The original Act defined respond or response as "remove, removal, remedy and remedial action." 42 U.S.C.A. § 9601(25) (West 1983).
81. Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal Co., 814 F. Supp. 1281 (E.D. Va. 1993); HRW Sys., Inc. v. Washington Gas Light Co., 823 F. Supp. 318, 346 (D. Md. 1993).
82. Hastings Bldg. Prods., Inc. v. National Aluminum Corp., 815 F. Supp. 228 (W.D. Mich. 1993).
83. BTR Dunlop, Inc. v. Rockwell Int'l Corp., No. 90-C-7414, 1993 WL 326599 (N.D. Ill. Feb. 16, 1993); Amcast Indus. Corp. v. Detrex Corp., 822 F. Supp. 545, 555 (N.D. Ind.. 1992), aff'd in part, 2 F.3d 746 (7th Cir. 1993), cert. denied, 114 S. Ct. 691 (1994).
84. General Elec. Co. v. Litton Indus. Automation Sys., 920 F.2d 1415 (8th Cir. 1990), cert. denied, 499 U.S. 937 (1991), reh'g denied, 111 S. Ct. 1697 (1991); Gopher Oil Co. v. Union Oil Co., 757 F. Supp. 998 (D. Minn. 1991), remanded in part, 955 F.2d 519 (8th Cir. 1992).
85. Pease & Curren Ref., Inc. v. Spectrolab, Inc., 744 F. Supp. 945 (C.D. Cal. 1990). But see Santa Fe Pac. Realty Corp. v. United States, 780 F. Supp. 687 (E.D. Cal. 1991); Stanton Rd. Assocs. v. Lohrey Enters., 984 F.2d 1015 (9th Cir. 1993); Key Tronic Corp. v. United States, 984 F.2d 1025 (9th Cir. 1993), cert. granted, 114 S. Ct. 633 (1993).
86. Bolin v. Cessna Aircraft Co., 759 F. Supp. 692 (D. Kan. 1991).
87. See Gopher Oil Co., 757 F. Supp. at 1005-18, for a thorough discussion of determining attorney fees and recoverable costs. The court explained that costs recoverable as attorney fees include attorney travel, telephone, postage, local delivery, legal assistant, and office expenses.
88. Donahey v. Bogle, 987 F.2d 1250 (6th Cir. 1993), cert. denied, 114 S. Ct. 636 (1993).

89. General Elec. Co., 920 F.2d at 1422.

90. Id. See also Cadillac Fairview/Cal., Inc. v. Dow Chem. Co., 840 F.2d 691, 694 (9th Cir. 1988); Shapiro v. Alexanderson, 741 F. Supp. 472, 480 (S.D.N.Y. 1990), reargument denied, 743 F. Supp. 268 (S.D.N.Y. 1990).

91. See Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal Co., 814 F. Supp. 1281, 1284-85 (E.D. Va. 1993).

92. 920 F.2d 1415 (8th Cir. 1990), cert. denied, 499 U.S. 937 (1991), reh'g denied, 111 S. Ct. 1697 (1991).

93. Id. at 1422. See also Gopher Oil Co. v. Union Oil Co., 757 F. Supp. 998, 1006-07 (D. Minn. 1991), remanded in part, 955 F.2d 519 (8th Cir. 1992).

94. General Elec. Co., 920 F.2d at 1422.

95. 42 U.S.C.A. § 9601(25) (West Supp. 1993).

96. General Elec. Co., 920 F.2d at 1422.

97. Shapiro v. Alexanderson, 741 F. Supp. 472, 480 (S.D.N.Y. 1990), reargument denied, 743 F. Supp. 268 (S.D.N.Y. 1990) (private party may recover attorney fees which are reasonable and expended in successfully obtaining compensation for proper response activities); Gopher Oil Co., 757 F. Supp. at 1006-07; Pease & Curren Ref., Inc. v. Spectrolab, Inc., 744 F. Supp. 945 (C.D. Cal. 1990).

98. 744 F. Supp. 945 (C.D. Cal. 1990).

99. Id.

100. Id. at 952.

101. Id. at 951.

102. Id.

103. Id. (citing Pacific Mut. Life Ins. Co. v. American Guar. Life Ins. Co., 722 F.2d 1498, 1500 (9th Cir. 1984)).

104. Id.

105. Id.; see also Hastings Bldg. Prods., Inc. v. National Aluminum Corp., 815 F. Supp. 228, 232 (W.D. Mich. 1993).

106. No. 90-C-7414, 1993 WL 326599 (N.D. Ill. Feb. 16, 1993).

107. Id. at *3.

108. Id. at *12-13 (quoting Stanton Rd. Assocs. v. Lohrey Enters., 984 F.2d 1015, 1023 (9th Cir. 1993) (Canby, J., dissenting)).

109. Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal Co., 814 F. Supp. 1281, 1283 (E.D. Va. 1993).

110. See 42 U.S.C.A. § 9601(25) (West Supp. 1993).

111. In Hastings the court explained that *'[i]f 'enforcement activities' is not read to include attorneys' fees, this phrase becomes superfluous. I cannot conceive of any other enforcement costs private parties could incur which are related to removal, remedy and remedial action." Hastings Bldg. Prods., Inc. v. National Aluminum Corp., 815 F. Supp. 228, 232 (W.D. Mich. 1993); see also Chesapeake & Potomac Tel. Co., 814 F. Supp. at 1283; Pease & Curren Ref., Inc. v. Spectrolab, 744 F. Supp. 945, 951 (C.D. Cal. 1990); Shapiro v. Alexanderson, 741 F. Supp. 472, 480 (S.D.N.Y. 1990), reargument denied, 743 F. Supp. 268 (S.D.N.Y. 1990).

112. 814 F. Supp. 1281 (E.D. Va. 1993).

113. Id. at 1283.

114. Id.

115. Key Tronic Corp. v. United States, 766 F. Supp. 865, 871 (E.D. Wash. 1991), rev'd, 984 F.2d 1025 (9th Cir. 1993), cert. granted, 114 S. Ct. 633 (1993) (quoting Wilshire Westwood Assoc. v. Atlantic Richfield Corp., 881 F.2d 801, 804 (9th Cir. 1989)). See also United States v. Carolina Transformer Co., 978 F.2d 832, 838 (4th Cir. 1992); Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986).

116. See, e.g., Chesapeake & Potomac Tel. Co., 814 F. Supp. at 1284; BTR Dunlop, Inc. v. Rockwell Int'l Corp., No. 90-C-7414, 1993 WL 326599 (N.D. Ill. Feb. 16, 1993); General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1422 (8th Cir. 1990), cert. denied, 499 U.S. 937 (1991); Key Tronic Corp., 766 F. Supp. at 871.

117. See Pinole Point Properties, Inc. v. Bethlehem Steel Corp., 596 F. Supp. 283, 287 (N.D. Cal. 1984); United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982).

118. See General Elec. Co., 920 F.2d at 1422; Hastings Bldg. Prods., Inc. v. National Aluminum Corp., 815 F. Supp. 228, 231 (W.D. Mich. 1993); Chesapeake & Potomac Tel. Co., 814 F. Supp. at 1284. See also Gopher Oil Co. v. Union Oil Co., 757 F. Supp. 998, 1006-07 (D. Minn. 1991), remanded in part, 955 F.2d 519 (8th Cir. 1992). In Gopher Oil Co., Gopher Oil was required to clean up a five acre site it owned in Minneapolis. The site had previously been owned by W. H. Barber Co. and used for the operation of a bulk oil and chemical facility. The facility was used for operations by Union Oil Company as well as by the American Mineral Spirits Company. These operations left the site substantially contaminated, and in the 1970's, Union Oil conducted several studies at the site which discovered the need for pollution control equipment and modernized facilities. The site was sold in November of 1980 to Gopher Oil. Before Gopher Oil purchased the site, Union Oil allegedly misrepresented material facts about the condition of the site. In 1983 and 1984, officials from the Minnesota Pollution Control Agency (MPCA) investigated the site and determined that it was contaminated. As the current owner of the property, Gopher Oil entered into a compliance agreement with the MPCA to investigate and clean up the contamination. As of the date of the district court opinion, Gopher Oil had spent \$423,272.81 pursuant to the MPCA's request and compliance agreement.

119. Chesapeake & Potomac Tel. Co., 814 F. Supp. at 1284-85; Pease & Curren Ref., Inc. v. Spectrolab, Inc., 744 F. Supp. 945, 951 (C.D. Cal. 1990).

120. General Elec. Co., 920 F.2d at 1422; Key Tronic Corp., 766 F. Supp. at 872.

121. Chesapeake & Potomac Tel. Co., 814 F. Supp. at 1284; see also, Hastings, 815 F. Supp. at 232.

122. Chesapeake & Potomac Tel. Co., 814 F. Supp. at 1284.

123. Id.

124. 759 F. Supp. 692 (D. Kan. 1991).

125. Id. In Bolin, the court addressed the question of attorney fees upon defendant's motion for partial summary judgment. The plaintiffs in Bolin were individual homeowners and their adult children who alleged that their groundwater had been contaminated with trichloroethylene by the defendant's operation of an aircraft manufacturing plant located within a mile of the plaintiffs' residence. The plaintiffs sued the defendant for recovery of their response costs of obtaining an alternative water supply and resulting attorney fees. Although the defendant admitted that trichloroethylene escaped from its property to the plaintiffs' groundwater, it argued that litigation costs were not recoverable response costs. Id. at 694.

126. Id. at 710. See Pennsylvania v. Union Gas, 491 U.S. 1, (1989); Artesian Water Co. v. New Castle County, 659 F. Supp. 1269, 1288 (D. Del. 1987), aff'd, 851 F.2d 643 (3d Cir. 1988); City of New York v. Exxon Corp., 633 F. Supp. 609, 616-17 (S.D.N.Y. 1986); Pinole Point Properties, Inc. v. Bethlehem Steel Corp., 596 F. Supp. 283, 288 (N.D. Cal. 1984); State ex rel. Brown v. Georgeoff, 562 F. Supp. 1300, 1311-14 (N.D. Ohio 1983).

127. Id.; see also Donahey v. Bogle, 987 F.2d 1250, 1256 (6th Cir. 1993); HRW Systems, Inc. v. Washington Gas Light Co., 823 F. Supp. 318, 346 (D. Md. 1993); Amcast Indus. v. Detrex Corp., 822 F. Supp. 545, 555 (N.D. Ind. 1992), aff'd in part and rev'd in part, 2 F.3d 746 (7th Cir. 1993), cert. denied 114 S. Ct. 691 (1994).

128. Abbott Lab. v. Thermo Chem, Inc., 790 F. Supp. 135, 141 (W.D. Mich. 1991).

129. In re Hemingway Transp., Inc., 993 F.2d 915, 934-35 (1st Cir. 1993), cert. denied sub nom., Kahn v. Juniper Dev. Group, 114 S. Ct. 303 (1993).
130. Stanton Rd. Assocs. v. Lohrey Enter., Inc., 984 F.2d 1015 (9th Cir. 1993); Key Tronic Corp. v. United States, 984 F.2d 1025 (9th Cir. 1993).
131. Leonard Partnership v. Town of Chenango, 779 F. Supp. 223, 229-30 (N.D.N.Y. 1991); New York v. SCA Servs., Inc., 754 F. Supp. 995 (S.D.N.Y. 1991).
132. Redland Soccer Club, Inc. v. Department of the Army of the United States, 801 F. Supp. 1432, 1437 (M.D. Pa. 1992); Fallowfield Dev. Corp. v. Strunk, 766 F. Supp. 335 (E.D. Pa. 1991); T & E Indus., Inc. v. Safety Light Corp., 680 F. Supp. 696 (D.N.J. 1988).
133. Abbott Lab. v. Thermo Chem, Inc., 790 F. Supp. 135 (W.D. Mich. 1991); Anspec Co., Inc. v. Johnson Controls, Inc., 788 F. Supp. 951, 957-58 (E.D. Mich. 1992).
134. Kaufman and Broad-South Bay v. Unisys Corp., 822 F. Supp. 1468, 1478 (N.D. Cal. 1993); Price v. United States Navy, 818 F. Supp. 1326, 1331, n.9 (S.D. Cal. 1992); Santa Fe Pac. Realty Corp. v. United States, 780 F. Supp. 687 (E.D. Cal. 1991).
135. United States v. Hardage, 750 F. Supp. 1460 (W.D. Okla. 1990), aff'd in part rev'd in part, 982 F.2d 1436 (10th Cir. 1992), cert. denied, 114 S. Ct. 300 (1993).
136. Pub. L. 99-499, § 101(e), 100 Stat. 1613, 1615 (codified as amended at 42 U.S.C.A. § 9601(25) (West Supp. 1993)).
137. 42 U.S.C.A. § 9601(25) (West 1983).
138. Id. § 9601(25) (West Supp. 1993).
139. No. 89-8644, 1990 WL 52745 (E.D. Pa. Apr. 23, 1990). In Fallowfield, Fallowfield had purchased 314 acres from Strunk in Chester County, Pennsylvania. In the sales agreement, Strunk represented that the property was free of hazardous, toxic, carcinogenic substances, or other pollutants. However, two years after Fallowfield had purchased the property, carcinogenic and other toxic wastes were discovered on the property. After being compelled by state and federal environmental authorities to cleanup the property, Fallowfield sued Strunk to recover response costs and attorney fees. After dismissing Fallowfield's request for attorney fees, the court reconsidered its dismissal in Fallowfield Dev. Corp. v. Strunk, 766 F. Supp. 335 (E.D. Pa. 1991) in light of the Eighth Circuit's opinion in General Elec. Co. v. Litton Indus. Automation Sys., 920 F.2d 1415 (8th Cir. 1990), cert. denied, 499 U.S. 937 (1991). The Court affirmed its dismissal of Fallowfield's request for attorney fees.
140. *H.R. Rep. No. 253*, 99th Cong., 1st Sess. pt. 1, at 66-67 (1985), reprinted in 1986 U.S.C.C.A.N., 2835, 2848-49.
141. Fallowfield Dev. Corp., 1990 WL 52745 at *15; but see BTR Dunlop, Inc. v. Rockwell Int'l Corp., No. 90-C-7414, 1993 WL 326599 at *2 (N.D.Ill. Feb. 16, 1993) (recognizing the subsequent Conference Committee Report does not mention the EPA).
142. New York v. SCA Servs., Inc., 754 F. Supp. 995, 1000 (S.D.N.Y. 1991); Regan v. Cherry Corp., 706 F. Supp. 145, 149 (D.R.I. 1989) (explaining that it would have been a simple matter to amend § 107 (section 9607) to allow recovery of attorney fees); Santa Fe Pac. Realty Corp. v. United States, 780 F. Supp. 687, 695 (E.D. Cal. 1991).
143. In re Hemingway Transp., Inc., 993 F.2d 915, 934 (1st Cir. 1993).
144. See *H.R. CONF. REPORT No. 99-962*, 99th Cong., 2d Sess. 1985 (1986).
145. No. 90-C-7414, 1993 WL 326599, at *2 (N.D. Ill. Feb. 16, 1993).
146. Id. *3.
147. 780 F. Supp. 687 (E.D. Cal. 1991).

148. *Id.* at 695.

149. *In Re Hemingway Transp., Inc.*, 993 F.2d at 934; see also *Stanton Rd. Assocs. v. Lohre Enter.*, 984 F.2d 1015, 1019 (9th Cir. 1993); *United States v. Hardage*, 750 F. Supp. 1460, 1511 (W.D. Okla. 1990), *aff'd* in part, *rev'd* in part, 982 F.2d 1436 (10th Cir. 1992), *cert. denied*, 114 S. Ct. 300 (1993); *T & E Industries, Inc. v. Safety Light Corp.*, 680 F. Supp. 696, 708 (D.N.J. 1988).

150. See *Regan v. Cherry Corp.*, 706 F. Supp. 145, 148-50 (D.R.I. 1989). See the government's argument in *Key Tronic Corp. v. United States*, 766 F. Supp. 865, 871 (E.D. Wash. 1991), *rev'd*, 984 F.2d 1025 (9th Cir. 1993), where the government argued that a private party cannot incur costs of enforcement activities. See also *T & E Industries*, 680 F. Supp. at 708, n. 13; *Hardage*, 750 F. Supp. at 1460-1511.

151. *T & E Indus.*, 680 F. Supp. at 708, n. 13 (finding that there exists no provision analogous to section 104 (section 9604) which would allow a private party to recover attorney fees).

152. But see *BTR Dunlop, Inc. v. Rockwell Int'l Corp.*, No. 90-C-7414, 1993 WL 326599 at *2, at note 73 *infra.*, for the argument that attorney fees are not explicitly provided for the government under section 9604.

153. 42 U.S.C.A. § 9659(a)(1) (West Supp. 1993).

154. *Id.* § 9659(c) (West Supp. 1993).

155. *Id.* § 9659(f) (West Supp. 1993).

156. *Regan v. Cherry Corp.*, 706 F. Supp. 145, 149 (D.R.I. 1989) (quoting *H.R. Rep. No. 253(1)*, 99th Cong., 2d Sess. 257, reprinted in, 1986 U.S.C.C.A.N. 2965).

157. *Id.* at 148-49.

158. *United States v. Hardage*, 750 F. Supp. 1460, 1511 (W.D. Okla. 1990).

159. *In re Hemingway Transp., Inc.*, 993 F.2d 915, 934 (1st Cir. 1993); *Stanton Rd. Assocs. v. Lohrey Enter.*, 984 F.2d 1015 (9th Cir. 1993); *Abbott Lab. v. Thermo Chem, Inc.*, 790 F. Supp. 135, 141 (W.D. Mich. 1991).

160. *Runyon v. McCrary*, 427 U.S. 160, 185, (1976); *Alyeska Pipeline Co. v. Wilderness Soc'y*, 421 U.S. 240, 262 (1975).

161. *Stanton Rd. Assocs.*, 984 F.2d at 1020; *T & E Indus., v. Safety Light Corp.*, 680 F. Supp. 696, 708 (D.N.J. 1988).

162. 421 U.S. 240 (1975)

163. *Id.* at 271.

164. 984 F.2d 1015. In this case, Lohrey Enterprises owned and operated a dry cleaning plant on property adjacent to property owned by Stanton Road Associates. During the operation of the dry cleaning plant, perchlorethelene spilled contaminating Stanton Road's property. Stanton Road sued Lohrey Enterprises seeking declaratory relief and response costs under CERCLA and damages under state common law claims. Stanton Road introduced testimony at trial that the cleanup of its property would cost between \$775,000 and \$1,100,000. After finding Lohrey Enterprises liable for the contamination, the district court awarded Stanton Road \$77,374 in response costs, \$389,925 in damages under state law claims, \$126,198 in attorney fees under CERCLA and ordered Lohrey Enterprises to pay \$1,100,000 to fund the cleanup of Stanton Road's property. *Id.* at 1016-17.

165. *Id.* at 1020.

166. *Id.*; see also *In re Hemingway Transp., Inc.*, 993 F.2d 915, 934 (1st Cir. 1993).

167. 790 F. Supp. 135, 142 (W.D. Mich. 1991).

168. *Id.* at 142.

169. 42 U.S.C.A. § 9659(f) provides that [t]he court ... may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party whenever the court determines such an award is appropriate."

170. Regan v. Cherry Corp., 706 F. Supp. 145, 149 (D.R.I. 1989); see New York v. SCA Sen's., Inc., 754 F. Supp. 995, 1000 (S.D.N.Y. 1991); Santa Fe Pac. Realty Corp. v. United States, 780 F. Supp. 687, 695 (E.D. Cal. 1991); Fallowfield Dev. Corp. v. Strunk, 766 F. Supp. 335, 338 (E.D. Pa. 1991).

171. 706 F. Supp. 145 (D.R.I. 1989).

172. *Id.* at 149.

173. 757 F. Supp. 998 (D. Minn. 1991).

174. *Id.* at 1006, n.5.

175. Fallowfield Dev. Corp. v. Strunk, 766 F. Supp. 335, 338 (E.D. Pa. 1991).

176. 780 F. Supp. 687 (E.D. Cal. 1991). In Santa Fe, the plaintiff owned property in Collinsville, California, which it leased to defendants, Clifford and Dora Dana, who subleased the property to the defendant, Richard Armor. In 1989, county officials discovered substantial quantities of hazardous substances stored on the property which constituted a substantial risk of fire and explosion. The majority of the chemicals had been purchased by the defendant Armor at public auction surplus sales from the defendant, United States of America. The plaintiff sued the defendants, alleging that the defendants were liable to it for CERCLA response costs, including attorney fees.

177. *Id.* at 696.

178. *Id.* (quoting In re Shear, 139 F. Supp. 217, 220 (N.D. Cal. 1956)).

179. *Id.* (citing Library of Congress v. Shaw, 478 U.S. 310, 321 (1986)).

180. Under section 310 of the CERCLA citizen suit provision, [t]he court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or the substantially prevailing party whenever the court determines such an award is appropriate." 42 U.S.C.A. § 9659 (West Supp. 1993).

181. Key Tronic Corp. v. United States, 766 F. Supp. 865, 870-71 (E.D. Wash. 1991), rev'd 984 F.2d 1025 (9th Cir. 1993). Under § 104(b), the United States government may "undertake such planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations as [it] may deem necessary or appropriate to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this chapter." 42 U.S.C.A. § 9604(b).

182. *Id.*; see Stanton Rd. Assocs. v. Lohrey Enter., 984 F.2d 1015, 1019 (9th Cir. 1993); Abbott Lab. v. Thermo Chem, Inc., 790 F. Supp. 135, 142 (W.D. Mich. 1991); United States v. Hardage, 750 F. Supp. 1460, 1511 (W.D. Okla. 1990); T & E Indus., Inc. v. Safety Light Corp., 680 F. Supp. 696, 708 (D.N.J. 1988).

183. Santa Fe Pac. Realty Corp. v. United States, 780 F. Supp. 687, 695 (E.D. Cal. 1991).

184. See Stanton Rd. Assocs., 984 F.2d at 1020.

185. Santa Fe Realty Corp., 780 F. Supp. at 695.

186. Stanton Rd. Assocs., 984 F. 2d at 1019.

187. 42 U.S.C.A. § 9607(a) (West Supp. 1993).

188. 42 U.S.C.A. § 9601(25) (West Supp. 1993).

189. *Id.*

190. See Abbott Lab. v. Thermo Chem, Inc., 790 F. Supp. 135, 141 (W.D. Mich. 1991); Santa Fe Pac. Realty Corp. v. United States, 780 F. Supp. 687, 695 (E.D. Cal. 1991); Fallowfield Dev. Corp. v. Strunk, 766 F. Supp. 335, 338

(E.D. Pa. 1991); New York v. SCA Serv., Inc., 754 F. Supp. 995, 1000 (S.D.N.Y. 1991); Regan v. Cherry Corp., 706 F. Supp. 145, 149 (D.R.I. 1989); T & E Indus., Inc. v. Safety Light Corp., 680 F. Supp. 696, 708 (D.N.J. 1988).

191. Aleyska Pipeline Co. v. Wilderness Soc'y, 421 U.S. 240 (1975).

192. Runyon v. McCrary, 427 U.S. 160 (1976).

193. Stanton Rd. Assocs. v. Lohrey Enter., 984 F.2d 1015, 1018-19 (9th Cir. 1993); Fallowfield Dev. Corp., 766 F. Supp. at 335-38; see Santa Fe Pacific Realty Corp., 780 F. Supp. at 694-96.

194. 30 U.S.C.A. § 185 (West 1983).

195. 42 U.S.C.A. §§ 4321-4335 (West 1983).

196. Wilderness Soc'y v. Morton, 495 F.2d 1026 (D.C. Cir. 1973).

197. Id.

198. Alyeska, 421 U.S. at 241.

199. Id.

200. Section 104(b), provides that the government "[m]ay undertake such planning, legal, fiscal, economic, engineering, architectural, and other studies for investigations as he [it] may deem necessary or appropriate to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this Chapter." 42 U.S.C.A. § 9604(b) (West Supp. 1993).

201. Section 310(f) provides that in citizen suits, the district court "may award costs of litigation (including reasonable attorney and expert witness fees)" 42 U.S.C.A. § 9659(f) (West Supp. 1993).

202. Abbott Lab. v. Thermo Chem, Inc., 790 F. Supp. 135, 142 (W.D. Mich. 1991); see also Stanton Rd. Assocs. v. Lohrey Enter., 984 F.2d 1015, 1019 (9th Cir. 1993).

203. See T & E Indus., Inc. v. Safety Light Corp., 680 F. Supp. 696, 708 (D.N.J.). 1988); United States v. Hardage, 750 F. Supp. 1460, 1511 (W.D. Okla. 1990).

204. Hastings Bldg. Prod., Inc. v. National Aluminum Corp., 815 F. Supp. 228, 232-33 (W.D. Mich. 1993); Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal Co., Inc., 814 F. Supp. 1281, 1283 (E.D. Va.1993).

205. See Vaughan v. Atkinson, 369 U.S. 527 (1962).

206. See Central R.R. & Banking Co. v. Pettus, 113 U.S. 116 (1885).

207. See Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399 (1923).

208. *WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY* (2d ed. 1983).

209. Pease & Curren Refining, Inc. v. Spectrolab, Inc., 744 F. Supp. 945, 951 (C.D. Cal. 1990); Wilshire Westwood Assoc. v. Atlantic Richfield, 881 F.2d 801, 803 (9th Cir. 1989).

210. See Key Tronic Corp. v. United States, 766 F. Supp. 865, 871 (E.D. Wash. 1991), rev'd, 984 F.2d 1025 (9th Cir. 1993).

211. Abbott Lab. v. Thermo Chem, Inc., 790 F. Supp. 135, 142 (W.D. Mich. 1991); United States v. Hardage, 750 F. Supp. 1460, 1511 (W.D. Okla. 1990), aff'd in part, rev'd in part, 982 F.2d 1436 (10th Cir. 1992), cert. denied, 114 S. Ct. 300 (1993); T & E Indus., Inc. v. Safety Light Corp., 680 F. Supp. 696, 708 (D.N.J. 1988).

212. General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1422 (8th Cir. 1990) cert. denied, 499 U.S. 937 (1991); Chesapeake and Potomac Tel. Co. v. Peck Iron & Metal Co., 814 F. Supp. 1281 (E.D. Va. 1993); Bolin v. Cessna Aircraft Co., 759 F. Supp. 692, 710 (D. Kan. 1991); Shapiro v. Alexanderson, 741 F. Supp. 472, 480 (S.D.N.Y. 1990).

213. Hastings Bldg. Prod., Inc. v. National Aluminum Corp., 815 F. Supp. 228, 233 (W.D. Mich. 1993).
214. Key Tronic Corp., 766 F. Supp. at 871; see Wilshire Westwood Assoc. v. Atlantic Richfield, 881 F.2d 801, 804 (9th Cir. 1989); Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986).
215. See Hastings Bldg. Prod., 815 F. Supp. at 232-33; Chesapeake and Potomac Tel. Co. of Virginia, 814 F. Supp. at 1283; Pease & Curren Refining, Inc. v. Spectrolab, Inc., 744 F. Supp. 945, 951 (C.D. Cal. 1990).
216. *HR. REP. NO. 253*, 99th Cong., 1st Sess, pt. 1 at 16067 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2848-49.
217. See *H.R. CONG. REP. NO. 962*, 99th Cong. 2d Sess. 1985 (1986).
218. Hastings Bldg. Prod., 815 F. Supp. at 232-33.
219. Stanton Rd. Assocs. v. Lohrey Enter., 984 F.2d 1015, 1019 (9th Cir. 1993).
220. Although the legislative history argument for denying attorney fees indicates that "enforcement activities" was added to clarify the government's ability to recovery attorney fees, it is not conclusive given the subsequent omission of any such reference by the Conference Committee Report. See *H.R. CONF. REP. NO. 962*, 99th Cong., 2d Sess. 1985 (1986).
221. *Id.*
222. *Id.*
223. Hastings Bldg. Prod. Inc. v. National Aluminum Corp., 815 F. Supp. 228, 232-33 (W.D. Mich. 1993); Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal Co., 814 F. Supp. 1281, 1283 (E.D. Va. 1993).
224. General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1422 (8th Cir. 1990); see also, Amcast Indus. Corp. v. Detrex Corp., 822 F. Supp. 545, 555 (N.D. Ind. 1992).
225. BTR Dunlop, Inc. v. Rockwell Int'l Corp., No. 90-D-7414, 1993 WL 326599 (N.D. III. Feb. 16, 1993).
226. *Id.* at * 2.
227. 42 U.S.C.A. § 9601(25) (West 1983).
228. See, e.g., Chesapeake and Potomac Tel. Co. v. Peck Iron & Metal Co., 814 F. Supp. 1281, 1284 (E.D. Va. 1993); BTR Dunlop, Inc., No. 90-C-7414, 1993 WL 326599; General Elec. Co., 920 F.2d at 1422; Key Tronic Corp. v. United States, 766 F. Supp. 865, 871 (E.D. Wash. 1991) rev'd., 984 F.2d 1025 (9th Cir. 1993). See also Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1455 (9th Cir. 1986) (citing 126 Cong. Rec. 31964 (statement of Rep. Florio)).
229. United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982). In Reilly Tar, the court emphasized that its determination of congressional purposes was based on a review of the *Senate Report of the Committee on Environment and Public Work, S. REP. NO. 848*, 96th Cong., 2d Sess. (1980), and the *REPORT OF THE HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, H.R. REP. NO. 96-1016*, 96th Cong., 2d Sess., reprinted in 1980 U.S.C.C.A.N. 6119. Reilly Tar, 546 F. Supp. at 1112, n.2. See also Pinole Point Properties v. Bethlehem Steel Corp., 596 F. Supp. 283, 287 (N.D. Cal. 1984); United States v. Akzo Coatings of America, Inc., 949 F.2d 1409, 1418 (6th Cir. 1991).
230. Donahey v. Bogle, 987 F.2d 1250, 1256 (6th Cir. 1993) (quoting Bolin v. Cessna Aircraft Co., 759 F. Supp. 692, 710 (D. Kan. 1991)); Hastings Bldg. Prod., Inc. v. National Aluminum Corp., 815 F. Supp. 228, 231 (W.D. Mich. 1993); Amcast Indus. Corp. v. Detrey Corp., 822 F. Supp. 545, 555 (N.D. Ind. 1992).
231. HRW Sys., Inc. v. Washington Gas Light Co., 823 F. Supp. 318, 346 (D. Md. 1993).
232. 920 F.2d 1415 (8th Cir. 1990).

233. It must be noted in this fact pattern that the reasonable commercial environmental inquiry, which has become a matter-of-fact inquiry necessary to assert the innocent landowner defense under CERCLA, is yet undeveloped. See supra note 60 for general cases interpreting the innocent-landowner defense.

234. General Electric Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1422; Chesapeake and Potomac Tel. Co. v. Peck Iron & Metal Co., Va., 814 F. Supp. 1281, 1284-85 (E.D. Va. 1993); BTR Dunlop, Inc. v. Rockwell Int'l Corp., No. 90-C-7414, 1993 WL 326599 (N.D. Ill., Feb. 16, 1993); Bolin v. Cessna Aircraft Co., 759 F. Supp. 692 (D. Kan. 1991); Gopher Oil Co., Inc. v. Union Oil Co., 757 F. Supp. 998, 1006-1007 (D. Minn. 1991). See also Donahey v. Bogle, 987 F.2d 1250, 1256 (6th Cir. 1993); HRW Systems, Inc., 823 F. Supp. at 346.

235. Wilshire Westwood Assoc. v. Atlantic Richfield, 881 F.2d 801, 803 (9th Cir. 1989).

236. Blum v. Stenson, 465 U.S. 886, 896 (1984); Chesapeake & Potomac Tel. Co., 814 F. Supp. at 1284.

237. Stanton Rd. Assocs., Inc., v. Lohrey Enter., 984 F.2d 1015, 1018 (9th Cir. 1993).

238. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 269 (1975).

239. Runyon v. McCrary, 427 U.S. 160, 185 (1976).

240. Stanton Rd. Assocs., Inc., 984 F.2d at 1019.

241. Key Tronic Corp. v. United States, 766 F. Supp. 865, 872 (E.D. Wash. 1991), rev'd, 984 F.2d 1025 (9th Cir. 1992).

242. International Clinical Lab., Inc. v. Stevens, 710 F. Supp. 466 (E.D.N.Y. 1990); BCW Assoc. v. Occidental Chem. Corp., No. 86-5947, 1988 WL 102641 (E.D. Pa. Sep. 29, 1988).