The Retroactive Application of CERCLA: Pre-Enactment Response Costs

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INTRODUCTION

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA")\(^1\) was hastily written and supplied its readers with little legislative history.\(^2\) Its purpose was to clean up inactive hazardous waste sites that had not been adequately dealt with in the past.\(^3\) Many courts and commentators consider CERCLA to be an eleventh hour compromise, having become law at the end of both a lame duck Congress and a Presidential term.\(^4\) This unfortunate scenario


\(^2\) One court has made the following observation:

CERCLA was created in a unique attempt by Congress to mitigate some of the problems caused by inactive hazardous waste sites. It was hastily, and, therefore inadequately drafted. Even the legislative history must be read with caution since last minute changes in the bill were inserted with little or no explanation. Because of the haste with which CERCLA was enacted, Congress was not able to provide a clarifying committee report, thereby making it extremely difficult to pinpoint the intended scope of the legislation.


It [CERCLA] was considered on December 3, 1980, in the closing days of the lame duck session of an outgoing Congress. It was considered and passed, after very limited debate, under a suspension of the rules, in a situation which allowed for no amendments. Faced with a complicated bill on a take it-or-leave it basis, the House took it, groaning all the way.


under which CERCLA became law has led to much disagreement over which situations and to what extent the statute may be applied against CERCLA defendants.

Courts have generally concluded that CERCLA holds responsible parties liable for acts committed before the passage of the statute. They have not, however, been in such accord over whether the liability section of CERCLA (section 107) holds responsible parties liable for response costs incurred by the federal government before the passage of CERCLA section 107(a), which, as amended, reads as follows:

> Notwithstanding any other provision or rule of law...

1. the owner or operator of a vessel or a facility,

2. any person who at the time of disposal of any hazardous substance owned or operated any facility of which such hazardous substances were disposed of,

3. any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

4. any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for —

(A) all costs of removal or remedial action incurred by the United States
CLAs. The federal circuit courts are divided on the issue of "pre-enactment response costs:" one group holds that CERCLA should be applied retroactively to hold responsible parties liable for pre-enactment response costs ("retroactive" side); the other group holds that the liability section can only be read to hold responsible parties liable for costs incurred after the passage of CERCLA ("prospective" side).

Part I of this Note shall give a brief overview of CERCLA's history. Part II discusses basic concepts of statutory construction and due process with respect to section 107. This Note concludes that, because of unclear legislative history, CERCLA should not be construed to apply to pre-enactment response costs, and that any such construction results in a denial of CERCLA defendants' due process rights.

Government or a State or an Indian tribe not inconsistent with the national contingency plan [40 C.F.R. sections §§ 300.1-300.86 (1986)];

(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 resource damages, including the reasonable costs of assessing such injury, destruction or loss resulting from such a release . . .

[CERCLA section 107(a)(4)(D) deals with the recovery of interest, which is not pertinent to the topic of this Note.]


8. See infra, notes 9 and 10 for the division of the courts.

9. While no court has explicitly defined the term "pre-enactment response costs," the facts from the cases lead to a ready deduction of the term's meaning. In the case of United States v. Morton-Thiokol, No. 83-4787, slip op. (D.N.J. July 2, 1984) [bench ruling], the New Jersey Department of Environmental Protection ("DEP") began cleaning up contaminated groundwater in August, 1980. On December 11, 1980, CERCLA was enacted. Pub. L. No. 96-510, 94 Stat. 2767 (1980). While defendant Morton-Thiokol may be liable for the costs expended by the DEP from December 11, 1980 onward, see supra note 6 and accompanying text, the question of whether Morton-Thiokol should pay for such expenses from August to December 10, 1980, is the subject matter of this Note. The court in Morton-Thiokol refused to hold the defendant liable for response costs incurred prior to December 10, 1980.


I. HISTORY OF CERCLA

CERCLA was enacted to close the gaps in its predecessor statute, the Resource Conservation and Recovery Act of 1976 ("RCRA"). Congress envisioned RCRA as the answer to the "last remaining loophole in environmental law." RCRA was enacted so that hazardous waste could be tracked from the moment it was generated to the moment it was disposed. RCRA's main purpose, then, was to block the creation of new hazardous waste sites. Prior to RCRA, no statute covered the disposal of hazardous wastes on land. RCRA failed, however, to provide a statutory basis for cleanup of the many inactive waste sites. Since RCRA provided no adequate remedy for the cleanup of sites in which operations ceased years ago, Congress began its work on CERCLA.

CERCLA's purpose was to clean up these inactive hazardous waste sites, especially where the owner or generator could not be found or could not afford the cleanup costs. While several bills reached the

15. This concept is evidenced by RCRA's "imminent hazard" provision, RCRA § 7003, 42 U.S.C. § 6973 (1982), which grants the Environmental Protection Agency ("EPA") the power to commence suit in federal district court to "restrain persons from contributing to any waste activities which may present an imminent and substantial endangerment to health or the environment." Id.
17. As was stated in CERCLA's House Report, "Since enactment of [RCRA], a major new source of environmental concern has surfaced: the tragic consequences of improperly, negligently, and recklessly hazardous waste disposal practices known as the 'inactive hazardous waste site problem.' . . . Existing law is clearly inadequate to deal with this massive problem." H.R. REP. No. 1016, 96th Cong., 2d Sess. 17-18, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6120. "Under present authority, before action can be taken to abate releases of hazardous wastes . . . a problem must already exist, a financially responsible owner must already exist, and abatement efforts can only begin after successful judicial action has occurred." 126 CONG. REC. 26780 (1980)(statement of Rep. Dingell).
20. As was stated by Thomas Jorling, Assistant Administrator, Department of Water and Waste Management of the EPA: "This fund is to be used to find, assess, and, where warranted, clean up abandoned hazardous waste sites when the company or companies responsible for creating the problem either no longer exist, cannot be identified, or lack the financial resources to clean up their own messes." Administration Testimony to the
floors of both houses between 1977 and 1979, the actual bill that became CERCLA, H.R. 7020, did not become law until late 1980. Congress debated over the exact number of inactive waste sites in existence in 1980, and generally agreed to a number of 397. The amount of money spent yearly at New York State sites was estimated at $44 billion. The then lame-duck Congress recognized that it was of the utmost importance to get some form of legislation passed whereby federally funded cleanup could begin. Since CERCLA was hastily written, Congress agreed that any gaps in the statute would have to be filled in by the courts or future Congressional bodies.

The House and Senate versions of the bill contained liability provisions that encompassed pre-enactment response costs. These sections, however, were not included in the final version of CERCLA. CERCLA as passed did contain a liability provision, section 107(f), with respect to "natural resource damages." Section 107(f) does not apply to

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21. See Grad, 8 Colum. J. Envtl. L. 1, 2 n.3 (1982), for a listing of the seven Senate bills and the twelve House bills.


24. Id. (Letter from the National Association of Attorneys General).

25. In response to an amendment proposed by Rep. Stockman, Rep. Florio stated, "Time is of the essence in many of these instances. The need is right now." 126 Cong. Rec. 26,761 (1980). As was stated by Rep. Dingell, "[T]he task is large and the stakes are high, and we must commence with this first and most important step. We have no more time to delay." 126 Cong. Rec. 26,780 (1980).

26. "It would be foolhardy to maintain that all of our hazardous waste ills will be solved with this one piece of legislation given the scope of the problem facing the Nation. The magnitude of the problem . . . will require the resources and resolve of generations to come." 126 Cong. Rec. 26,780 (1980) (statement of Rep. Dingell).

27. "[I]t would be foolhardy to maintain that all of our hazardous waste ills will be solved with this one piece of legislation given the scope of the problem facing the Nation. The magnitude of the problem . . . will require the resources and resolve of generations to come." 126 Cong. Rec. 26,780 (1980) (statement of Rep. Dingell).


29. S. 1480, 96th Cong., 2d Sess. section 4(a)(1)(A), reprinted in 1 Legislative History, at 267 (1983), which provided that responsible parties would be liable for "[A]ll costs of removal, or remedial action incurred by the United States Government or a State . . . ."

H.R. 7020, 96th Cong., 2d Sess. section 3072, reprinted in 2 Legislative History, at 198 (1983), which provided: "The provisions of this subpart . . . shall apply to releases of hazardous waste without regard to whether or not such releases occurred before, or on or after, the date of the enactment . . . ."


31. "Natural resources" is defined in 42 U.S.C. § 9601(d)(16) (1982), which includes, "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States . . . any state or local government, or any foreign government . . . ." 42 U.S.C. § 9607(f) (1982) provides in pertinent part: "Sums recovered shall
natural resource damages that occurred entirely before the enactment of the statute. Section 107(f), then, was not to be applied retroactively.

CERCLA was amended in 1986 by the Superfund Amendment and Reauthorization Act of 1986 ("SARA"). While SARA makes dramatic changes in some areas, it left section 107(f) intact as per the issue of retroactivity. Nothing in SARA addresses pre-enactment response costs. The most current legislative efforts to amend CERCLA have not provided interpretative aids to determine the retroactive effect of the statute. It shall be necessary, then, to approach the problem by means of statutory construction.

II. STATUTORY CONSTRUCTION

Courts generally abhor giving retroactive application to statutes. Just be available for use to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government or the State government

32. 42 U.S.C. § 9607(f) (1982), which provides, in pertinent part: "There shall be no recovery under the authority of subparagraph (C) of subsection (a) of this section where such damages and the release of a hazardous substance from which such damages resulted occurred wholly before December 11, 1980."


36. See Atkeson, 16 ENVTL. L. REP. (Envtl. L. Inst.) 10363, 10400-01.

37. See id.


RETRACTIVE APPLICATION

Retroactive Application

Practice Story best defined the term "retroactive statute" in the following manner:

"Every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective."

Throughout our country's legal history, courts have refused to give retroactive effect to statutes unless expressly provided for in the statute, or when such an inference can be drawn from a reading of the statute's legislative history. For a statute to be applied retroactively, the intent for such application has to be clear.

No provision in CERCLA or SARA provides for retroactive application of pre-enactment response costs. The retroactive application of CERCLA or SARA, therefore, must flow from clear Congressional intent evidenced in the legislative history.

III. LEGISLATIVE HISTORY

The retroactive courts interpret CERCLA's legislative history to say that the statute was intended to be "backward-looking." The courts reason that the statutory intention was to go back and clean up inactive waste sites. Because CERCLA is a remedial statute, all of its provisions must be applied against past conduct, unless the statute specifically


41. 2 SUTHERLAND § 41.04 at 252 (Sands 4th ed. 1986); United States v. Security Industrial Bank, 459 U.S. 70, 79 (1982) ("A retrospective operation will not be given to a statute . . . unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.'") (quoting Union Pacific R. Co. v. Laramie Stock Yards Co., 231 U.S. 190, 199 (1913). "Words in a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied." United States v. Heth, 7 U.S. (3 Cranch) 399, 412 (1806).

42. 2 SUTHERLAND § 41.04 at 253 (Sands 4th ed. 1986).

43. See supra notes 36-38 and accompanying text.


excludes such an application.\textsuperscript{47}

The interpretation of CERCLA as a backward-looking statute is not surprising. As the prospective courts reason, however, application of the retroactive argument to its logical limits makes all statutes legitimately retroactive.\textsuperscript{48} No statute would be written if some past occurrence had not prompted its necessity. As Professor Sutherland reasoned:

\begin{quote}
All laws. . . have connections with the past. Legislators, no less than judges, make decisions based on knowledge and understanding gained from awareness of past facts, since that only can be known which is history, and the future can only be the subject of guess.\textsuperscript{49}
\end{quote}

Courts have addressed the removal of the pre-enactment liability provisions from both bills (section 3072 from H.R.7020,\textsuperscript{50} and section 4(n) from S.1480).\textsuperscript{51} The main point the retroactive courts make is that since Congress deliberately included a section that denied retroactive applications for natural resource damages, it implicitly excluded any limitation on the recovery of response costs.\textsuperscript{52} This argument draws a distinction between response costs and natural resource damages.\textsuperscript{53}

The retroactive argument clashes with the basic common law tenet that if Congress is silent on an issue, that issue cannot be applied retroactively unless a strong intent to the contrary can be gathered from the legislative history.\textsuperscript{54} The retroactive side, under the guise of interpreting

\textsuperscript{47}. Shell Oil, 605 F. Supp. 1064, 1079 (D. Colo. 1985).
\textsuperscript{48}. "All statutes are enacted to remedy present effects. If present effects were determinative of retroactivity, no statute could ever be construed as retroactive." United States v. Stringfellow, 20 Env't Rep. Cas. (BNA) 1912, 1914 (C.D. Cal. 1984).
\textsuperscript{49}. 2 SUTHERLAND § 41.02 at 248 (Sands 4th ed. 1986).
\textsuperscript{50}. See supra note 27.
\textsuperscript{51}. See supra note 28. The retroactivity side argues that the basic meaning of section 4(n) was upheld in the statute as passed. Shell Oil, 605 F. Supp. 1064, 1079 (D. Colo. 1985).
\textsuperscript{52}. Where Congress has intended a liability provision to have only prospective operation, as in the case of natural resource damages, Congress has so stated explicitly (citations omitted). Congress did not explicitly limit or deny liability for response costs incurred before enactment. \ldots I conclude that CERCLA authorizes recovery of pre-enactment response costs.
\textsuperscript{54}. See 2 SUTHERLAND § 41.04 at 252 (Sands 4th ed. 1986).
legislative history, is merely interpreting the statute to serve its purposes. The prospective side, however, gives added weight to the removal of the sections in its argument that Congress did not intend a retroactive application of pre-enactment response costs.\textsuperscript{55} The thrust of the argument lies in the fact that the issue involved millions of dollars.\textsuperscript{56} Congress, being aware of the costs here, would have included a section on pre-enactment response costs had it wished to do so.\textsuperscript{57}

The prospective argument is supported by the lack of any definite inferences that can be drawn from the legislative history.\textsuperscript{58} For every retroactive interpretation, a reader can find an equally convincing prospective argument. Keeping in mind the courts' general disdain for retroactive statutes,\textsuperscript{59} the prospective argument becomes more persuasive. Since courts have been accepting both arguments,\textsuperscript{60} it will be necessary to discuss an area upon which the courts are loathe to tread - due process.\textsuperscript{61}

55. United States v. Wade, 20 Env't Rep. Cas. (BNA) 1849, 1851 (E.D. Pa. 1984). The Wade court makes reference to statements made by Senators Bradley and Moynihan regarding the Love Canal and Elizabeth, New Jersey sites, respectively, wherein no comment is made on pre-enactment response costs. \textit{Id.}, citing 126 CONG. REC. 30,937-40 (1980). While the Wade court did not mention the following excerpts from the Congressional debates, the statements further the argument that Congress was aware of the costs involved, including retroactive applications of liability provisions:

Of particular concern to me and a number of my colleagues on the Commerce Committee during development of this legislation were the liability issues. Especially difficult were the ramifications of retroactive application of statutory liability provisions to past activities of potential defendants. The committee rejected any notion of absolute liability in this regard. While the bill [H.R. 7020] does contain provisions holding defendants who caused or contributed to release resulting in occurrence of cleanup costs by the administrator strictly, jointly, and severally liable for such costs, certain important defenses and safeguards were provided in the interest of due process...

126 CONG. REC. 26,785 (1980) (statement of Rep. Madigan). "[T]he point about the disincentive, that we need to put on a fee or some kind of retroactive liability is raised over and over again." \textit{Id.} at 26,766 (1980) (statement of Rep. Stockman). The debates also suggest that SARA was to operate in a prospective manner only. "[E]ffective after the date of enactment of these amendments, a party who receives an order can begin the work of environmental cleanup." 132 CONG. REC. H9,624 (daily ed. Oct. 8, 1986) (statement of Rep. Eckart).


59. \textit{See supra} notes 39-40 and accompanying text.

60. \textit{See supra} notes 9 and 10.

IV. DUE PROCESS

The Fifth Amendment of the United States Constitution provides, in part, that "No person . . . shall be deprived of life, liberty, or property without due process of law."62 One of the main concepts that the due process clause covers is the avoidance of penalizing parties for past conduct.63 CERCLA defendants argue that they are being penalized for disposing of materials during a time in which such disposal was not forbidden.64 Courts, however, have few criteria for determining when a statute violates due process.65

The standard to be applied in most due process cases is whether Congress had a rational basis in applying legislation retroactively.66 There must be a "rational connection between the fact proved and the ultimate fact presumed."67 The root of the problem at hand is that Congress is not applying the statute here.68 It has left that job up to the courts and the EPA.69 The rational basis test may not be the standard to be applied in this situation, and it undoubtedly could be a more onerous test.70 Courts have been quite unwilling to address this question.71

Courts, when dealing with the constitutional issues, may have to bal-

62. U.S. CONST. amend. V.
64. The concept of Bentham's "dog law" is apparent. See supra note 39.
65. NOWAK § 11.09 at 384 (3d ed. 1986).
68. Freeman, 42 BUS. LAW. 215, 225 n.29 (1986).
69. See supra note 26.
71. See Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 19 (1976). The Supreme Court applied a rational basis test in this case, and refused to consider other interests, or question the wisdom of Congress. See also NOWAK, § 11.9 at 390. The main problem with applying the rational basis test here is that Congress is not the entity being tested. Rather, the EPA, a wing of the executive branch, and the court system are the parties to be put under a due process analysis. While the courts defer to the legislative history regarding retroactive applications, when the legislative history is inconclusive, the courts may have to turn to balancing competing interests in their due process analysis. Cf. NOWAK, § 11.9 at 390 (3d ed. 1986).
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ance the competing interests involved. The courts favoring retroactivity argue that there is no way CERCLA defendants could have limited their liability, if they were to have known that the statute would be passed and applied retroactively. Therefore, there is no element of unfair surprise. However, it is arguable that CERCLA defendants could have performed the cleanup for much less than the government's costs, so as to negate all amounts spent pre-CERCLA. Courts must consider the expectations of CERCLA defendants within the pre-CERCLA time frame before determining such extensive liability.

The retroactive side proposes a second, and stronger, argument which sounds in public policy. The retroactive side argues that it is unfair to punish the government for acting quickly to aid the public. While this argument has substantial weight, there is an equally strong argument that the government cannot be presumed to have expected to be reimbursed under a statute that was not yet in existence. This argument is further supported by the fact that CERCLA carried no provisions in this area, and the interpretations from the legislative history have yet to settle the matter. It would be even more dubious to expect the EPA to have acted in reliance upon future interpretations of legislative history.

The arguments posed on either side counteract one another in the due process area. Even a rational basis test may not be proper under these circumstances. In light of this standoff, the retroactive application of CERCLA response costs must be denied as violative of CERCLA defendants' due process rights.

72. See supra note 71.
73. Shell Oil, 605 F. Supp. 1064, 1073 (D. Colo. 1985). The Shell court saw no due process questions involved with respect to pre-enactment response costs, since it had already considered the retroactive application of liability for pre-enactment conduct not to run afoul of due process. Id. at 1072.
74. See NOWAK, § 11.9 at 390 (3d ed. 1986).
76. See United States v. Wade, 20 Env't Rep. Cas. (BNA) 1849, 1851 (E.D. Pa. 1984), where the court, while holding that pre-enactment response costs were not recoverable, granted that "[i]n a sense, failure to impose such liability penalizes those who responded promptly to hazardous sites prior to CERCLA."
77. Id., at 1851 n.2.
78. See supra notes 36-38 and 42.
79. See supra notes 50-58 and accompanying text.
80. While the government end in creating CERCLA is clearly proper, the fact that there is no legislation or irrebuttable legislative history means that the standard "rational basis" test from Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976), may not be applicable in this situation. It is the legislation from Congress which must satisfy the test. When there is no legislation, there is no authority as to what test to apply. Perhaps the previously mentioned balancing test would be appropriate. If this were the case, the balance would swing in favor of CERCLA defendants, as no argument can be presented that cannot be refuted.
CONCLUSION

Courts exercise judicial restraint in cases where constitutional issues may be involved. With regard to CERCLA, courts have refused to adequately address the constitutional issues, preferring to travel more traditional paths. These other paths, however, have proved to be insufficient to solve the questions CERCLA poses, particularly with respect to retroactive application of pre-enactment response costs. While the recent trend of the courts has been toward retroactive application, the cases on that side have been contradictory in their analyses. The prospective argument, however, remains logical and consistent. Many of these cases may take years before they are finally decided, but when the courts of appeal, and perhaps the Supreme Court, deal with this issue in earnest, they must address the due process questions. Only when courts seriously deal with this constitutional issue can CERCLA defendants be guaranteed their due process rights.

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81. See supra note 61 and accompanying text.
82. See, e.g., United States v. Stringfellow, 20 Env't Rep. Cas. (BNA) 1912, 1915 (C.D. Cal. 1987) ("The Court will not address the issue of whether CERCLA § 107 is unconstitutional on its face.").
84. See supra note 52, where the court in Continental Insurance Co. v. Northeastern Pharmaceutical & Chem. Co., 811 F.2d 1180 (8th Cir. 1987), resulted in a break from the previous understanding that natural resource damages and response costs are separate. See also NEPACCO II, 810 F.2d 726, 733 (8th Cir. 1986) cert. denied, 108 S. Ct. 146 (1987), where the court clearly states that the "language used in the key liability provision, CERCLA section 107, refers to actions and conditions in the past tense," meaning that since the language is in the past tense, retroactive applications were intended. But see Shell Oil, 605 F. Supp. 1064, 1073 (D. Colo. 1985), where the court concluded that Congressional intent on this issue could not be gathered from the verb tenses in CERCLA section 107(a), 42 U.S.C. § 9607(a) (1982). Accord, Mayor of Boonton v. Drew Chem. Co., 621 F. Supp. 663, 668 (D.N.J.1985).
85. The NEPACCO I decision, 579 F. Supp. 823 (W.D. Mo. 1984), was handed down on January 31, 1984, while the NEPACCO II decision, 810 F.2d 726 (8th Cir. 1986), cert. denied, 108 S. Ct. 146 (1987), was not delivered until December 31, 1986.