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The Retroactive Application of CERCLA: Pre-Enactment Response Costs

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THE RETROACTIVE APPLICATION OF CERCLA: PRE-ENACTMENT RESPONSE COSTS

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

1. 42 U.S.C. §§ 9601-9657 (1982), as amended by Act of Oct. 17, 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

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.

United States v. Price, 577 F. Supp. 1103, 1109 (D.N.J. 1983) (citations omitted), quoted in Giblin & Kelly, *Judicial Development of Standards of Liability in Government Enforcement Actions under the Comprehensive Environmental Response, Compensation and Liability Act*, 33 CLEV. ST. L. REV. 1 (1984) [hereinafter Giblin & Kelly]. Other commentators similarly discuss CERCLA:

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.

Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982) [hereinafter Grad]. "By lack of design due to eleventh-hour compromises and amendments in the Congress, the Act has much ambiguity and little authoritative legislative history." Comment, *CERCLA 1985: A Litigation Update*, 15 ENVTL. L. REP. (Envtl. L. Inst.) 10395, 10395 (Dec. 1985). See generally, *Developments in the Law: Toxic Waste Litigation*, 99 HARV. L. REV. 1458 (1986); Note, *The Right to Contribution for Response Costs under CERCLA*, 62 NOTRE DAME L. REV. 345, 347 (1985).

3. H.R. REP. NO. 1016, 96th Cong., 2d Sess. 17-18, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6119-20. "The bill was intended to provide remedies for environmental hazards caused by abandoned or inactive waste disposal sites or facilities." F. Skillern, ENVIRONMENTAL PROTECTION: THE LEGAL FRAMEWORK § 5A.01 at 157 (Supp. 1986). "CERCLA applies primarily to the cleanup of leaking inactive or abandoned sites and to emergency responses to spills." F. ANDERSON, D. MANDELKER, & A. TARLOCK, ENVIRONMENTAL PROTECTION: LAW AND POLICY 568 (1984).

4. Along with commentators mentioned in *supra*, note 2, see Blaymore, *Retroactive Application of Superfund: Can Old Dogs be Taught New Tricks?*, 12 B.C. ENVTL. AFF. L. REV. 1, 6 (1985); Freeman, *Inappropriate and Unconstitutional Retroactive Application of Superfund Liability*, 42 BUS. LAW 215, 223 (1986) [hereinafter Freeman]. Courts have continually stated that CERCLA was quickly written, and Congress had little time for debate. *Exxon Corp. v. Hunt*, 475 U.S. 355, 368 (1986); *Mayor of Boonton v. Drew Chem. Corp.*, 621 F. Supp. 663, 668 (D.N.J. 1985); *United States v. Shell Oil Co.*, 605 F. Supp. 1064, 1069 (D. Colo. 1985) [hereinafter *Shell Oil*]; *United States v. Northeastern*

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.⁵

Courts have generally concluded that CERCLA holds responsible parties liable for acts committed before the passage of the statute.⁶ They have not, however, been in such accord over whether the liability section of CERCLA (section 107)⁷ holds responsible parties liable for response costs incurred by the federal government before the passage of CER-

Pharmaceutical & Chem. Co., 579 F. Supp. 823, 838 n.15 (W.D. Mo. 1984) [hereinafter NEPACCO I], *rev'd in part on other grounds sub nom.* NEPACCO II, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987) [hereinafter NEPACCO II]; United States v. A & F Materials Co., 578 F. Supp. 1249, 1253 (S.D. Ill. 1984); United States v. Wade, 577 F. Supp. 1326, 1331 (E.D. Pa. 1983); State *ex rel.* Brown v. Georgeoff, 562 F. Supp. 1300, 1310 n.12 (N.D. Ohio 1983); United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1111 (D. Minn. 1982).

5. Courts have generally agreed that CERCLA imposes a standard of strict liability. *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985). *See also*, *Bulk Distribution Centers v. Monsanto Co.*, 589 F. Supp. 1437, 1443 (S.D. Fla. 1984); *United States v. South Carolina Recycling & Disposal*, 653 F. Supp. 984, 991 n.2 (D.S.C. 1984); NEPACCO I, 579 F. Supp. 823, 843 (W.D. Mo. 1984), *rev'd in part on other grounds*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987). Joint and several liability has also been considered the norm. *See id.* at 845; *United States v. Wade*, 577 F. Supp. 1326, 1338 (E.D. Pa. 1983). Two courts, however, have held that such liability need not be applied in every instance. *See United States v. A & F Materials Co.*, 578 F. Supp. 1249, 1256 (S.D. Ill. 1984); *United States v. Stringfellow*, 20 Env't Rep.Cas. (BNA) 1912, 1915 (C.D. Cal. 1987).

6. *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823, 839 (W.D. Mo. 1984), *rev'd in part on other grounds sub nom.* NEPACCO II, 810 F.2d 726, 732 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987); *United States v. South Carolina Recycling & Disposal*, 653 F. Supp. 984, 995 (D.S.C. 1984); *United States v. Wade*, 20 Env't Rep. Cas. (BNA) 1849, 1850 (E.D. Pa. 1984); State *ex rel.* Brown v. Georgeoff, 562 F. Supp. 1300, 1314 (N.D. Ohio 1983). *But see*, *Freeman*, 42 BUS. LAW 215 (1986): "In short, there is no express language of Superfund to support liability for pre-enactment conduct. . . ." *Id.* at 222. "But while the law is thus continually adding to its specific rules, it does accept the coarse and impolitic principle that a man acts always at his peril." *Id.* at 222, quoting O.W. HOLMES, *THE COMMON LAW* 163 (1923).

7. 42 U.S.C. § 9607 (1982), as amended by Act of Oct. 17, 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986). The pertinent section that this Note addresses is section 9607(a), CERCLA section 107(a), which, as amended, reads as follows:

Sec. 107. (a) 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

CLA.⁸ The federal circuit courts are divided on the issue of "pre-enactment response costs:⁹ one group holds that CERCLA should be applied retroactively to hold responsible parties liable for pre-enactment response costs ("retroactive" side);¹⁰ 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).¹¹

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.]

42 U.S.C. § 9607(a), *reprinted as amended in Env't Rep. (BNA) § 71 at 0720 (Federal Laws binder, Nov. 28, 1986 update).*

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.

10. *NEPACCO I*, 579 F. Supp. 823, 843 (W.D. Mo. 1984), *rev'd in part on other grounds sub nom*, *NEPACCO II*, 810 F.2d 726, 737 (8th Cir. 1986) *cert. denied*, 108 S. Ct. 146 (1987); *United States v. Ottati & Goss*, 630 F. Supp. 1361, 1398 (D.N.H. 1985); *Mayor of Boonton v. Drew Chem. Co.*, 621 F. Supp. 663, 669 (D.N.J. 1985); *United States v. Ward*, 618 F. Supp. 884, 899 (E.D. N.C. 1985). *See also Massachusetts v. Pace*, 616 F. Supp. 815, 819 (D. Mass. 1985) (interpreting a state provision similar to CERCLA section 107); *Shell Oil*, 605 F. Supp. 1064, 1077 (D. Colo. 1985).

11. *Nunn v. Chem. Waste Management*, 22 *Env't Rep. Cas. (BNA)* 1763, 1766 (D. Kan. 1985); *United States v. Morton-Thiokol*, No. 83-4787, slip op. at 6 (D.N.J. July 2, 1984) [bench ruling]; *United States v. Wade*, 20 *Env't Rep. Cas. (BNA)* 1849, 1853 (E.D. Pa. 1984). The court's opinion in *Idaho v. Bunker Hill Co.*, 635 F. Supp. 665 (D. Idaho 1986), suggests that pre-enactment response costs were expended, but not granted. *See id.* at 670-2. One court in which this matter is pending has yet to reach a decision. *United States v. Occidental Chem. Corp.*, 606 F. Supp. 1470 (W.D.N.Y. 1985). *See also*, Joint Supplemental Memorandum for Plaintiffs, *United States v. Occidental Chem. Corp.*, No. 79-990C (W.D.N.Y. filed Dec. 5, 1986).

I. HISTORY OF CERCLA

CERCLA was enacted to close the gaps in its predecessor statute, the Resource Conservation and Recovery Act of 1976 ("RCRA").¹² Congress envisioned RCRA as the answer to the "last remaining loophole in environmental law."¹³ RCRA was enacted so that hazardous waste could be tracked from the moment it was generated to the moment it was disposed.¹⁴ RCRA's main purpose, then, was to block the creation of new hazardous waste sites.¹⁵ Prior to RCRA, no statute covered the disposal of hazardous wastes on land.¹⁶ RCRA failed, however, to provide a statutory basis for cleanup of the many inactive waste sites.¹⁷ Since RCRA provided no adequate remedy for the cleanup of sites in which operations ceased years ago,¹⁸ Congress began its work on CERCLA.

CERCLA's purpose was to clean up these inactive hazardous waste sites,¹⁹ especially where the owner or generator could not be found or could not afford the cleanup costs.²⁰ While several bills reached the

12. 42 U.S.C. §§ 6901-6987 (1982).

13. H.R. REP. NO. 1491, 94th Cong., 2d Sess. 4, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 6238, 6241.

14. RCRA has been cited as "a cradle-to-grave" regulatory scheme for toxic wastes providing nationwide protection against the dangers of improper waste disposal. *United States v. Johnson & Towers*, 741 F.2d 662, 666 (3rd Cir. 1984), cert. denied, 469 U.S. 1209 (1985). RCRA's regulatory system is found in 42 U.S.C. §§ 6921-6934 (1982), and 40 C.F.R. part 262 (1986).

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.*

16. Other environmental statutes in existence in 1976 were as follows: Clean Air Act, 69 Stat. 322 (1955), codified as amended at 42 U.S.C. §§ 7401 et seq. (1982); National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970), codified as amended at 42 U.S.C. §§ 4321 et seq. (1982); Solid Waste Disposal Act, Pub. L. No. 94-469, 79 Stat. 997 (1965), which RCRA proposed to amend. See RCRA § 2, 42 U.S.C. § 6902 (1982).

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).

18. H.R. REP. NO. 1016, 96th Cong., 2d Sess. 17-18, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6120.

19. H.R. REP. NO. 1016, 96th Cong., 2d Sess. 1, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6119.

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 1979,²¹ the actual bill that became CERCLA, H.R. 7020,²² did not become law until late 1980.²³ Congress debated over the exact number of inactive waste sites in existence in 1980, and generally agreed to a number of 397.²⁴ The amount of money spent yearly at New York State sites was estimated at \$44 billion.²⁵ 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.²⁶ 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.²⁷

The House and Senate versions of the bill²⁸ contained liability provisions that encompassed pre-enactment response costs.²⁹ These sections, however, were not included in the final version of CERCLA.³⁰ CERCLA as passed did contain a liability provision, section 107(f), with respect to "natural resource damages."³¹ Section 107(f)³² does not apply to

Subcommittee on Environmental Pollution and Resource Protection to the Senate Committee on Environment and Public Works, 96th Cong., 2d Sess. 93, cited in Blaymore, Retroactive Application of Superfund: Can Old Dogs be Taught New Tricks?, 12 B.C. ENVTL. AFF. L. REV. 1, 7 (1985).

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.

22. H.R. 7020, 96th Cong., 2d Sess., 126 CONG. REC. 26,757 (1980).

23. Pub. L. No. 96-510, 94 Stat. 2767 (1980).

24. 126 CONG. REC. 26,761 (1980) (statement of Rep. Florio).

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

26. 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).

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).

28. S. 1480, 96th Cong., 2d Sess. (1980), reprinted in 1 U.S. SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT OF 1980, at 462 (1983) [hereinafter LEGISLATIVE HISTORY]; H.R. 7020, 96th Cong., 2d Sess. (1980), reprinted in 2 LEGISLATIVE HISTORY, at 138 (1983).

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"

30. 126 CONG. REC. 31,950 (1980).

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.³³

CERCLA was amended in 1986 by the Superfund Amendment and Reauthorization Act of 1986 ("SARA").³⁴ While SARA makes dramatic changes in some areas,³⁵ it left section 107(f) intact as per the issue of retroactivity.³⁶ Nothing in SARA addresses pre-enactment response costs.³⁷ The most current legislative efforts to amend CERCLA have not provided interpretative aids to determine the retroactive effect of the statute.³⁸ 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.³⁹ Jus-

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."

33. "This provision allows for recovery only of prospective natural resource damages." S. REP. NO. 848, 96th Cong., 2d Sess. 37 (1980), reprinted in 1 LEGISLATIVE HISTORY 145 (1983), quoted in *Idaho v. Bunker Hill Co.*, 635 F. Supp. 665, 674 (D. Idaho 1986).

34. Pub. L. No. 99-499, 100 Stat. 1613 (1986).

35. For a thorough discussion of SARA's provisions, see D. Hayes & C. McKerron, *Superfund II: A New Mandate* (A BNA SPECIAL REPORT, 17 ENV'T REP. (BNA) No. 42 (February 13, 1987 supplemental pamphlet)). See also Atkeson, Goldberg, Ellrodd, and Connors, *An Annotated Legislative History of the Superfund Amendments and Reauthorization Act of 1986 ("SARA")*, 16 ENVTL. L. REP. (Envtl. L. Inst.) 10363 (Dec. 1986) [hereinafter Atkeson], Bayko and Share, *Stormy Weather on Superfund Front Forecast as "Hurricane SARA" Hits*, NAT'L L.J., Feb. 16, 1987, at 24, col. 1.

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

37. See *id.*

38. In Congressional debates on SARA, Rep. Eckart stated that a section on pre-enactment response costs was not necessary because the courts "are moving in the right direction in holding polluters accountable." 131 CONG. REC. H11,074 (daily ed. Dec. 5, 1985). Rep. Dingell commented that "the courts are currently adequately addressing the issue." 131 CONG. REC. H11,070 (daily ed. Dec. 5, 1985). In *United States v. Occidental Chem. Corp.*, 606 F. Supp. 1470 (W.D.N.Y. 1985), plaintiffs argued that these statements meant that all cases following *Shell Oil*, 605 F. Supp. 1064 (D. Colo. 1985), are what was meant by "adequately addressing the issue." Plaintiffs' Joint Supplemental Memorandum at 17-18, *United States v. Occidental Chem. Corp.*, No. 79-990C (W.D.N.Y. filed Dec. 5, 1986). This argument fails to take into account the decision in *Idaho v. Bunker Hill Co.*, 635 F. Supp. 665, 672 (D. Idaho 1986). See *supra* note 10.

39. See, e.g., *United States v. Sec. Indus. Bank*, 459 U.S. 70 (1982); *Union Pac. R.R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190 (1913); *United States v. Heth*, 7 U.S. (3 Cranch) 399 (1806). See also 2 J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 41.02 at 247 (Sands 4th ed. 1986) [hereinafter SUTHERLAND], where the author refers to a statement made by Jeremy Bentham against judicial legislation in the English common law: "[H]e likened it to 'dog law,' referring to the age-old method of training dogs by waiting until they do what they are forbidden to do, and kicking them." *Id.*, citing *J. BOWRING, WORKS OF JEREMY BENTHAM* v. 235 (1962).

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

[E]very 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.⁴⁰

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.⁴¹ For a statute to be applied retroactively, the intent for such application has to be clear.⁴²

No provision in CERCLA or SARA provides for retroactive application of pre-enactment response costs.⁴³ 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."⁴⁴ The courts reason that the statutory intention was to go back and clean up inactive waste sites.⁴⁵ Because CERCLA is a remedial statute,⁴⁶ all of its provisions must be applied against past conduct, unless the statute specifically

40. *Soc'y for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (C.C.D. N.H. 1814) (No. 13,156). The terms "retrospective" and "retroactive" are interchangeable. 2 SUTHERLAND § 41.01 at 245 (Sands 4th ed. 1986).

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.

44. *United States v. Ottati & Goss*, 630 F. Supp. 1361, 1398 (D.N.H. 1985); *Mayor of Boonton v. Drew Chem. Corp.*, 621 F. Supp. 663, 668 (D.N.J. 1985); *United States v. Ward*, 618 F. Supp. 884, 898 (E.D.N.C. 1985); *Shell Oil*, 605 F. Supp. 1064, 1072 (D. Colo. 1985).

45. H.R. REP. NO. 1016, 96th Cong., 2d Sess. 17-18, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6122.

46. NEPACCO II, 810 F.2d 726, 733 (8th Cir. 1986) cert. denied, 108 S. Ct. 146 (1987); *Mayor of Boonton v. Drew Chem. Corp.*, 621 F. Supp. 663, 666 (D.N.J. 1985); *United States v. Ward*, 618 F. Supp. 884, 892 (E.D.N.C. 1985). "Some laws are necessarily retrospective, such as laws . . . relating to remedies." 2 SUTHERLAND § 41.02 at 248, quoting *Richardson v. Scignlinsky*, 9 N.J. Misc. 370, 371, 154 A. 541, 541 (1931). But see *State ex rel. Brown v. Georgeoff*, 562 F. Supp. 1300, 1306 n.7, where the court stated, "[I]t can hardly be contended . . . that this statute involves remedial legislation . . . CERCLA creates an entirely new procedure for enforcing substantive rights - a procedure which was the purpose for enacting the statute."

excludes such an application.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.⁴⁸ No statute would be written if some past occurrence had not prompted its necessity. As Professor Sutherland reasoned:

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.⁴⁹

Courts have addressed the removal of the pre-enactment liability provisions from both bills (section 3072 from H.R.7020,⁵⁰ and section 4(n) from S.1480).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.⁵² This argument draws a distinction between response costs and natural resource damages.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.⁵⁴ The retroactive side, under the guise of interpreting

47. *Shell Oil*, 605 F. Supp. 1064, 1079 (D. Colo. 1985).

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).

49. 2 SUTHERLAND § 41.02 at 248 (Sands 4th ed. 1986).

50. *See supra* note 27.

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).

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 . . . I conclude that CERCLA authorizes recovery of pre-enactment response costs.

Shell Oil, 605 F. Supp. 1064, 1079 (D. Colo. 1985).

53. *But cf.* *Continental Ins. Co. v. Northeastern Pharmaceutical & Chem. Co.*, 811 F.2d 1180 (8th Cir. 1987). In *Continental*, the Court held an insurance company liable for natural resource damages caused by defendant Northeastern Pharmaceutical in NEPACCO II, 810 F.2d 726 (8th Cir. 1986) *cert. denied*, 108 S. Ct. 146 (1987). The policy was in effect from 1970-1972, when the first releases/damages occurred. Costs to clean up were not expended until after the policy term had expired. *Id.* at 1181. The court considered the cleanup costs to be recoverable "damages" under the defunct policy. *See id.* at 1188. While there was a strong dissent in the case, *id.* at 1193-95 (McMillian, C.J., concurring in part, dissenting in part), the Eighth Circuit has seemingly retroactively applied natural resource damages by equating them to response costs. This decision runs afoul of the standard most recently discussed in *Idaho v. Bunker Hill Co.*, 635 F. Supp. 665, 675 (D. Idaho 1986), that natural resource damages are not recoverable to the extent they occurred pre-CERCLA. *See also* 42 U.S.C. § 9607(f) (1982), *as amended* by Act of Oct. 17, 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

54. 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.⁵⁵ The thrust of the argument lies in the fact that the issue involved millions of dollars.⁵⁶ Congress, being aware of the costs here, would have included a section on pre-enactment response costs had it wished to do so.⁵⁷

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

56. *See supra* note 26.

57. *United States v. Wade*, 20 Env't Rep. Cas. (BNA) 1849, 1851 (E.D. Pa. 1984). *United States v. Morton-Thiokol*, No. 83-4787, slip. op. at 5 (D.N.J. July 2, 1984) [bench ruling].

58. *See Freeman*, 42 BUS. LAW. 215, 223 (1986).

59. *See supra* notes 39-40 and accompanying text.

60. *See supra* notes 9 and 10.

61. The Supreme Court holds to the "cardinal principle that [it] will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided." *United States v. Sec. Indus. Bank*, 459 U.S. 70, 78 (1982), citing *Lorillard v. Pons*, 434 U.S. 575, 577 (1978), (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

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.

63. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 11.9 at 387 (3d ed. 1986) [hereinafter NOWAK].

64. The concept of Bentham's "dog law" is apparent. *See supra* note 39.

65. NOWAK § 11.09 at 384 (3d ed. 1986).

66. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 19 (1976).

67. *Mobile v. Turnipseed*, 219 U.S. 35, 43 (1910), *cited in Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).

68. Freeman, 42 BUS. LAW. 215, 225 n.29 (1986).

69. *See supra* note 26.

70. While courts generally give great deference to administrative agencies by applying a rational basis test to the agencies' interpretations of federal statutes and regulations, *Chem. Manufacturers Ass'n v. Nat. Resources Defense Council*, 470 U.S. 116, 125 (1985), this deference "only sets the framework for judicial analysis; it does not displace it." *Securities In'y Ass'n v. Board of Governors of the Fed'l Reserve System*, 468 U.S. 137, 143 (1984), *citing United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 24 (1982), (quoting *United States v. Cartwright*, 411 U.S. 546, 550 (1973)). Furthermore, the "deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *Bureau of Alcohol, Tobacco, and Firearms v. Fed'l Labor Relations Authority*, 464 U.S. 89, 97 (1983), (quoting *Am'n Ship Building Co. v. Nat'l Labor Relations Bd.*, 380 U.S. 300, 318 (1965)). One commentator considered the retroactive application of CERCLA to be worthy of congressional attention. *See Freeman*, 42 BUS. LAW. 215, 225 (1986).

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).

ance the competing interests involved.⁷² 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.⁷³ 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.⁷⁴

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.⁷⁵ 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.⁷⁶ This argument is further supported by the fact that CERCLA carried no provisions in this area,⁷⁷ and the interpretations from the legislative history have yet to settle the matter.⁷⁸ 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.⁷⁹ Even a rational basis test may not be proper under these circumstances.⁸⁰ 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).

75. *Massachusetts v. Pace*, 616 F. Supp. 815, 819 (D. Mass. 1985); *Shell Oil*, 605 F. Supp. 1064, 1076 (D. Colo. 1985).

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.⁸¹ With regard to CERCLA, courts have refused to adequately address the constitutional issues, preferring to travel more traditional paths.⁸² 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,⁸³ the cases on that side have been contradictory in their analyses.⁸⁴ The prospective argument, however, remains logical and consistent. Many of these cases may take years before they are finally decided,⁸⁵ 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.

James A. Resila

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.").

83. Compare *supra* notes 9 and 10, and the dates of the opinions. But cf. *Idaho v. Bunker Hill Co.*, 635 F. Supp. 665 (D. Idaho 1986), which acts as a deviation from the recent trend.

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.