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More than thirteen years ago, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[1] in an effort "to bring order to the array of partly redundant, partly inadequate federal hazardous substances cleanup and compensation laws."[2] The contentious debate that has swirled around the second major reauthorization of the statute bears witness to CERCLA's failure, thus far, to achieve that objective.[3] According to a wide variety of interests,[4] both the cleanup[5] and the response cost reimbursement[6] mechanisms appear to be unsatisfactory, and the many proposals expected to surface during the reauthorization process are likely to focus on improving those aspects of CERCLA's implementation.

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[1] CERCLA §§ 101-175, 42 U.S.C. §§ 9601-9675 (1988).

[2] New York v. Shore Realty Corp., 759 F.2d 1032, 1040 (2d Cir. 1985) (quoting FREDERICK ANDERSON, ET. AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 568 (1984)).

[3] The first reauthorization took the form of the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

[4] A "long roster of complaints" has been leveled against CERCLA: "that [it] is too slow and too expensive; that it misdirects scarce public and private funds to site investigation or litigation rather than remediation; that the liability scheme is unfair; that the program focuses on hypothetical risks while ignoring real risks; that it lacks clear cleanup standards; and that remedies are not sufficient or permanent enough—or that they are gold-plated." James M. McElfish, Jr. & John Pendergrass, *Learning from the States*, ENVTL. FORUM, Nov.-Dec. 1993, at 17.

[5] *See, e.g.*, Richard T. Dewling, *Clean Out the Cleanup Backlog*, ENVTL. FORUM, Sept.-Oct. 1993, at 32. "Against the backdrop of political and public rhetoric regarding the stagnation of the Superfund program, there appears to be one fact that everyone has accepted—that the backlog of contaminated and unremediated hazardous waste sites keeps growing." *Id.*

[6] *See, e.g.*, Kathy Prosser, *Resolve Problems Outside the Court Room*, ENVTL. FORUM, Sept.-Oct. 1993, at 36. CERCLA's "reliance on a single, outmoded, and unsuccessful approach to cleanup has the program in a stranglehold . . . . [T]he current Superfund program still waste[s] too many resources on lawsuits and counter claims." *Id.*

At least at this early juncture, far less attention has been paid to the natural resource damage assessment and compensation provisions of CERCLA. If familiarity indeed breeds contempt, it is not surprising that it has been easier to detect the flaws of the remediation and response cost reimbursement aspects of CERCLA than to evaluate the relatively untested natural resource damage provisions. Restoration of damaged natural resources has taken a back seat to cleanup of released hazardous substances, and far more litigation has involved response cost reimbursement than damage claims. The pace of natural resource damage litigation is already accelerating, however, and both federal and state governments are likely to become even more aggressive in their pursuit of damage recoveries in the near future. It is appropriate, therefore, to suggest clarifications of statutory uncertainties and corrections of selected aspects of CERCLA's natural resource damage provisions.

I. THE NATURAL RESOURCE DAMAGE PROVISIONS OF CERCLA

CERCLA authorizes federal and state governments to act on behalf of the public as trustees in assessing and recovering damages for injured, destroyed, or lost natural resources.[7] Those trustees may seek to recover damages, including the costs of assessment, from the same four categories of potentially responsible parties (PRPs) that are liable for response costs.[8] Trustees must devote damage recoveries to the restoration or replacement of the damaged resources or to the acquisition of equivalent resources.[9] CERCLA requires the President, acting through officials designated in the National Contingency Plan,[10] to issue damage assessment regulations.[11] Trustees who conduct assessments in accordance with the regulations are entitled to a rebuttable presumption in administrative or judicial proceedings to recover

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[7] CERCLA § 107(f)(1), 42 U.S.C. § 9607(f)(1) (1988). For a complete description of the natural resource damage provisions of CERCLA, *see* Robert L. Glicksman, *Pollution on the Federal Lands IV: Liability for Hazardous Waste Disposal*, 12 UCLA J. ENVTL. L. & POL'Y (forthcoming).

[8] *See* 42 U.S.C. § 9607(a)(4)(C).

[9] 42 U.S.C. § 9607(f)(1).

[10] The contents of the National Contingency Plan are described in 42 U.S.C. § 9605(a). The Plan itself is located at 40 C.F.R. pt. 300 (1992).

[11] 42 U.S.C. § 9651(c)(1).

damages from PRPs.[12] The "presumption shifts the burden of proof from the trustee to PRPs on the issue of the validity of the assessment."[13]

The Department of Interior issued the initial damage assessment regulations in 1986.[14] In 1989, however, the Court of Appeals for the District of Columbia Circuit in *Ohio v. Department of Interior* invalidated and remanded critical provisions of the regulations, holding that the agency had failed to give effect to Congress' preference for measuring damages by reference to restoration costs rather than to the use value of damaged resources.[15] In March 1994, the Department issued revised final regulations on remand,[16] more than eleven years after the the damage assessment regulations were supposed to go into effect.[17]

The Department's delay in issuing valid damage assessment regulations has impeded the operation of CERCLA's natural resource damage provisions. Lacking guidance on the appropriate manner in which to conduct damage assessments, trustees have shied away from pursuing damage recoveries. Few cases have reached trial,[18] and the unavailability of final damage assessment regulations has precluded trustees from taking advantage of the statutory rebuttable presumption.

Despite these obstacles, federal and state trustees have begun to file natural resource damage claims with increasing frequency.

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[12] 42 U.S.C. § 9607(f)(2)(C). The presumption also applies in similar proceedings conducted under the oil spill provision of the Clean Water Act, 33 U.S.C. § 1321 (1988 & Supp. III 1991); *see also* 43 C.F.R. §§ 11.10-.11 (1992).

[13] Kerry E. Russell, *A Research Guide to Natural Resource Damage Under the Comprehensive Environmental Response, Compensation, and Liability Act*, 26 LAND & WATER L. REV. 403, 408 (1991).

[14] 51 Fed. Reg. 27,725 (1986)(codified at 43 C.F.R. § 11). The Department revised the regulations after the 1986 amendments to CERCLA. 53 Fed. Reg. 5,166 (1988) (codified at 43 C.F.R. § 11).

[15] Ohio v. United States Dept. of the Interior, 880 F.2d 432, 443-45 (D.C. Cir. 1989); *see also* Colorado v. United States Dept. of the Interior, 880 F.2d 481, 490-91 (D.C. Cir. 1989).

[16] 59 Fed. Reg. 14,262 (1994).

[17] *See* 42 U.S.C § 9651 (c)(1) (1988).

[18] *E.g., In re* Natural Gypsum Co., 24 Chem. Waste Lit. Rep. 848 (Bankr. N.D. Tex. June 24, 1992); Idaho v. Southern Refrigerated Transp., Inc., No. 88-1279, 1991 U.S. Dist. LEXIS 1869 (D. Idaho Jan. 24, 1991); *cf.* Idaho v. Bunker Hill Co., 635 F. Supp. 665 (D. Idaho 1986) (holding that damages would be the lesser of the value and the cost of restoration of the damaged resources). *Bunker Hill* conflicts with the decisions in Ohio v. United States Dep't of the Interior, 880 F.2d 432 (D.C. Cir. 1989), and Colorado v. United States Dep't of the Interior, 880 F.2d 481 (D.C. Cir. 1989). Therefore, *Bunker Hill* is of doubtful validity. *See also supra* note 15 and accompanying text.

The Department of Justice has negotiated consent decrees requiring payments for damaged resources,[19] resulting in substantial recoveries in some cases. Exxon's agreement to pay $900 million to settle federal and state trustees' claims arising out of the oil spill in Prince William Sound is the most prominent example.[20] These recoveries are bound to encourage trustees to file even more damage recovery actions.

II. RECOMMENDED REVISIONS TO THE NATURAL RESOURCE DAMAGE PROVISIONS

Because of the Department of Interior's delay in issuing valid, final damage assessment regulations, it is difficult to assess the effectiveness of CERCLA's natural resource damage provisions. That delay may support conflicting arguments that it is too soon to amend the natural resource damage provisions or that Congress should completely revise the damage recovery process. On the one hand, recommendations for revisions to CERCLA's natural resource damage provisions may appear to be premature. The cases that have been litigated, however, have revealed statutory ambiguities and weaknesses that merit consideration in the current reauthorization process.

On the other hand, the Department's belated issuance of damage assessment regulations may indicate that the difficulties of valuing damaged natural resources are insurmountable. If they are, then an approach to providing compensation for injured natural resources that does not require individualized assessments may be advisable. The statute already requires the Department to create standard procedures for simplified assessments requiring minimal field observations.[21] These Type A assessment procedures, which currently apply to coastal and marine resources, are governed by the use of a computer model, the Natural Resource Damage Assessment Model for Coastal and Marine Environ-

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[19] Lists of proposed and final consent decrees are published each month in the Recent Developments section of the Environmental Law Institute's Environmental Law Reporter. *See also* GEORGE C. COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 11.05[8][a], at n.350 (Release # 7, 1994) (listing other decrees); *see generally* Utah v. Kennecott Corp., 801 F. Supp. 553 (D. Utah 1992) (rejecting a proposed consent decree involving damages for contamination of state groundwater resources).

[20] *See Water Pollution: Abuses Cited in Exxon Valdez Spending; Salmon Fisherman End Blockade of Alaska Port*, Env't Rep. (BNA) 781 (Aug. 27, 1993).

[21] CERCLA § 151(c)(2), 42 U.S.C. § 9651(c) (1988).

ments.[22] If the Department proves to be incapable of devising feasible individualized assessment procedures, it may be possible to apply similar models to a wider variety of resources and ecosystems.

In my view, it is too soon to scrap the existing statutory structure. Although more than eleven years have passed since the initial statutory deadline for issuance of damage assessment regulations, the Department of Interior has finally issued its revised damage assessment regulations.[23] The four-year delay since issuance of the Ohio decision may indicate, not that a practical damage assessment process is impossible, but that the agency has grappled seriously with the issues raised by the court and with the comments submitted in response to the proposed regulations in an attempt to avoid further crippling litigation.[24] To scrap the current assessment and liability system now risks throwing out the baby with the bath water. Selective and limited revisions, moreover, do not necessarily preclude more radical changes in the future if the system proves unwieldy.

Among the aspects of natural resource damage recovery in need of clarification are those relating to the standards of liability and causation. In the absence of clear legislative direction, the courts have defined these standards in the context of response cost recovery litigation. A PRP is jointly and severally liable for response costs unless it can demonstrate that the damages are apportionable,[25] although the courts have begun to diverge in their application of the principles of joint and several liability.[26] Further, a PRP is liable for response costs even if the government is unable to prove that it caused the release; proof of a causal connection between the release and the response costs incurred is sufficient.[27]

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[22] 43 C.F.R. § 11.41(a) (1992).

[23] 59 Fed. Reg. 14,262 (1994).

[24] The Department of Interior reopened and extended the public comment period several times. *See, e.g.*, 56 Fed. Reg. 30, 367 (1991), 58 Fed. Reg. 39, 328 & 45,877 (1993).

[25] *See, e.g.*, O'Neil v. Picillo, 883 F.2d 176, 178-79 (1st Cir. 1989), *cert. denied sub. nom.* American Cyanamid Co. v. O'Neil, 493 U.S. 1071 (1990); United States v. Monsanto Co., 858 F.2d 160, 171-73 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989).

[26] *See In re* Bell Petroleum Serv, Inc. 3 F.3d 889, 901 (5th Cir. 1993) (describing three different approaches to apportioning damages).

[27] *See, e.g.*, City of New York v. Exxon Corp., 766 F. Supp. 177, 191-93 (S.D.N.Y. 1991); New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985).

Although the legislative history appears to draw no distinction between the liability standard for response costs and natural resource damages,[28] commentators raise the possibility that the courts will conclude that proportional responsibility governs natural resource damage liability.[29] The evidence is even stronger that the courts will apply more demanding causation requirements in damage cases than in response cost reimbursement litigation. In the *Montrose Chemical* case,[30] for example, the court stated that the government would have to establish that a release of hazardous substances was the sole or a substantially contributing cause of each alleged injury to natural resources.[31] In addition, the *Ohio* court rejected an attack on provisions of the initial Department of Interior damage assessment regulations, which required trustees to satisfy a series of "acceptance criteria" as a prerequisite to establishing a causal link between a release and the injured resource.[32] The environmental petitioners claimed that these requirements were inconsistent with CERCLA's purpose of liberalizing the traditional causation-of-injury standard. The court, however, found the statute and its legislative history ambiguous on the issue of whether Congress intended to command a standard of proof of causation of injury that was less rigorous than the traditional common law approach in tort litigation.[33] The court pointed out that Congress clearly modified traditional causation standards in the context of the causal relation between a PRP and a hazardous substance release. It was, therefore, significant that the legislature "fail[ed] to similarly alter the traditional rules concerning the causal relation between a substance release and the biological injuries alleged to have resulted from it."[34] Finding

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[28] *See, e.g.*, 126 CONG. REC. 31,965 (1980) (statement of Rep. Florio, the sponsor of CERCLA in the House of Representatives).

[29] *See* Russell, *supra* note 13, at 413.

[30] United States v. Montrose Chem. Co., 33 Env't Rep. Cas. (BNA) 1207 (C.D. Cal. 1991).

[31] *Id.* at 1208. Another court rejected this test in favor of one requiring proof that a release was a contributing factor. *In re* Acushnet River & New Bedford Harbor, 722 F. Supp. 893, 897 n.8 (D. Mass. 1989).

[32] Ohio v. United States Dep't of the Interior, 880 F.2d 432, 468-73 (citing 43 C.F.R. § 11.62(f)(2) (1988)).

[33] *Id.* at 470-71. *See also id.* at 470 ("The statutory text of CERCLA provides no clues as to whether proof of [causation] should be less strict than that required by the common law.").

[34] *Id.* at 471.

the Department's interpretation of the statutory causation requirement reasonable, the court deferred to it.[35]

Congress should erase any doubts concerning the liability and causation standards for natural resource damage recovery by declaring that the same principles that govern response cost liability also apply in actions for recovery of natural resource damages. Plaintiffs in actions for natural resource damages face the same difficulties in attributing injured resources to the wastes of a particular PRP that justify shifting the burden of proving apportionability to PRPs and dispensing with traditional causation principles in cost recovery actions. Indeed, in many cases the same hazardous waste releases that require the expenditure of response costs will result in natural resource impairment. The establishment of two sets of liability and causation standards applicable to different aspects of the same release would be unnecessarily and unjustifiably confusing.

Another area of uncertainty deals with the ability of local governments to sue for natural resource damages. CERCLA defines natural resources to include "resources belonging to, managed by, or otherwise controlled by state or local governments."[36] The statute also indicates, however, that natural resource damage liability shall be to the federal or state governments,[37] and its definition of a state does not refer to localities.[38] In two early cases, the courts concluded that municipalities were appropriate natural resource damage plaintiffs.[39] Following the 1986 amendments to CERCLA, the courts have barred localities from pursuing dam-

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[35] *Id.* at 470, 472-73. The issue in *Ohio* was the degree of proof of causation necessary between a hazardous substance release and the injuries alleged to have resulted from it. Although the court distinguished the issue of the required proof of a causal link between a PRP's acts and the substance released, *id.* at 471 n.54, it is certainly possible that the courts in natural resource damage cases will extend the more rigorous causation requirements to the latter context.

[36] CERCLA § 101(16), 42 U.S.C. § 9601(16) (1988). In its revised final regulations, the Interior Department noted but did not resolve the issue. *See* 59 Fed. Reg. 14,262, 14,268 (1994).

[37] 42 U.S.C. § 9607(f).

[38] 42 U.S.C. § 9601(27).

[39] City of New York v. Exxon Corp., 633 F. Supp. 609, 616 (S.D.N.Y. 1986)(holding prior approval from EPA is not required for action by city); Town of Boonton v. Drew Chem. Corp., 621 F. Supp. 663 (D.N.J. 1985) (allowing a municipality to represent the state for purposes of invoking CERCLA).

age recoveries,[40] reasoning that municipalities have an alternative means of protecting their interests—a city or county may request that the state designate it as a natural resource trustee.[41] Furthermore, these later decisions reflect the view that precluding local governments from suing for damages prevents parochial local interests from affecting matters of statewide concern and avoids a proliferation of inconsistent litigation strategy by counsel of variable quality and experience.[42]

Congress should use the current reauthorization process to strike an appropriate balance between the interest of localities in protecting resources primarily managed at that level of government, such as sources of municipal water supplies, and the legitimate concern that municipalities not be empowered to interfere with matters of broader, statewide concern. The citizen suit provisions of CERCLA[43] and the other federal pollution control statutes provide a model for reconciling these potentially divergent interests. Congress should authorize localities to sue for damage to resources which they consider to be locally controlled or managed. A potential municipal plaintiff, however, would have to provide prior notice to the state, which would have the opportunity to forestall the suit. Congress could require the state to file its own action in order to bar the local government from proceeding, or, if it wanted to provide the state with more discretion, it could authorize the state to block suit simply by notifying the locality that the resources at issue invoke broader interests that cannot be represented adequately at the local level.[44] This solution would provide an efficient means of deciding on a case-by-case basis whether the locus of concern for the injured resources is state or local. It also would preserve local government input and participation in the process of protecting natural resources. This result is consistent with the statutory provisions that seek to maximize

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[40] *See* Mayor & Council of the Borough of Rockaway v. Klockner & Klockner, 811 F. Supp. 1039, 1047 (D.N.J. 1993); Town of Bedford v. Raytheon Corp., 755 F. Supp. 469 (D. Mass. 1991).

[41] Town of Bedford v. Raytheon Co., 755 F. Supp. 469, 472 (D. Mass. 1991).

[42] *See id.* at 473; *see also* Borough of Rockaway v. Klockner, 811 F. Supp. at 1047-51.

[43] 42 U.S.C. § 9659.

[44] CERCLA's citizen suit provision requires potential plaintiffs to provide sixty-days prior notice to the President, to the state in which the alleged violation occurs, and to the alleged violator. 42 U.S.C. § 9659(d)(2), (e). The statute bars the citizen suit if the federal government has commenced and is diligently prosecuting an action to require compliance at the end of the prescribed notice period, *id.*

public participation opportunities[45] and could be part of an effort to respond to charges that, despite these provisions, CERCLA nevertheless freezes local communities out of important decision-making processes involving the fate of damaged resources.

A third area of uncertainty concerns the availability of attorneys' fees to prevailing parties in natural resource damages litigation. The courts have struggled with the authority of the courts to award attorneys' fees in response cost recovery cases, especially in suits by private parties.[46] The Tenth Circuit recently held that while the American Rule bars a private party from recovering attorneys' fees arising from the litigation of a private cost recovery action, nonlitigation attorneys' fees may be recoverable under CERCLA as necessary response costs.[47] The circuit courts, however, are still deeply split on this issue.[48] No case involving natural resource damage recoveries has addressed the issue in any depth, although one court refused to award attorneys' fees for unexplained reasons.[49]

Congress should authorize the district courts to award attorneys' fees to prevailing or substantially prevailing parties in natural resource damage cases. It has authorized the courts to make such awards under many of the judicial review and citizen suit provisions of the federal pollution control laws,[50] including CER-

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[45] *See generally* 42 U.S.C. § 9617; H.R. REP. No. 253, 99th Cong., 1st Sess., pt. 1, at 90 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2872 (expressing the "strong opinion that communities affected by Superfund sites will demonstrate much stronger support for actions necessary to clean up those sites if the community is involved from the beginning in determining the actions which will be necessary to complete the cleanup").

[46] *See generally* Kenneth A. Freeling, *Recovery of Attorneys Fees in CERCLA Private-Party Cost Recovery Actions: Striking A Balance*, 23 Envtl. L. Rep. (Envtl. L. Inst.) 10,477 (1993).

[47] FMC Corp. v. Aero Indus., Inc., 998 F.2d 842, 847-48 (10th Cir. 1993).

[48] *Compare* Donahey v. Bogle, 987 F.2d 1250, 1256 (6th Cir. 1993) *and* General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1422 (8th Cir. 1990), *cert. denied*, 111 S.Ct. 1390 (1991) *with* FMC Corp. v. Aero Indus. Inc., 998 F.2d 842 (10th Cir. 1993); *In re* Hemingway Transport, Inc., 993 F.2d 915 (1st Cir. 1993) *and* Stanton Rd. Assocs. v. Lohrey Enters., 984 F.2d 1015, 1018-19 (9th Cir. 1993).

[49] In Idaho v. Hanna Mining Co., 882 F.2d 392 (9th Cir. 1989), the Court stated only that "CERCLA does not state whether attorneys' fees may be awarded for actions for natural resource damages . . . nor do any cases appear to resolve the question. We elect to make no award of attorneys' fees." *Id.* at 396. The revised Interior Department rules again are not dispositive. *See* 59 Fed. Reg. 14,262, 14,270 (1994).

[50] *See, e.g.*, Clean Water Act §§ 505, 509, 33 U.S.C. §§ 1365(d), 1369(b)(3) (1988); Resource Conservation and Recovery Act § 7002, 42 U.S.C. § 6972(e) (1988); Clean Air Act §§ 304, 307, 42 U.S.C. §§ 7604(d), 7607(f) (1988).

CLA's citizen suit provision,[51] typically on the ground that fee shifting is appropriate for litigants who vindicate important public interests.[52] By definition, a successful trustee in a natural resource damage case has benefitted the public by providing the means of restoring the resources it owns, manages, or controls on behalf of the public. If fees are not available, complete restoration or replacement may not be possible because the amount awarded will be reduced by the trustee's litigation costs. The inability to shift fees to PRPs may be particularly troublesome in connection with litigation concerning assessments performed prior to the Interior Department's revised damage assessment regulations. That litigation is likely to be protracted because trustees will not be able to take advantage of the statutory rebuttable presumption.[53] Congress should avoid the possibility that the prospect of incurring exorbitant legal fees will discourage trustees from initiating potentially meritorious damage actions.

In addition to clarifying the statutory provisions relating to joint and several liability, causation, damage suits by municipalities, and the recoverability of attorneys' fees, Congress should bolster the mechanisms available to the Environmental Protection Agency (EPA) to induce cooperation in the mitigation of natural resource damages and eliminate an ill-conceived defense to natural resource damage liability. CERCLA authorizes the assessment of punitive damages against any person who is liable for a release or threat of release of a hazardous substance and who fails without sufficient cause to comply with an EPA order to assist in remediation. The government may sue such a person for up to three times the amount of cleanup costs attributable to the PRP's lack of compliance.[54] Congress should extend punitive damage liability to PRPs whose lack of cooperation with mitigation efforts by

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[51] CERCLA § 159(f), 42 U.S.C. § 9659(f) (1988).

[52] *See* COGGINS & GLICKSMAN, *supra* note 19, at § 7.05[1]. *Cf.* S. REP. No. 414, 92nd Cong., 1st Sess. (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3747 (acknowledging that, "in bringing legitimate actions under [the citizen suit provision of the Clean Water Act], citizens would be performing a public service and in such instances, the courts should award costs of litigation to such party").

[53] The results in cases such as Idaho v. Southern Refrigerated Transp., Inc., No. 88-1279, 1991 U.S. Dist. LEXIS 1869 (D. Idaho Jan. 24, 1991), are certain to encourage PRPs to attack the validity of every conceivable aspect of trustee damage assessments. In that case, the court concluded that, although existence value represents a legitimate component of natural resource damages, the studies which the state relied upon to support its valuation of steelhead killed by a fungicide release were inadequate, *id.* at *55-*56.

[54] 42 U.S.C. § 9607(c)(3).

EPA[55] or with restoration efforts by natural resource trustees increases the cost of restoring or replacing damaged resources.[56] The absence of such potential liability may encourage PRPs to seek delays in the resolution of natural resource damage claims, with a resulting increase in the risk of irreversible environmental damage.[57]

The defense that Congress should abandon relates to damages caused by pesticide applications. CERCLA prohibits recovery of damages resulting from the application of a pesticide product registered under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).[58] This exemption was presumably included to placate agricultural interests who were fearful that current pesticide application practices could result in substantial natural resource damage liability. The exemption is misguided for at least two reasons. First, the adequacy of EPA's review of the potential adverse environmental effects of registered pesticides is questionable.[59] Thus, the mere fact that EPA has registered a pesticide does not necessarily mean that its use is likely to be free of adverse environmental consequences.[60] Second, even if EPA's registration decisions were beyond reproach, a pesticide that, when properly applied, will not create unreasonable adverse effects on

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[55] CERCLA authorizes EPA to take response measures necessary to protect the environment. 42 U.S.C. § 9604(a). The statute also grants authority to EPA to take whatever action, including the issuance of orders to private parties, is necessary to abate an imminent and substantial endangerment to the environment attributable to a release or threatened release of hazardous substances. 42 U.S.C. § 9606(a). Failure to cooperate with government-conducted remediation or to comply with EPA orders may result in avoidable damage to natural resources.

[56] Liability could equal some multiple of the difference between the costs incurred by the government as a result of the noncompliance and the costs that would have been incurred had the PRP fully cooperated. The burden of proving this difference would be on the government.

[57] *See* Bradley M. Marten & Cestjon L. McFarland, *Litigating CERCLA Natural Resource Damage Claims*, 22 Env't Rep. (BNA) 670, 674 (July 19, 1991) (asserting that PRPs lack adequate incentives to settle questionable damage claims in part as a result of the unavailability of punitive damages).

[58] FIFRA §§ 2 - 31, 7 U.S.C. §§ 136-136y (1988); *see* 42 U.S.C. § 9607(i).

[59] *See, e.g.*, 3 WILLIAM H. RODGERS, ENVIRONMENTAL LAW: PESTICIDES AND TOXIC SUBSTANCES § 5.8, at 102 (1988) (discussing "management difficulties" in EPA's FIFRA registration process).

[60] The Senate Committee on the Environment in 1980 cited "a substantial body of evidence indicating that . . . damages to natural resources and food from pesticide releases are widespread." S. REP. No. 848, 96th Cong., 2d Sess. 45 (1980). It nevertheless recommended that failure to comply with FIFRA not provide a basis for invoking liability under CERCLA for pesticide applications, *id.*

the environment may cause considerable damage if misused. The current exemption is analogous to providing an absolute defense to common law nuisance liability for activities located in compliance with local zoning laws, even if those activities are conducted negligently or recklessly. Congress should amend the exemption to impose liability on pesticide applicators who violate EPA application requirements or whose conduct is actionable under state common law or statutory requirements not preempted by FIFRA.[61]

CONCLUSION

Although it is not yet possible to assess fully the utility of the natural resource damage provisions of CERCLA, Congress should not bypass an opportunity during the upcoming reauthorization debate to resolve ambiguities and correct flaws that have already appeared. To maximize the potential of natural resource damage liability, to deter conduct that threatens serious if not irreparable harm to valuable resources, and to facilitate the recovery of damaged resources, Congress should confirm that natural resource damage liability is joint and several, that the same causation standard applicable in cost recovery actions also applies in damage litigation, that local governments may sue for damages (at least until the state precludes them from doing so), and that attorneys' fees are available to successful plaintiffs in damage actions. In addition, Congress should authorize the courts to impose punitive damages on PRPs who fail to cooperate with EPA or natural resource damage trustees. Finally, Congress should narrow the scope of the exemption for pesticide applications so that PRPs who apply those products improperly are not shielded from liability. Congress should reassess the need for more substantial changes after trustees and courts have had a chance to implement the Department of Interior's final damage assessment regulations and after the impact of the statutory presumption in favor of trustees who conduct assessments in compliance with those regulations has become clearer.

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[61] For analysis of the scope of FIFRA's preemption of state law, *see generally* Wisconsin Public Intervenor v. Mortier, 111 S.Ct. 2476 (1991); King v. E.I. Dupont de Nemours & Co., 996 F.2d 1346 (1st Cir. 1993); Papas v. Upjohn Co., 985 F.2d 516 (11th Cir. 1993), *cert. denied sub nom.* Papas v. Zoecon Corp., 114 S. Ct. 300 (1993); Worm v. American Cyanamid Co., 5 F.3d 744 (4th Cir. 1993); Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc., 959 F.2d 158 (10th Cir. 1992), *vacated and remanded for reconsideration*, 113 S. Ct. 314 (1992).